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Feb 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-000658
Civil Action No. 2018-CP-32-03103

R-Anell Housing Group, LLCRespondent,

v.

Homemax, LLCAppellant.

**MOTION TO STRIKE APPELLANT’S DESIGNATION OF
DEFENDANT’S TRIAL EXHIBIT 12 FROM THE RECORD ON APPEAL**

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ARGUMENT

Respondent R-Anell Housing Group, LLC (“R-Anell”) makes this motion pursuant to Rule 240, SCACR, to strike Defendant’s Trial Exhibit 12 from Appellant Homemax LLC (“Homemax”)’s Designation of Matter for the Record on Appeal.

By way of background, Homemax filed its initial brief and designation of mater for the record on January 4, 2022 (“designation”). Item 6(d) of Homemax’s designation designates Defendant’s Trial Exhibit 12 to be included with the record on appeal. Defendant’s Trial Exhibit 12 is discussed extensively in Homemax’s initial brief, and indeed its exclusion from evidence at trial is the entire basis of Homemax’s third argument on appeal. *See* Homemax Brief, p. 20-24. R-Anell objects to its designation for the record on appeal, and asks the Court to strike said designation and order that Defendant’s Trial Exhibit 12 not be included in the record on appeal, because the exhibit does not appear on the record at trial.

Rule 209, SCACR, provides the standard for what may be included in the designation of matter to be included in the record on appeal. 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.” Rule 209(b), SCACR. The content of what is “properly included” is governed by Rule 210, SCACR. The record must not “include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR.

There are few cases interpreting what it means to “present” a matter to the trial court under Rule 210, SCACR. However, the cases that do refer to Rule 210 require that the material actually appear in the trial record. For example, in one instance, where the appellant attempted to present facts that occurred after trial, the Court of Appeals found that it was “bound by the record at trial.” *Argabright v. Argabright*, 398 S.C. 176, 179 n.3, 727 S.E.2d 748, 750 (2012). In another instance,

where both parties on appeal attempted to argue the validity of an agreement that was the subject of a separate civil suit, the court found that the item regarding the agreement must be struck from both parties' designations "because these items were part of the record in the *separate action* before the circuit court." *Croft v. Town of Summerville*, 428 S.C. 576, 597 n.5, 837 S.E.2d 219, 230 (Ct. App. 2019) (emphasis added), later vacated as moot on writ of certiorari, *Croft v. Town of Summerville*, 433 S.C. 473, 860 S.E.2d 352 (2021). The Court of Appeals has also declined to consider exhibits on appeal where "[s]everal of the exhibits [the] [a]ppellant is appealing were not in the record..." *State v. Tucker*, 324 S.C. 155, 167 n.4, 478 S.E.2d 260, 266 (1996). In sum, the import of these decisions is that where an exhibit is not in the record on appeal, the Court cannot consider it.

It necessarily follows, then, that this Court should strike Defendant's Trial Exhibit 12 from the record on appeal. As constituted at trial, Defendant's Trial Exhibit 12 is not preserved anywhere in the trial court's record. This is evidenced by the fact that Defendant's Trial Exhibit 12 does not appear anywhere in the list of exhibits from the record at trial, whether in Defendant's Exhibits or the list of Court's Exhibits. *See* Trial Transcript, p. 5-9, attached as Motion Exhibit A. Indeed, the transcript show that while trial counsel for Homemax asked the trial court to admit "Defendant's Exhibit 12," the exhibit, after exclusion, was not preserved as a court's exhibit despite no fewer than two opportunities to preserve it as such. *See* Trial Transcript, p. 115-118, attached as Motion Exhibit B; *See* Trial Transcript, p. 135-137, attached as Motion Exhibit C.

It is an inviolate principle under South Carolina law that an appellant must properly "present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). In keeping with this principle, appellants such as Homemax should

be required to preserve at issue trial exhibits on the trial court record, particularly where their arguments on appeal necessarily depend on an examination of the exhibit itself. In this instance especially, where Homemax sought to admit what purports to be a multi-page string of emails, it is crucial to have the preserved exhibit as offered to the court at trial if it is to be considered on appeal for its admissibility. *See* Homemax Brief, p. 21 (“The email evidence in question is a thread of four emails between R-Anell and the delivery company that delivered the Christofoli House...”). Since Homemax failed to preserve Defendant’s Trial Exhibit 12, as constituted at trial, this Court should order that Homemax not include Defendant’s Trial Exhibit 12 with the record on appeal.

CONCLUSION

For the reasons stated herein, this Court should affirm the trial court on all three grounds raised by Homemax on appeal.

February 14, 2022

Respectfully submitted,

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E X H I B I T SPlaintiff's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Receipt		X	331
2	Unclear Deposit		X	331
3	Signed Quote Order		X	75
4	Invoice and Interest		X	78
6	Delivery Inspection		X	82
7	Fautley Email		X	88
11	State Responsibility Form		X	337
12	Christofoli Invoice		X	172
13	Assignment Foundation		X	340
14	Delivery Inspection		X	143
15	Email-Vapor Barrier		X	230
17	Email-Hathcock		X	146
18	Email-BioTech		X	149
19	TAG Lending Letter		X	346
20	Deed-Homemax		X	347
22	Closing Disclosure		X	350
23	Deed to Mattingly		X	347
24	Claimed Expense		X	351
26	Billing Overview		X	239
27	Building Solution Invoice		X	242
28	Invoice Building Solution		X	242
29	Invoice-Cochrane		X	242

E X H I B I T SPlaintiff's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
30	Expense-Floyd Smith		X	242
31	Expense Floyd Smith		X	242
32	Expense Floyd Smith		X	242
33	Expense-Floyd Smith		X	242
34	Expense Floyd Smith		X	242
35	Expense Julian Carter		X	242
36	Expense Kevin Grieninger		X	242
37	Expense Kevin Grieninger		X	242
38	Expense Mid-State		X	242
39	Expense-Rose		X	242
40	Expense-Treadway		X	242
41	Expense-Treadway		X	242
42	Expense-Treadway		X	242
43	Expense-Treadway		X	242
44	Donnie Norwood Parts		X	242
45	Weather Data		X	342

	<u>Defendant's</u>				
	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1					
2					
3	1	Dealer Agreement		X	319
4	2	Christofoli Invoice		X	287
5	3	Termination Letter		X	318
6	5	Christofoli Inspection		X	123
7	10	Floor Plan Christofoli		X	125
8	11	Wall Panel Christofoli		X	126
9	13	Nature Lane Photos		X	289
10	14	Email Hathcock		X	120
11	16	ABS Invoice		X	276
12	17	BioTech Invoice		X	276
13	18	Bickley Invoice		X	276
14	19	Jackson Invoice		X	276
15	20	Southern Crane Invoice		X	276
16	21	Patriot Invoice		X	276
17	22	Smooth Waters Invoice		X	276
18	23	TLK Invoice		X	276
19	24	Barnhills Invoice		X	276
20	25	H&H Invoice		X	276
21	26	MacCon Invoice		X	276
22	27	K&L Invoice		X	276
23	28	Cutters Invoice		X	276
24	29	Fit Home Invoice		X	276
25					

E X H I B I T SDefendant's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
30	North Point Payment		X	302
31	Settlement Agreement		X	305
32	TAG Letter		X	310
33	TAG Letter		X	311
35	Closing Disclosure		X	314
36	Final Account Report		X	307
37	Final P&L		X	315

E X H I B I T S

Court's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Deposition-Hathcock	X		161
2	Deposition-Cosby	X		184
3	Note-Foreperson	X		477
4	Jury Note	X		476

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1 opportunity for a wet house. So I don't -- I can't tell
2 you if it was the wrapping or whatever. But you asked me,
3 I think, in my deposition had I ever experienced any and I
4 said yeah, in the 10 years, yes.

5 Q Sure. And I think at least for this house, and maybe
6 back in 2017 R-Anell was using Bennett Transportation to
7 ship some of it's houses, right?

8 A They were one of our contractors. But I think that's
9 specifically who shipped the Christofoli house.

10 MR. HEWETT: Your Honor, I'm handing the witness
11 what's marked as Defendant's Exhibit 12. Again, some of
12 these are just taken out of sequence. But it has been
13 marked. And I believe that opposing Counsel has not
14 objected to the authenticity of the email, but may have
15 objected as to the admissibility and perhaps on the
16 relevance. So just -- just for the record that's what the
17 witness has been handed. And, Your Honor, since you can't
18 see the TV screen would you like a copy?

19 THE COURT: Yes, please. Do you object?

20 MR. MANGUM: We do object to admissibility, so we'll
21 see how that goes here.

22 THE COURT: All right. Let's lay some foundation.

23 Q You see here what we're looking at, Mr. Hathcock?
24 It's two separate emails. Do you see that on the
25 document?

1 A Yes.

2 Q And it actually carries over to a third email on the
3 back. The first email we see is a response from Melissa
4 Allen to Carol Gentry dated May 17th of 2017, right?

5 A Uh-huh. (Affirmative.)

6 Q Is that right?

7 A Yes.

8 Q And Melissa Allen, as you mentioned earlier, is the
9 transportation coordinator for R-Anell?

10 A That's correct.

11 Q And Carol Gentry was somebody with Bennett
12 Transportation, right?

13 A Yes.

14 Q Okay. And the second email is again an exchange
15 between Carol Gentry and Melissa Allen dated the same day,
16 May 17th of 2017, is it not?

17 A Yes.

18 Q Okay. And May 17th, 2017 is the same day that the
19 Christofoli house was shipped, correct?

20 A That's correct.

21 Q And within these emails, without disclosing the
22 specific exchange, it looks like that there's an issue
23 being raised from Bennett Transportation and R-Anell about
24 the plastic wrap on certain houses, right? There's an
25 issue that's coming up in these emails?

1 A It was brought up in about the middle of the emails,
2 but it all started by that they had a person that was
3 complaining that a house was too heavy on one side.

4 Q That's part of the complaint, right?

5 A Well, that's the start of the complaint.

6 Q But there's a complaint about one house being
7 overloaded, and there's a complaint also about the plastic
8 wrap on their houses, right?

9 A We never had a complaint until this email, that's
10 correct.

11 Q I'm just talking about this email.

12 A Yeah.

13 Q And Bennett Transportation, like you just mentioned,
14 is the same company that carried the Christofoli house
15 from R-Anell to HomeMax's lot?

16 A That is correct.

17 MR. HEWETT: Your Honor, we would move to admit this
18 email. Opposing Counsel has already agreed to the
19 authenticity. It's an email dated the exact same day that
20 the Christofoli house was shipped by a representative of a
21 company for the -- somebody from the company that actually
22 carried the Christofoli house and concerns the quality of
23 plastic wrapping being done on houses that they are
24 picking up the same week as the Christofoli was completed
25 and being shipped out. So again, the authenticity has

1 been agreed to. We believe it is relevant as
2 circumstantial evidence of --

3 THE COURT: Let me hear the objection first.

4 MR. MANGUM: We still object, Your Honor. You know,
5 if you look at this temporally, okay, 4876 is the
6 Christofoli house order. This one --

7 THE COURT: All right. You all approach.

8 (Whereupon, a bench conference was held in the
9 presence of the jury but out of the hearing of the
10 jury.)

11 THE COURT: The Plaintiff's objection to Defendant's
12 Exhibit 12 is sustained. It is not admitted. Mr. Hewett,
13 if you want to put something on the record at the next
14 break I'm happy to hear you.

15 MR. HEWETT: Thank you, Your Honor.

16 Q Now, we were talking -- I think you mentioned there
17 was this three part responsibility process during the
18 shipping and the wrap, right? You had the transport
19 company at R-Anell, and then you also had the dealer,
20 right?

21 A Yeah, except R-Anell, transportation and then dealer
22 last. In that order, yes.

23 Q And R-Anell doesn't have any information that HomeMax
24 disturbed plastic wrapping once the units were dropped off
25 and stationed at their sales lot, does it?

1 THE COURT: Any redirect?

2 MR. MANGUM: I don't know if you want to go forward
3 with this or not. It might be rather long.

4 THE COURT: Might it be lengthy?

5 MR. MANGUM: Yeah, because now I've got to go through
6 the whole counterclaim. So I don't want to hunger an
7 angry jury.

8 THE COURT: Well, I'm fine, but I hate to keep the
9 jurors. So let's go ahead and take a lunch break. Be
10 back in your jury room at two o'clock. Don't discuss the
11 case amongst yourselves or with anyone else. Don't do any
12 research about the case. Just go and have a good lunch
13 and be back at two o'clock.

14 (Whereupon, the jury was excused from open court for
15 a lunch break.)

16 THE COURT: Mr. Hathcock, you are not permitted to
17 discuss your testimony with anyone. Do you understand?

18 MR. HATHCOCK: Yes, ma'am.

19 THE COURT: Take a lunch break and see you at 2:00
20 o'clock.

21 MR. HEWETT: Your Honor, to the extent, do I need to
22 put anything on the record.

23 THE COURT: Yes, did you want to, yes.

24 MR. HEWETT: I did. Obviously Plaintiff, I am sorry,
25 Defendant has moved the emails between Melissa Allen,

1 Carol Gentry into evidence. They have already been
2 stipulated to, it's authenticity. We believe they are
3 relevant because these emails take place the exact same
4 day the Christofoli house was delivered, between the exact
5 same company that delivered the house. It mentions in the
6 email that a tape is being provided to the drivers instead
7 mechanical fasteners which Mr. Hathcock says is what is
8 used to fasten plastic to the houses. So we think it is
9 circumstantial evidence and is relevant as to R-Anell's
10 wrapping of its houses during that particular time period.
11 During this week we are receiving complaints from drivers
12 about the houses not being properly wrapped. So we
13 certainly believe that that email should go into evidence
14 as admissible but I also understand the Court's ruling.

15 THE COURT: And my ruling sustaining the Plaintiff's
16 objection is based on the fact, I don't believe it is
17 relevant to the ultimate issue in this case, the emails we
18 are discussing, Defendant's exhibit number 12. These
19 emails refer to another house, something that happened the
20 day before and there between someone at the shipping
21 company and Melissa Allen who is --

22 MR. HEWETT: -- transportation coordinator for
23 R-Anell.

24 THE COURT: Right. But regarding a different house,
25 although it appears as though these emails at some point

1 began discussing the Christofoli home, the emails
2 presented, what is actually in Defendant's exhibit 12, is
3 about another home and something that happened at a prior
4 date with a different home. And so therefore it is not
5 relevant to the ultimate issue in this case. All right,
6 see y'all at 2:00 o'clock.

7 (Whereupon, a lunch break was taken.)

8 THE COURT: Let's get Mr. Hathcock back on the stand.
9 And we will bring the jury in.

10 (Whereupon, the jury came into open court at
11 approximately 2:10 p.m.)

12 THE COURT: Y'all can have a seat. Welcome back,
13 Folks. I hope you enjoyed your lunch. We have been
14 through direct examination and cross-examination of Mr.
15 Hathcock. The Plaintiff now gets an opportunity to do a
16 redirect examination followed by a recross if we get there
17 or if Mr. Hewett finds it necessary. So that is where we
18 are. I call Mr. Mangum for redirect.

19 MR. MANGUM: Yes ma'am, we are ready.

20 REDIRECT EXAMINATION

21 By Mr. Mangum:

22 Q First I am going to address a couple of points you
23 talked with Mr. Hewett about. First is, there was a lot
24 of talk about inspection and wrapping. And you said that
25 you don't do the inspecting or wrapping but do you

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PROOF OF SERVICE

The undersigned certified that he served a copy of the foregoing **Motion to Strike** to all counsel of record on February 14, 2022, electronically, as follows:

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