

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Sep 18 2023

SC 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' RETURN IN SUPPORT OF THEIR MOTION TO STRIKE MATTER
FROM RECORD ON APPEAL**

Respondents Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC (collectively, "Respondents") submit the following Return in support of their Motion to Strike Matter from the Record on Appeal:

- I. THE DISPUTED DEPOSITION TESTIMONY CANNOT BE INCLUDED IN THE RECORD ON APPEAL BECAUSE APPELLANT, AS THE OFFERING PARTY, DID NOT MAKE A PROFFER, SO SHE DID NOT ACTUALLY PRESENT THE DISPUTED TESTIMONY TO THE LOWER COURT.**

As an initial matter, Respondents do not contend that only items admitted as evidence may be considered as part of the Record on Appeal as Appellant erroneously asserts. Response, p. 3.

However, the law requires that the matter must actually be presented to the lower court in order for it to be included in the Record on Appeal. Rule 210(c), SCACR; *see also* Ex. A to Respondents' Motion, Order. For excluded testimony to satisfy this presentation requirement, it is not enough for the testimony to simply be referenced during trial. Instead, the **party offering the testimony must make a proffer** to actually present it to the lower court as required by South Carolina law. *See Ellis by Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (internal citations omitted) (refusing to review evidence that the appellant sought to introduce because he did not proffer it at trial). Otherwise, the excluded testimony is not reviewable by the appellate courts. *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). Here, Appellant plainly did not proffer the disputed testimony despite an obligation to do so as the offering party. As a result, Appellant did not actually present the disputed testimony to the lower court, and it cannot be included in the Record on Appeal. Rule 210(c), SCACR.

Appellant attempts to circumvent the proffer requirement by relying on the oral arguments of Respondents' counsel at trial. First, this Court was not persuaded by a similar argument in *Fountain*.¹ Compare Exhibit A – Appellant's Response to Respondent Wildevco, LLC's Motion to Strike Matter and Exclude Matter from Record on Appeal *with* Ex. A to Respondents' Motion. Second, the arguments of Respondents' counsel did not create a reviewable record.

¹ Appellant suggests that, because the remainder of the motion to strike in *Fountain* was denied, this Motion should somehow also be denied. Response, p. 3. However, the only portion of the motion to strike that was denied by this Court in *Fountain* was the respondent's request to strike an argument by the appellant that the respondents were bound by their own pleadings and were estopped from recovering damages not requested within their complaint, which the respondents alleged had not been timely raised. Exhibit B – Respondent Wildevco, LLC's Motion to Strike Matter and Exclude Matter from Record on Appeal. This is highly distinguishable from the present Motion and does not reflect a policy against motions to strike.

Absent a proffer, an attorney's arguments do not create a reviewable record. If the opposite were true, the proffer requirement would not exist, and parties would be incentivized to backdoor as much testimony and other evidence as they can onto the record through attorney arguments to bolster their appeals. Regardless, Respondents' counsel never proffered the disputed deposition testimony.

Contrary to Appellant's suggestion, Respondents' counsel did not proffer/present the disputed testimony by merely answering Judge Murphy's questions about the basis for their objection or by providing her with a courtesy copy of the transcript at her request. Notably, as the relevant portion of the Trial Transcript demonstrates, the parties also provided Judge Murphy with a notebook containing courtesy copies of other case materials. Exhibit C – Trial Transcript, p. 186 (“The Court: Oh, is it in the notebook? I’m sorry.”). The contents of that notebook did not automatically become part of the reviewable record despite being “presented” to Judge Murphy, so Respondents' counsel's courtesy copy of the disputed testimony does not satisfy the proffer requirement either. An opposite conclusion likewise incentivizes parties to pad the record with judge notebooks and similar tactics aimed at circumventing the Rules of Evidence.

Furthermore, the relevant portion of the Trial Transcript also demonstrates that Respondents did not have any intention of putting the substance of the disputed testimony on the Trial Transcript themselves – let alone formally “read it in to the record” as Appellant now attempts to contend. Ex. B. Indeed, Respondents' counsel merely offered the page and line numbers to Judge Murphy during their objection. *Id.* Despite this, Appellant would have Respondents, who did not have a burden of proof, create record evidence for her by complying with Judge Murphy's innocuous requests for information. This does not comport with the proffer requirement and is markedly unjust.

Importantly, absent Judge Murphy’s questions and Respondents’ counsel’s argument, the substance of the disputed testimony would not appear in any portion of the Trial Transcript, and it would be impossible for the appellate courts to determine what was excluded. Even still, as Appellant points out, the appellate courts are not even able to review the complete substance of the disputed testimony because Respondents’ counsel did not read it verbatim, and Appellant did not proffer the actual testimony, either verbally or by attempting to move the deposition transcript into evidence. *See* Jean Hoefler Toal, et al. *Appellate Practice in South Carolina* 200 (3d ed. 2016) (contrasting *Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 405 S.E.2d 417) (“[A] proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice.”). This further undermines that Respondents’ counsel’s arguments satisfied any preservation requirement – let alone one for which Appellant can now avail herself.

Even assuming *arguendo* that Respondents proffered the disputed testimony to the lower court, the fact that Respondents were not the party offering the disputed testimony into evidence is still fatal to Appellant’s position. *See Ellis* (cited *supra*). Thus, there is no merit to Appellant’s claim that Respondents presented the disputed testimony to the lower court, and it should be struck from the Record on Appeal.

II. SANCTIONS ARE NOT WARRANTED AGAINST RESPONDENTS BECAUSE THEIR MOTION IS NEITHER FRIVOLOUS, MADE FOR THE PURPOSE OF DELAY, NOR OUT OF COMPLIANCE WITH THE SOUTH CAROLINA APPELLATE COURT RULES.

Under Rule 269, SCACR, sanctions may only be imposed where a motion is “frivolous or taken solely for the purpose of delay, or is not in compliance with [the SCACR].” A motion is not frivolous where a reasonable attorney presented with the same circumstances would believe that the motion was not intended merely to harass or injure the other party. *See* S.C. Code § 15-36-10(A)(4)(a)(iii) (providing that an attorney may be sanctioned for filing a frivolous pleading, motion, or document if “a reasonable attorney presented with the same circumstances would

believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party”); *see also Taylor v. Stop 'N' Save, Inc.*, No. 2017-UP-249, 2017 S.C. App. Unpub. LEXIS 281, at *3-4 (Ct. App. June 21, 2017) (internal citations omitted) (considering the standard set in the frivolous proceedings act in reviewing a denial of award of sanctions).

The above citations clearly demonstrate that Respondents’ Motion is well supported by both the law and facts, so there can be no merit to Appellant’s bald assertion that it is frivolous; a reasonable attorney would pursue Respondents’ Motion to protect the interests of his or her client. The fact that Respondents declined to further litigate this issue with Appellant via letter prior to filing the instant Motion does not weaken its position. Appellant made it clear in her response to Respondents’ meet and confer letter, which was supported by Rule 210(c), SCRAC, that she disagreed with the controlling interpretation of the Rule, so additional correspondence was unnecessary and would have delayed this appeal further, which Appellate now claims is a basis for imposing sanctions on Respondents (i.e., delay). Exhibit D – Respondents’ Meet and Confer Letter.

Regardless, Respondents’ Motion cannot be construed as intended for any purpose other than to correct the Record on Appeal, let alone to “solely” cause a delay as is required by law to warrant sanctions. Rule 269, SCACR. In fact, Respondents have an obligation to clarify the Record on Appeal as they have because the disputed testimony bears on one of Appellant’s two distinct case theories (e.g., whether Respondents failed to timely diagnose and treat an infection), so there is no basis for questioning Respondents’ motivation for this Motion or imposing sanctions for it.

Moreover, while Respondent’s certainly did not make the Motion to delay any part of this appeal, it can hardly be said to have caused any. The parties have been able to file their Final

Briefs, which will not be significantly altered by this Motion. Finally, this Motion fully complies with this Court's Rules, which is the only other available ground for sanctions, so there is no support for an award of sanctions of any kind.

CONCLUSION

The foregoing demonstrates that there is nothing in Appellant's Response that changes that the disputed testimony was never presented to the lower court in accordance with our Rules of Evidence. Appellant, as the offering party, had an obligation to proffer the disputed testimony in some way, but she did not. Appellant cannot leverage Respondents' oral argument to create matter for the Record on Appeal as she has attempted to do. Accordingly, Respondents respectfully ask this Court to grant their Motion to Strike and deny Appellant's request for sanctions.

Respectfully submitted,

s/Todd W. Smyth

Todd W. Smyth
Allie A. Maples
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 260
Charleston, South Carolina 29492
Tel: (843) 606-5635
Fax: (843) 654-4095
tsmyth@smythwhitley.com
amaples@smythwhitley.com

Attorneys for Respondents

September 18, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

OCT 25 2017

SC Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-000688

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.

**APPELLANT'S RESPONSE TO RESPONDENT WILDEVCO, LLC'S MOTION TO
STRIKE MATTER AND EXCLUDE MATTER FROM RECORD ON APPEAL**

Appellant Tippins-Polk Construction, Inc. ("Appellant") respectfully submits the following in opposition to Respondent Wildevco, LLC's ("Respondent") Motion to Strike Matter and Exclude Matter from Record on Appeal. For the reasons set forth below, this Court should deny Respondent's Motion to Strike.

ARGUMENT

Pursuant to Rule 209(b), SCACR, the designation of matter to be included in the record on appeal “may only propose to include portions of transcripts, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal” as outlined in Rule 210(c), SCACR. “A party may not include any matter in his Designation which is not relevant to the appeal.” Rule 209(b), SCACR. Rule 210(c), SCACR, states, in pertinent part, the following: “The Record shall not, however, include matter which was not presented to the lower court or tribunal.”

Id.

I. Appellant’s argument set forth in Section III of its Initial Brief is properly preserved in its post-trial motions pursuant to Rules 52(e) and 59(e), SCRCF, because it was not possible to raise such an argument until after judgment was entered by the circuit court.

“It is well settled that an issue cannot be raised for the first time on appeal.” Pye v. Estate of Fox, 369 S.C. 555, 564 (2006); see also Bank of N.Y. v. Sumter Cnty., 387 S.C. 147, 159 (2010) (“It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.”). However, the Supreme Court held in Buist v. Buist, 410 S.C. 569, 576 (2014), that the “conclusion that *any* request . . . at the Rule 59(e) stage of the proceedings was untimely . . . is clearly erroneous.” Id., 410 S.C. 569, 577 (2014) (emphasis in original).

In Buist, the Supreme Court heard a challenge to the award of attorneys’ fees in family court. The appellant objected to the award of attorneys’ fees in a Rule 59(e) motion filed post-trial. The respondent argued that appellant’s objection in his Rule 59(e) motion was untimely, and, therefore, not preserved for appellate review. The South Carolina Supreme Court, however, stated that “the conclusion that *any* request to reconsider an award of attorneys’ fees at the 59(e) stage of the proceedings was untimely because [the appellant] could have raised this issue at trial is clearly erroneous. This statement wrongly conflates the timing of [the appellant’s] objection with his

failure to object with specificity, prior to his appeal to the court of appeals, to the propriety of awarding attorneys' fees." Buist, 410 S.C. at 576. The Supreme Court, rather than adhering to the blanket statement that any issue raised in a post-trial Rule 59(e) motion is untimely, instead focused on the timing and propriety of objection if it would have occurred during trial.

Here, similarly, Appellant was not in a position to know for certain (and, therefore, raise the objection) whether the circuit could award damages not requested in Respondent's complaint until judgment was entered awarding such damages. Prior to judgment being entered, it was unnecessary and inappropriate to object to a circuit court potentially awarding such damages. In essence, the issue was not yet ripe until judgment was entered. When judgment was entered, Appellant timely raised the issue in its Rule 59(e), SCRCP, motion.

Furthermore, as this Court knows, "[t]he duty is on the litigant to make a timely objection in order to preserve the right of review." Doe v. S.B.M., 327 S.C. 352, 356 (Ct. App. 1997). "A contemporaneous objection is required to properly preserve an error for appellate review." Id. Judge Early, subsequent to the trial, took the matter under advisement. He thereafter entered an Order finding for Respondents on August 1, 2016, almost two months after the trial. Appellant had no opportunity to object to the circuit court's award of damages not requested in Respondent's complaint until notice of the entry of judgment. Like the Supreme Court in Buist, this Court must consider the timing and propriety of objecting before the issue became ripe.

A timely filed Rule 59(e), SCRCP, motion is a contemporaneous objection in this instance. Accordingly, the Court should deny Respondent's motion to strike Section III of Appellant's Initial Brief.

II. The settlement agreement is relevant to Appellant's appeal, and the issue arising therefrom was presented to the circuit court.

As stated above, Rule 210(c), SCACR, states, in pertinent part, the following: "The Record shall not . . . include matter which was not presented to the lower court or tribunal." Id. Further, Rule 209(b), SCACR, states that "[a] party may not include any matter in his Designation which is not relevant to the appeal." Id.

Here, including the settlement agreement between Plaintiff and Respondents Wildevco and Fred's, Inc. in the Record on Appeal is proper. First, it is undoubtedly relevant to the appeal. In Appellant's Initial Brief, Appellant argues that the settlement agreement acknowledges that Respondents were liable for Plaintiff's injuries, and that the equitable doctrine of judicial estoppel prevents Respondents from taking a position inconsistent therewith. This issue was timely raised and preserved for appeal, and Respondents do not refute this. Regardless of the validity of this argument, the settlement agreement is nonetheless relevant to the appeal. Therefore, this specific requirement of Rule 209(b), SCACR, is met.

Furthermore, this issue was presented to the circuit court within the meaning of Rule 210(c), SCACR. While the settlement agreement was not entered into evidence, upon information and belief, there is no rule which states that a document has to be entered into evidence for it to be included in the Record on Appeal. If this were the case, a party appealing a circuit court's refusing to admit certain evidence would not be entitled to present to the appellate court the excluded evidence. The settlement agreement was germane to the entire trial, and was addressed numerous times. See R. at _____ (Tr. Trans. June 6, 2016 at 6:5-8; 7:3-6; 10:19-20; 11:1; 12:18; 12:22-24; 14:3-4; 20:16-24; 21:1-3; 21:10-14; 24:21-25; 25:1; and 33:23-25); see also R. at _____ (Tr. Trans. June 7, 2016 at 66:22-25; 67:1-3; 68:11-13; 68:19-21; 68:22-24; 69:2-3; 69: 13-14; 69:16-19; 70:1-3; 70:8-10; 71:14-16; 72:9-12; 73:21-23; 74:16-17; 84:2-12; and 85:9-18).

Respondent states the same in its Motion to Strike. See Mot. to Strike Matter and Exclude Matter from Record on Appeal at p.2 (“[T]he parties and witnesses did reference it during testimony and argument during the trial of this matter.”). Lastly, Respondent cites to pertinent provisions of the settlement agreement in its Initial Brief. See Resp. Initial Br. at p.23.


Given the importance of the settlement agreement and the number of times it is referenced in the trial transcripts and initial briefs of the parties, the agreement should be included in the Record on Appeal. Appellant respectfully urges this Court to consider the foregoing, and avers that the Court needs the full settlement agreement to fully consider the issues raised on appeal. Accordingly, Appellant respectfully requests this Court deny Respondent’s Motion to Exclude Matter from Record on Appeal.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court deny Respondent’s Motion to Strike Matter and Exclude Matter from Record on Appeal.

Dated this 23 day of October, 2017.

Respectfully submitted,



Morgan S. Templeton
John J. Dodds, IV
Post Office Box 1200
Charleston, South Carolina 29402
(832) 329-9500
Morgan.Templeton@WallTempleton.com
John.Dodds@WallTempleton.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-000688

RECEIVED

OCT 25 2017

SC 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.

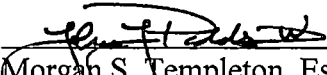
PROOF OF SERVICE

I, John J. Dodds, IV, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Response to Respondent's Motion to Strike Matter and Exclude Matter from Record on Appeal on counsel for Respondents, by depositing the same in the United States Mail, properly posted on October 23, 2017 addressed as follows to counsel of record:

Lee Ellen Bagley, Esq.
Gaffney Lewis & Edwards
3700 Forest Drive, Suite 400
Columbia, SC 29204

Matthew C. LaFave, Esq,
Crowe LaFave, LLC
Post Office Box 1149
Columbia, SC 29202

WALL TEMPLETON & HALDRUP, P.A.


Morgan S. Templeton, Esquire
John J. Dodds, IV Esquire
145 King Street, Ste. 300
Post Office Box 1200
Charleston, South Carolina 29402
843-329-9500
Attorneys for the Appellant



Wall Templeton
ATTORNEYS

John J. Dodds, IV
John.Dodds@WallTempleton.com
Telephone: 843.329.9500 Ext. 213
Facsimile: 843.329.9501

October 23, 2017

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

RECEIVED
OCT 25 2017
SC Court of Appeals

Re: *Martha M. Foundain v. Fred's Inc., et al.*
Civil Action No.: 2010-CP-06-101

Dear Mr. Kitchings:

Please find enclosed an original and six (6) copies of Appellant's Response to Motion to Strike Matter and Exclude Matter from Record on Appeal and Proof of Service in the above referenced matter. I am also enclosing an original and one copy of Appellant's Initial Reply Brief.

Please file the originals with the Court and return a filed-stamped copy of each to me in the envelope provided for your convenience.

By copy of this letter to all counsel of record, I am serving them with the enclosed Response to Motion and Reply Brief of Appellant.

Thank you for your time and attention to this matter.

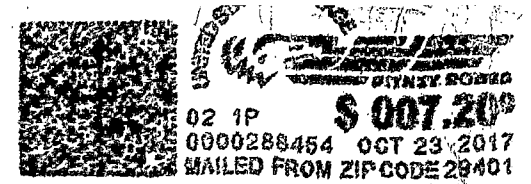
Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

John J. Dodds, IV

JJD,IV/sjs
enclosures

cc: Lee Ellen Bagley, Esquire (w/ *encl*)
Matthew C. LaFave, Esquire (w/ *encl*)



FIRST CLASS MAIL



Wall Templeton
ATTORNEYS

145 King Street, Suite 300 (29401)
Post Office Box 1200
Charleston, South Carolina 29402

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

RECEIVED
OCT 25 2017
SC Court of Appeals



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-00068

RECEIVED
OCT 11 2017
SC 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.

**RESPONDENT WILDEVCO, LLC'S MOTION TO STRIKE MATTER AND EXCLUDE
MATTER FROM RECORD ON APPEAL**

Respondent, Wildevco, LLC hereby moves this Honorable Court for an Order striking Section III. of Appellant's Initial Brief as well excluding the Settlement Agreement between Plaintiffs, Fred's, Inc. and Wildevco, LLC from the record on appeal.

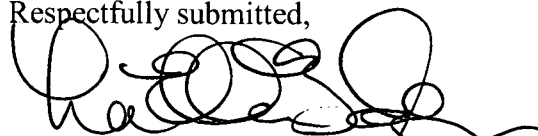
Specifically, Appellant's argument set forth in Section III. of its Initial Brief, titled "Respondents are Bound by Their Own Pleadings and are Estopped from Recovering Damages not Requested within the Complaint," was not preserved for appeal as Appellant failed to raise the issue prior to or during the trial of this matter and raised it for the first time in its post-trial Motion to Make Additional Findings and Motion to Reconsider and/or Amend pursuant to Rules 52(b) and 59(e), SCRCP; therefore, the issue was not preserved and is not properly before the

Court for consideration. *See* June 6 Trans., pp. 15: 3 – 18: 24; June 7 Trans., pp. 77: 8 – 86: 24, 121: 12 – 122: 10; Tippins-Polk Motion to Make Additional Findings and Motion to Reconsider and/or Amend, pp. 25-26. *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) (“It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.”); *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct.App.2003) (“A party cannot raise an issue for the first time in a Rule 59(e), SCRCP[,] motion which could have been raised at trial.”).

Additionally, in its Designation of Matter to be Included in the Record on Appeal, Appellant designates the Settlement Agreement between Plaintiffs, Respondent Fred’s, Inc. and Respondent Wildevco, LLC. However, the Settlement Agreement was never offered nor introduced into evidence, although the parties and witnesses did reference it during testimony and argument during the trial of this matter. *See, e.g.*, June 7 Trans., pp. 66: 22 – 67: 2, 68:11 – 72: 5, 84: 2 – 12, 85: 9 -18. Therefore, the Settlement Agreement is not a proper matter for inclusion in the record on appeal.

Based upon the foregoing, Respondent Wildevco, LLC respectfully requests that this Honorable Court issue an Order striking Section III. of Appellant’s Initial Brief and excluding the Settlement Agreement from the record on appeal.

Respectfully submitted,



Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77072
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, SC 29204
(803) 790-8838

October 11, 2017

Attorneys for Respondent Wildevco, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 11 2017
SC Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-00068

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.

PROOF OF SERVICE

I do hereby certify, on this 11th day of October, 2017, that a copy of the foregoing **Respondent Wildevco, LLC's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Motion to Strike Matter and Exclude Matter from Record on Appeal, and Proof of Service** were served by depositing copies of the same in the United States Mail, first-class, postage prepaid, addressed to Morgan S. Templeton, Esquire, PO Box 1200, Charleston, South Carolina 29402 and Matthew C. LaFave, Esquire PO Box 1149, Columbia, South Carolina 29202.



Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77672
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)
803.790.8841 (facsimile)

Attorneys for Respondent Wildevco, LLC



**GAFFNEY LEWIS
& EDWARDS**

3700 Forest Drive, Suite 400, Columbia, SC 29204 | T: 803.790.8838 | F: 803.790.8841
www.glelawfirm.com

October 11, 2017

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

RECEIVED
OCT 11 2017
SC Court of Appeals

Re: *Martha M. Fountain and Curtis Fountain v. Fred's Inc., and Wildevco, LLC v. Tippins-Polk Construction, Inc, and Rhoad's Excavating Services, LLC*
Case No : 2017-00068

Dear Clerk Kitchings:

Enclosed for filing please find the original and two (2) copies of **Respondent Wildevco, LLC's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Motion to Strike Matter and Exclude Matter from Record on Appeal, and Proof of Service**. We would appreciate you filing the original with the Court and returning the clocked copy for our records to the courier.

By copy of this letter, I herewith serve all counsel of record with same. Should you have any questions or need additional information please do not hesitate to contact our office.

Sincerely,

Kelli F. Hall
Paralegal

/kfs

Enclosures

cc: Morgan S. Templeton, Esq.
Matthew C. LaFave, Esq.

STATE OF SOUTH CAROLINA)
) COMMON PLEAS COURT OF THE
)
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

REBECCA TURISK) NO. 2018-CP-10-02109
VS.)
) TRANSCRIPT OF RECORD
DENNIS K. SCHIMPF, M.D.) Jury Trial - Volume II of IV
) (Pages 95 - 256)

B E F O R E:

The Honorable Maite Murphy, Judge; and a jury
Charleston, South Carolina

DATE: Tuesday, November 15, 2022
9:19 a.m.

A P P E A R A N C E S:

Elizabeth Middleton Burke, Esquire

Misty Black O'Neal, Esquire

Rogers, Patrick, Westbrook & Brickman, LLC
Post Office Box 1007
Mount Pleasant, South Carolina 29465
bburke@rpwb.com
moneal@rpwb.com

Mark C. Tanenbaum, Esquire

Mark C. Tanenbaum, PA
Post Office Box 2455
Mount Pleasant, South Carolina 29465
mark@tanenbaumlaw.com
Attorneys for the Plaintiff

Todd W. Smyth, Esquire

Allie Aleece Maples, Esquire

Smyth Whitley, LLC
126 Seven Farms Drive
First Citizens Plaza, Suite 150
Charleston, SC 29492
tsmyth@smythwhitley.com
amaples@smythwhitley.com
Attorneys for the Defendant

Reported by: Cathy J. Provost, RMR, Official Court Reporter

EXHIBIT C

1 their next witness via her discovery deposition. And in
2 preparing for trial, the parties negotiated denudations for
3 Ms. Harper's deposition. However, they disagreed on the
4 inclusion of seven lines, and so we'd like to take that up at
5 this time.

6 THE COURT: All right. Yes, ma'am.

7 ATTORNEY MAPLES: So particularly, the defendants have
8 objected to the inclusion of page 20, lines 13 through 20, as an
9 improper opinion.

10 THE COURT: Do you have a copy for me?

11 ATTORNEY MAPLES: Oh, yes.

12 THE COURT: Oh, is it in the notebook? I'm sorry.

13 ATTORNEY MAPLES: No, I have one handy.

14 THE COURT: Okay. Thank you. What page?

15 ATTORNEY MAPLES: Page 20.

16 THE COURT: Okay.

17 ATTORNEY MAPLES: Lines 13 through 20.

18 THE COURT: So tell me the nature of your objection and what
19 we're looking at here.

20 ATTORNEY MAPLES: Yes. Your Honor, the question calls for
21 an improper question. And we would like to strike not only the
22 question but also Jordan Harper's answer, as it's speculative.
23 So the question is: And what caused that? Do you know? Answer:
24 I am definitely not a plastic surgeon, but so I feel like -- and
25 not physician, you know, but I'm thinking would be just blood



SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

RECEIVED

Sep 18 2023

SC Court of Appeals

August 16, 2023

VIA E-MAIL ONLY

Jesse Sanchez, Esquire
jesse@jessesanchezlaw.com

Re: *Rebecca Turisk, Appellant v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, Respondents*

Dear Jesse:

We have reviewed Appellant's August 4, 2023 filing of the Record on Appeal and write to object to Appellant's inclusion of lines 20:13-20 of Jordan Harper's deposition transcript as those lines were struck by the Honorable Maite Murphy upon Respondents' objection prior to Appellant's presentation of Ms. Harper's deposition transcript and were therefore not presented to the lower court. *See* Trial Transcript, pp. 185:24-189:10. As you know, Rule 210(c), SCRAP, precludes the inclusion of "matter which was not presented to the lower court or tribunal" in a Record on Appeal. Accordingly, we are writing to respectfully request that Appellant file an Amended Record on Appeal with a redacted copy of Ms. Harper's deposition transcript that reflects only the portions of Ms. Harper's deposition testimony that was presented to the jury. Due to the upcoming Final Brief deadline, we appreciate your prompt attention to this matter.

Please do not hesitate to contact me with any questions or concerns.

Thank you,

Allie A. Maples, Esquire

cc: All Counsel of Record (VIA E-MAIL ONLY)