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Aug 21 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Appellate Case No. 2023-000029
Circuit Court Case No. 2018-CP-10-02109

Rebecca Turisk,

Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC,

Respondents.

RESPONDENTS' MOTION TO STRIKE MATTER FROM RECORD ON APPEAL

Respondents Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC (collectively, "Respondents") hereby move this Honorable Court for an Order striking lines 20:13-20 of Jordan Harper's deposition transcript from the Record on Appeal (currently, R. p. 809). The basis for Respondents' Motion is that those lines were not actually presented to the lower court or tribunal and therefore cannot be included in the Record on Appeal pursuant to Rule 210(c), SCRAP. Indeed, the only reference to those lines at trial were in the form of an objection lodged by Respondents' counsel prior to Appellant's attempt to read the deposition to the jury, which the

Honorable Maite Murphy granted. (R. p. 330-34). However, this does not amount to presentation to the lower court under South Carolina law.

This Court reached the same decision in *Fountain v. Fred's, Inc. et al.*, Case No. 2017-00068 (Ct. App. 2017). In *Fountain*, upon a motion to strike filed by one of the respondents, this Court struck a settlement agreement from the Record on Appeal although it was referenced extensively by witnesses during testimony and in the attorneys' arguments because it was neither offered nor proffered and therefore "not actually presented to the lower court." See Exhibit A - Order, filed November 29, 2017. The same logic applies here. While Respondents discussed the contested testimony with Judge Murphy once during oral arguments, Appellant never proffered the testimony herself or even attempted to formally admit that portion of the transcript into evidence to preserve the issue. See *State v. Simmons*, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (stating the failure to make a proffer of excluded evidence will preclude review on appeal); see also *State v. Hawkins*, 310 S.C. 50, 54, 425 S.E.2d 50, 57 (Ct. App. 1992) (declining to rule on the court's alleged error of excluding evidence when no proffer was made, and the excluded evidence was not contained in the Record). No other witness testified about it either. Thus, the only matter that was "actually presented" to lower court and that this Court will be able to view from the trial transcript were the oral arguments of counsel, which are not evidence and do not make the contested lines a proper matter for inclusion in the record on appeal.

Based on the foregoing, Respondents respectfully request that this Honorable Court issue an Order striking lines 20:13-20 of Jordan Harper's deposition transcript from the Record on Appeal. Undersigned counsel certify that they conferred with counsel for Appellant prior to filing this Motion in an effort to resolve it in good faith but that they were unable to reach an agreement.

[Signature Page to Follow]

s/Todd W. Smyth

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Attorneys for Respondents

August 21, 2023

The South Carolina Court of Appeals

Martha M. Fountain and Curtis Fountain, Plaintiffs,

v.

Fred's, Inc. and Wildevco, LLC, Respondents,

v.

Tippins-Polk Construction, Inc. and Rhoad's Excavating
Services, LLC, Third-Party Defendants,

Of whom Tippins-Polk Construction, Inc. is the
Appellant.

Appellate Case No. 2017-000688

ORDER

After careful consideration, Appellant's consent motion to amend its final brief is granted. This court will take no further action on Respondent Fred's Inc.'s motion to strike.

Respondent Wildevco, LLC's motion to strike is granted in part. The motion to strike the settlement agreement from Appellant's designation of matter is granted because the agreement was not actually presented to the lower court. *See* Rule 210(c), SCACR. The motion to strike is otherwise denied.


FOR THE COURT

Columbia, South Carolina

FILED

November 29, 2017

EXHIBIT A

cc:

Morgan S. Templeton, Esquire
Matthew Clark LaFave, Esquire
Regina Hollins Lewis, Esquire
Lee Ellen Bagley, Esquire
John Joseph Dodds, IV, Esquire

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Rebecca Turisk,

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Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC,

Respondents.

PROOF OF SERVICE

I certify that I have served RESPONDENTS' MOTION TO STRIKE MATTER FROM RECORD ON APPEAL electronically on August 21, 2023, to all counsel of record as listed below:

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SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

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SC Court of Appeals

VIA EMAIL ONLY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Rebecca Turisk v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC
Appellate Case No.: 2023-000029

Dear Ms. Kitchings:

Enclosed for service, please find Respondents' Motion to Strike Matter from Record on Appeal. Please contact me with any questions or concerns. Our \$50.00 filing fee is being sent via U.S. Mail. We sincerely appreciate your consideration of our Motion.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Todd'.

Todd W. Smyth

TWS:cmr
Enclosure

cc: all counsel of record (via email only)