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Feb 18 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2021-000658

R-Anell Housing Group, LLC, ..... Respondent,

v.

Homemax, LLC, ..... Appellant.

**RETURN TO RESPONDENT’S MOTION TO STRIKE EXHIBIT 12 FROM THE  
RECORD ON APPEAL**

COMES NOW the Appellant, Homemax, LLC (“Homemax” or “Appellant”) in return to Respondent’s Motion to Strike Exhibit 12 from the Record on Appeal. Respondent alleges Exhibit 12 was not presented to the trial court and is not part of the trial record. As shown herein Respondent’s motion is baseless and must be denied. This argument is supported by the law and the following attachments:

**Appendix 1** Certified Copy of Exhibit 12 provided by the Lexington County Clerk of Court evidencing Exhibit 12 is plainly part of the trial record.

**Appendix 2** Certified Copy of the Clerk of Court’s Evidence Log provided by the Lexington County Clerk of Court evidencing Exhibit 12 is plainly part of the trial record.

**Appendix 3** A reproduction of Exhibits B & C to Respondent’s Motion, which consists of seven pages of trial transcript confirming that Exhibit 12 was marked for identification, moved into evidence by Appellant, objected to by Respondent, and ruled on by the trial court after arguments by counsel.

## ARGUMENT IN RETURN

Citing Rule 210(c), SCACR, Respondent claims Exhibit 12 should be excluded from the record on appeal because it “does not appear on the record at trial.” (Resp. Mot. p. 1). Yet, Exhibits B and C to Respondent’s own motion include seven pages of colloquy from trial regarding Exhibit 12—precisely the exhibit Respondent now claims was never presented to the trial court. Appellant is perplexed by Respondent’s claim. Nonetheless, to the extent the trial transcript is not enough to defeat Respondent’s claim, a simple review of the trial record maintained by the Lexington County Clerk of Court conclusively demonstrates Respondent’s motion unfounded.

As required by Rule 606(a), SCACR,<sup>1</sup> after Exhibit 12 was marked for identification, the clerk of court retained this exhibit in the official record of this case. A certified copy of Exhibit 12, as recorded by clerk of court, is attached hereto as **Appendix 1**. Further, the clerk’s log of Defendant’s exhibits entered into the record for this matter plainly identifies Exhibit 12, and a certified copy of this log is attached hereto as **Appendix 2**.

As demonstrated by the certified records of the clerk of court (i.e., **Appendix 1**, **Appendix 2**), as well as by the transcript attached to Respondent’s motion (re-attached hereto for convenience as **Appendix 3**), Respondent’s claim that Exhibit 12 was not presented to the trial court is completely meritless. But there is more.

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<sup>1</sup> Rule 606 mandates “the clerk of court for the county shall retain possession of all exhibits admitted into evidence **or marked for identification** during a hearing or trial before the circuit or family court.” Rule 606(a), SCACR (emphasis added); *see also* Rule 606(c)(2) (requiring that in the event of an appeal the clerk shall retain these exhibits until sixty days after the appellate court issues a remittitur).

Respondent's motion is devoid of any legal authority supporting its position. Although acknowledging this flaw,<sup>2</sup> Respondent nonetheless summarily suggests that Exhibit 12 was not "presented" to the trial court because it is not listed in the index of admitted exhibits contained in the preface to the trial transcript (i.e., Exhibit A to Respondent's Motion), and/or because Appellant did not make Exhibit 12 a "court's exhibit." (Resp. Mot. p. 2). These conclusory arguments are unsupported and unavailing.

First, whether Exhibit 12 is listed in the index created by the court reporter is immaterial because "the record" is not limited to the trial transcript.<sup>3</sup> Rule 210(c) explains that "the record" includes "orders, judgments, decrees, decisions, pleadings, transcripts, charges, **exhibits** and other materials or documents." Rule 210(c), SCACR. (emphasis added). This rule identifies "exhibits" without distinction between those admitted into evidence or those excluded. *Id.* Similarly, the plain text of the rule confirms that exhibits are distinct from the transcript. *Id.* Thus, Respondent's suggestion that the court reporter's index is determinative of whether Exhibit 12 was presented to the trial court is simply wrong. *See* (**Appendix 2**) (a certified copy of the clerk's log of Defendant's exhibits and demonstrating Exhibit 12 is part of the trial court's record in this matter).<sup>4</sup>

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<sup>2</sup> Although Respondent acknowledges "there are few cases interpreting what it means to 'present' a matter to the trial court under Rule 210, SCACR," it fails to cite any of these "few." (Resp. Mot. p. 1). Instead, the cases it does cite have no import to the circumstances of this motion and offer no support for Respondent's contention that an exhibit otherwise identified, argued about, ruled on, and maintained by the clerk of court is somehow not part of the trial record.

<sup>3</sup> Notably, Respondent has already filed its Initial Brief and Designation of Matter and has not designated the index it relies on as part the Record on Appeal. Thus, it is not clear this index is properly before this Court. Moreover, Respondent offers no authority that the index, which is created by the court reporter after the fact, is actually part of the trial transcript, or that the index would control in the face of a discrepancy with the body of the transcript.

<sup>4</sup> Accepting Respondent's suggestion that the court reporter's index should be determinative of the record would lead to absurd results that are contrary to Rule 210. For example, in this case neither the pleadings nor the Court's Order entering judgment against Appellant are contained in the index. *See* (Exhibit A to Resp. Mot.). Thus, under Respondent's reasoning these items are not part of the

Second, Respondent seems to suggest that in addition to marking Exhibit 12 for identification and moving to have it admitted Appellant was also required to “preserve [it]” by making it a “court’s exhibit.” (Resp. Mot. p. 2). Again, Respondent offers no legal support for this claim because none exists. To the contrary, this Court has accepted that filing a document with the clerk or providing it to the trial judge is generally all that is required to make the document part of the record. *See generally, Loyd’s Inc. by Richardson Constr. Co. v. Good*, 306 S.C. 450, 452-53, 412 S.E.2d 441, 443 (Ct. App. 1991) (finding in order to put a documents on file, “we hold they ordinarily must have been filed . . . with the clerk of court . . . However, as here, where the court file is in the physical custody of the trial judge we hold she had the discretion and the inherent power to receive the documents and make them a part of the file.”).

Pursuant to Rule 606(a), once an exhibit is marked for identification, the clerk of court is required to enter the exhibit in the record regardless of whether the trial court allows it to be admitted into evidence. *See* Rule 606 (a), SCACR (mandating “the clerk of court for the county shall retain possession of all exhibits admitted into evidence **or marked for identification** during a hearing or trial before the circuit or family court.”) (emphasis added). Where, as here, a litigant has marked the exhibit for identification and moves to admit it, whether successfully or not, the exhibit is necessarily part of the record. As a result, the law does not (and should not) impose an additional requirement that the litigant also move to make the same exhibit a “court’s exhibit.” This would be redundant. Former Chief Justice Toal agreed, explaining: “[a]s to physical evidence, it should be marked for identification only and included in the trial record.” Toal, *Appellate*

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record. However, that result would be absurd—a point confirmed by the fact that Respondent itself designated these items. Under Rule 210 the pleadings and orders are part of the record. The fact that these items are not listed in the index makes no difference whatsoever because the documents are filed with the clerk of court. The same reasoning must apply to exhibits which are likewise addressed by Rule 210.

*Practice in South Carolina*, 2d. Ed. 2002, Chpt. 5, §V-6, p. 136-37 (discussing “Motions, Objections, Rulings, and Proffers” in the context of the “Record on Appeal”).<sup>5</sup> That is precisely what the clerk of court’s records conclusively show happened in this case.

CONCLUSION

Because the certified copies of the clerk of court’s records (i.e., Appendix 1 & Appendix 2) confirm Exhibit 12 is plainly part of the record in this matter, and further because Respondent’s contention is entirely unsupported by the law, this Court should summarily deny Respondent’s Motion to Strike Exhibit 12.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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*Attorneys for Appellant*

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<sup>5</sup> While a party may sometimes need to proffer testimonial or non-documentary evidence to make it part of the trial record, this requirement does not translate to documentary because any “proffer” requirement for documentary evidence can be accomplished by physically marking it for identification. In outlining the record requirements, then Chief Justice Toal commented on this distinction stating; “[a]s to physical evidence, it should be marked for identification only and included in the trial record. Testimonial evidence [on the other hand] can be proffered [by either] taking the witness’s testimony outside the jury’s presence; or [] summarizing the testimony.” Toal, *Appellate Practice in South Carolina*, 2d. Ed. 2002 at p. 136-37 (*supra*).

Appendix 1  
to Appellant's Return to Mot. to Strike

Zimbra

rosie.sellers@bennettig.com

Fwd: 40876

**From :** Carol Gentry <znc@bennettig.com>  
**Subject :** Fwd: 40876  
**To :** Rosie Sellers <rosie.sellers@bennettig.com>

Wed, Oct 02, 2019 04:14 PM

----- Forwarded Message -----  
From: "Melissa Allen" <mallen@commodorehomes.com>  
To: "Carol Gentry" <znc@bennettig.com>  
Sent: Wednesday, May 17, 2017 10:40:26 AM  
Subject: RE: 40876

Carol - I have 4 witnesses that the escort driver was the one talking and cussing our employees and Managers. I have witnesses that he was behind the plant in the final finish area. Bottom line - he should not be inside the gate. I have sent out notices (several times) to all the transportation companies stating that ALL escort drivers are to remain outside the gates. I was also told by the witnesses that Big John was given 2 rolls of tape to give to John, Jr.

Roger McSwain said that you could call him about the incident if you would like to. 704-445-9610 Ext. 106

I do appreciate all that you have done to help us with this house. I hate that they had trouble with the plastic yesterday. Unfortunately, that happens from time to time. We appreciate them fixing it and getting the house to the site.

I hate that your drivers don't like pulling from our plant.....

Roger has gone out to talk to John, Jr. now and see what he can do about the weight.

Thanks!

-----Original Message-----  
From: Carol Gentry [mailto:znc@bennettig.com]  
Sent: Wednesday, May 17, 2017 10:19 AM  
To: Melissa Allen <mallen@commodorehomes.com>  
Cc: Carol Gentry <znc@bennettig.com>  
Subject: Re: 40876

drivers are very upset today about one escort trying to get a roll of tape.....and getting talked to so badly.

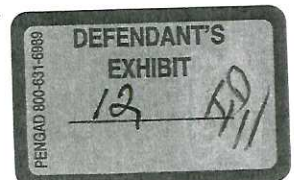
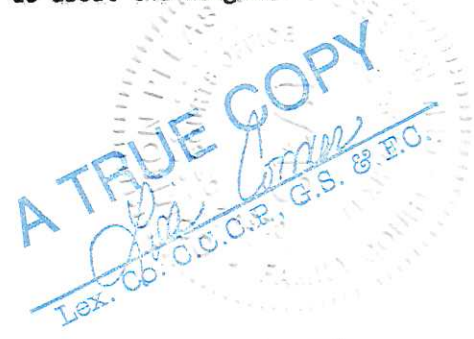
You know we jumped thru hoops to ship this house..had 4 escorts and 2 drivers on stand by just so it could possibly go.

[ yesterday they had all kinds of problems with plastic..that is why they needed tape today....

also having trouble getting tires.

we just want to get the houses delivered safely to destination and overloading them with parts does not help.

----- Original Message -----



Appendix 1  
to Appellant's Return to Mot. to Strike

From: "Melissa Allen" <mallen@commodorehomes.com>  
To: "Carol Gentry" <znc@bennettig.com>  
Sent: Wednesday, May 17, 2017 10:16:45 AM  
Subject: RE: 40876

I just called Roger and Ship to see if anything can be done. I'll keep you updated. Thanks!

-----Original Message-----

From: Carol Gentry [mailto:znc@bennettig.com]  
Sent: Wednesday, May 17, 2017 10:13 AM  
To: Melissa Allen <mallen@commodorehomes.com>  
Subject: 40876

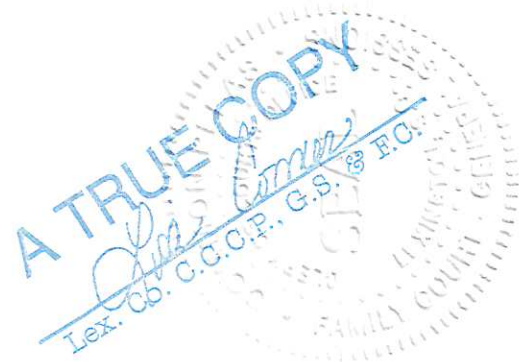
THE A side is loaded down with parts.  
driver said this house weight too big and heavy to be delivering parts..

is there anyway to move some of them around before he leaves.

they not real happy....

--

Carol Gentry  
Terminal Manager-ZNC  
Steve Gentry  
Terminal Asst-ZNC  
Bennett Truck Transport, LLC  
1144 N. Main St. Roxboro, NC  
877-604-6452 (toll free)  
336-599-9212 (fax)  
znc@bennettig.com (email)



Defendant's  
 COUNTY OF LEXINGTON  
 [REDACTED]  
 CLERK OF COURT

Appendix 2

IN THE COMMON PLEAS / GENERAL SESSIONS / FAMILY COURT

CASE NO. 2018 CP 323103

JUDGE Spedyn Newman

CT. REP. Jay Holston DATE 6-7-2021

CLOCK-IN AREA

(NOTES)

- (1) \_\_\_\_\_
- (2) \_\_\_\_\_
- (3) \_\_\_\_\_

**A TRUE COPY**  
 [Seal of the County of Lexington Clerk of Court]

PLAINTIFF Defendants Exhibits VS.  
L-Anell Housing Group

DEFENDANT  
HomeMax, LLC

Atty. Robert Mangum

Atty. Brad Hewett

NO.	ID.	EV.	DESCRIPTION	NO.	ID.	EV.	DESCRIPTION
1		✓	Deputy Agreement	20		✓	Dartem Crane Invoice
2		✓	Christofie Invoice	21		✓	Patriot Invoice
3		✓	Termination Letter	22		✓	Smalley Work Invoice
5		✓	Christofie Inspection	23		✓	TLK Invoice
10		✓	Floor Plan-Christofie	24		✓	Barnhills Invoice
11		✓	Wall Panel Cut List	25		✓	H+H Invoice
13		✓	Nature Lane Photos	26		✓	Mac Cow Invoice
14		✓	Email Hancock	27		✓	K+K Invoice
16		✓	ABS Invoices	28		✓	Cutreas Invoice
17		✓	Brotek Invoice	29		✓	Fit Home Invoice
18		✓	Bickley Invoices	30		✓	North Point Payment
19		✓	Jackow Invoice	31		✓	Settlement Agreement

CT. REP Jay E. Holston

REC. BY MHuggins

VERIFIED \_\_\_\_\_

TITLE Deputy Clerk

TITLE \_\_\_\_\_

WHITE: COURT RECORDS \* YELLOW: EVIDENCE VAULT \* PINK: FILE

LCF 661 (1/05)

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*Defendant's*  
 COUNTY OF LEXINGTON  
 [REDACTED]  
 CLERK OF COURT

**Appendix 2**

IN THE COMMON PLEAS / GENERAL SESSIONS / FAMILY COURT

CASE NO. 2018 CP 323103

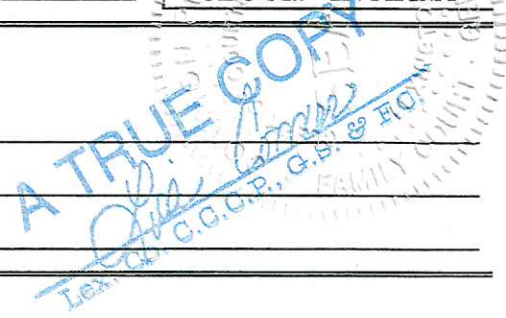
JUDGE Jocelyn Neidman

CT. REP. Jay Holston DATE 6-7-2021

CLOCK - IN AREA

(NOTES)

- (1) \_\_\_\_\_
- (2) \_\_\_\_\_
- (3) \_\_\_\_\_



PLAINTIFF VS. DEFENDANT

R-Anell Housing Group

Home MAX, LLC

Atty. Robert Mangum

Atty. Boad Hewett

NO.	ID.	EV.	DESCRIPTION	NO.	ID.	EV.	DESCRIPTION
32		✓	Tag letter Nature Lake				
33		✓	Tag letter Nature Lake				
35		✓	Closing Disclosure				
36		✓	Final Account Report				
37		✓	Final P+L				
12	✓		Email = Carol Gentry				

CT. REP Gay E. Holston

REC. BY M Huggins

VERIFIED \_\_\_\_\_

TITLE Deputy Clerk

TITLE \_\_\_\_\_

WHITE: COURT RECORDS \* YELLOW: EVIDENCE VAULT \* PINK: FILE

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

RECEIVED

Feb 18 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2021-000658

R-Anell Housing Group, LLC, ..... Respondent,

v.

Homemax, LLC, ..... Appellant.

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**PROOF OF SERVICE**

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The undersigned certifies that she served a copy of the foregoing **Return to Respondent's Motion to Strike and Appendixes** to all counsel of record on February 18, 2022, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

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*S. Cerone*

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