

**RECEIVED**

**Nov 13 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge  
Case No. 2018-CP-26-00307

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Appellate Case No. 2023-001132

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Wedgewood Condominium Association, ..... Respondent

vs.

Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as  
successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC;  
Crescent Engineering, Inc., Defendants.

OF WHICH:

Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as  
successor by merger to Centex Construction Company, Inc. and Centex Construction, LLC,  
are..... Appellants

and

Centex Homes, a Nevada General Partnership, Third Party Plaintiff

v.

Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.;  
Frank Harris d/b/a Frank Harris Construction a/k/a F. Harris Construction a/k/a Harris Drywall;  
Builders First Source–South East Group, LLC; Stock Building Supply, LLC f/k/a Stock Building  
Supply, Inc. f/k/a Carolina Builders Corporation; Michael D. Brownlee d/b/a Carolina Drywall  
& Interiors; Carolina Drywall & Interior, Inc. a/k/a Carolina Drywall & Interiors, Inc. a/k/a  
Carolina Drywall Contractors, Inc.; Roof Doctor of the Carolinas, Inc.; John D. Frazier d/b/a  
and/or a/k/a Roof Doctor and/or Roof Doctor of the Carolinas and/or Roof Doctor of the Carolinas,  
Inc.; Steven Bosch d/b/a The Roofer Man; Tri-City Insulation and Building Products of Myrtle  
Beach, Inc.; Martin Mata d/b/a Martin Masonry; Martin Masonry, Inc.; BR Brick & Masonry,  
Inc.; BR Brick & Masonry, LP f/k/a BR Brick & Masonry, Inc.; Unicon Concrete, LLC; Seno’s  
Cleaning Services; Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc., Floors, Inc.  
Successor by Merger to Rice Planter Carpets, Inc.; Carpets By Kendall, Inc.; Reliable Floor

Systems, Inc.; TNT Painting; Paint with Pride a/k/a Painting with Pride; William Evans d/b/a Top Notch Painters; Morningstar Consultants Inc.; MI Windows and Doors, LLC; Michael Dawson d/b/a Michael Dawson Construction, and Inc.; Vereen Concrete Co. Inc.; AK Construction Inc. a/k/a AK Framing and Siding Co.; and AK United, Inc. f/k/a AK Construction Inc., Third Party Defendants.

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**RESPONDENT'S MOTION TO STRIKE  
AND TO STAY BRIEFING**

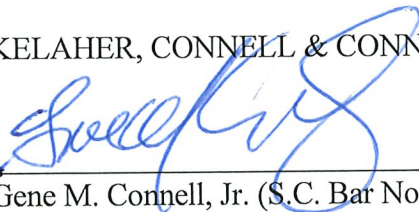
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The Respondent Wedgewood Condominium Association moves this Court for an Order striking Appellant Centex's Designations of Matter No. 17 and No. 18 from their proposed Record on Appeal. The basis of this Motion is Rule 209(b), SCACR ("A party shall not include any matter in his designation which is not relevant to the appeal."). Respondent also has provided a memorandum in support of its motion.

Further, Respondent Wedgewood requests a stay of the Court's briefing schedule until the Court rules on Respondent's Motion to Strike. The basis of this request is that Wedgewood, as Respondent, will need the Court's ruling on this motion to properly prepare its brief and designation of matter accordingly.

Respectfully submitted.

KELAHER, CONNELL & CONNOR, P.C.



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November 13, 2023

**Attorneys for Respondent Wedgewood  
Condominium Association**

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and/or a/k/a Roof Doctor and/or Roof Doctor of the Carolinas and/or Roof Doctor of the Carolinas,  
Inc.; Steven Bosch d/b/a The Roofer Man; Tri-City Insulation and Building Products of Myrtle  
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Systems, Inc.; TNT Painting; Paint with Pride a/k/a Painting with Pride; William Evans d/b/a Top Notch Painters; Morningstar Consultants Inc.; MI Windows and Doors, LLC; Michael Dawson d/b/a Michael Dawson Construction, and Inc.; Vereen Concrete Co. Inc.; AK Construction Inc. a/k/a AK Framing and Siding Co.; and AK United, Inc. f/k/a AK Construction Inc., Third Party Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S  
MOTION TO STRIKE AND TO STAY BRIEFING**

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I. BACKGROUND FACTS.

This is a construction defect case in which Centex has appealed a jury verdict to this Court. Centex filed and served its Initial Brief and Designation of Matter to be Included in the Record on Appeal on October 18, 2023. Centex's Brief and Designation of Matter reference a Motion for Summary Judgment which was partially granted and partially denied by the trial judge on November 18, 2022. The Motion for Summary Judgment was over 2,000 pages with 75 exhibits and sub-exhibits attached to it. (No. 17). The Order Granting Partial Summary Judgment issued by the trial judge against Wedgewood on November 18, 2022 was not appealed. (No. 18). Thereafter a lengthy jury trial was held on May 22, 2023 through May 26, 2023.

Wedgewood asserts that Centex's designations No. 17 (Motion for Summary Judgment and attachments) and No. 18 (the Order of the trial court partially granting summary judgment entered November 18, 2022) are unnecessary and not relevant to this appeal. Rule 209(b), SCACR which states in pertinent part: "A party shall not include any matter in his designation which is not relevant to the appeal." If the Court were to allow the designated Motion for Summary Judgment and Order (No. 17 and No. 18) as part of the Record on Appeal, it would require Wedgewood to provide its response in opposition to the Motion for Summary Judgment. This would essentially add thousands of pages of additional documents to the record which are not relevant to the jury verdict which Centex

has appealed. It is a waste of scarce judicial resources to require this Court and its staff to review thousands of unnecessary pages in Centex's Designation of Matter which have no application to this appeal.

II. APPLICABLE LAW.

It is well settled in South Carolina that the denial or partial denial of summary judgment will not be addressed on appeal even after final judgment. Centex is attempting to have this court consider its Motion for Summary Judgment and exhibits (over 2,000 pages) by placing those documents in the Record on Appeal. The Supreme Court has addressed this very issue on multiple occasions. In *Raino v. Goodyear Tire*, 309 S.C. 255, 422 S.E.2d 98 (1992) the appellants argued the trial court should have dismissed Goodyear on the ground that it did not manufacture or sell the tire in question. The trial court found this was a triable issue of whether Goodyear should be liable. On appeal, the Court reiterated that the denial of a motion for summary judgment is never reviewable even after the trial of a case on its merits.

The *Raino* Court cited *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986) in which the Supreme Court of South Carolina held that the denial of a motion for summary judgment is not reviewable on appeal from the trial of a case on its merits. The *Holloman* Court cited multiple decisions around the country which follow this rule and addressed the following reasons for the rule:

(1) Hearing the case on its merits moots the issue of whether the motion was properly denied;

(2) The denial of a motion for summary judgment followed by a full hearing or trial on the merits may be likened to a denial of a motion for directed verdict at the conclusion of plaintiff's proof. In either case, the deficiencies existing at the time of the motion may well have been supplied by the evidence at a full trial of the issues. *Bigney v. Blanchard*, 430 A 2d 839 (Me. 1979);

(3) Appellate review of the orders denying motion for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nonetheless find himself losing

on appeal because he failed to prove his case fully at the time of the motion. *All-States Leasing Co. v. Pacific Empire Land Corp.*, 31 Or. App. 733, 571 P.2d 192 (1977). (*Holloman* 345 S.E.2d at 729).

The rule that the appellate courts of this state do not review denials of summary judgment even after final judgment has been consistently reaffirmed in South Carolina. See *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). See also *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (S.C. App. 2014).

The above cases provide conclusive legal authority that Centex's designation No. 17 (the Motion for Summary Judgment and its attachments) are not relevant to this appeal and will only add confusion and require Wedgewood to designate additional matters which will clutter and unnecessarily expend an already large record.

Further Wedgewood's counsel contacted Centex's primary counsel regarding designations No. 17 and No. 18 and was informed that Centex did not intend to introduce all of the exhibits which were attached to its Motion for Summary Judgment but only the Motion and Memorandum and the Order of the circuit court granting partial summary judgment.<sup>1</sup> However, based on established South Carolina case law the Motion for Summary Judgment and the Memorandum should not be included in the record, nor should the Order granting partial summary judgment since it was not appealed by Wedgewood.

### III. THIS COURT SHOULD STAY THE TIME FOR RESPONDING TO THE APPEAL

Wedgewood asserts this Court should stay the filing of Respondent's Initial Brief until such time as this Court can issue a ruling on the Motion to Strike. Wedgewood cannot prepare its Brief or Designation of Matter until this Court has made a definitive ruling on whether Centex's designations

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<sup>1</sup> The Memorandum references over 75 exhibits, while the trial transcript reveals Centex offered only 25 exhibits into evidence.

No. 17 (Motion for Summary Judgment) and No. 18 (Order granting partial summary judgment) should be included in the record.

#### IV. CONCLUSION

In sum, our courts have consistently held that the only matters which shall appear in the record are those items relevant to the appeal. *Forner v. Butler* 319 S.C. 275, 460 S.E.2d 425 (S.C. App. 1995). In this case the Motion for Summary Judgment (No. 17) and the Order partially granting summary judgment (No. 18) are neither relevant nor applicable. This matter was tried to a jury for five days and almost all of the exhibits which were in the Motion for Summary Judgment were never presented to the trial court. Thus, Wedgewood asserts based on the case law that Centex's designation No. 17 and designation No. 18 should be stricken and that the time to file the Initial Brief of Respondent Wedgewood should be delayed until the Court issues its ruling.

Respectfully submitted.

(Signature on following page)

KELAHER, CONNELL & CONNOR, P.C.



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November 13, 2023

**Attorneys for Respondent Wedgewood  
Condominium Association**

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**PROOF OF SERVICE**

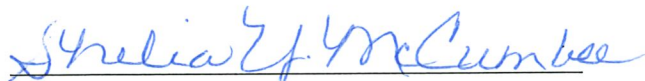
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PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of **Respondent's Motion to Strike and to Stay Briefing and Memorandum of Law in Support** on the 13<sup>th</sup> day of November, 2023, by depositing a copy of same in the United States Mail, postage prepaid, to:


Thomas C. Hildebrand, Jr., Esquire  
William G. DesChamps, IV, Esquire  
Paul N. Nybo, Esquire  
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Katon E. Dawson, Jr. Esquire  
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Jeffrey A. Turner, Esquire  
Stephanie A. Douglas, Esquire  
Bush Seyferth PLLC  
100 W Big Beaver Road, Suite 400  
Troy, MI 48084

  
\_\_\_\_\_  
Shelia Y. McCumbee

**SWORN AND SUBSCRIBED** before me,  
this 13<sup>th</sup> day of November, 2023.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 3-12-24

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

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SURFSIDE BEACH, SOUTH CAROLINA 29587

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SC Court of Appeals

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November 13, 2023

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

Re: Appellate Case No. 2023-001132  
*Wedgewood Condominium Association v. Centex Homes, et al.*  
C/A No. 2018-CP-26-00307  
Our File No. 2018-0272C

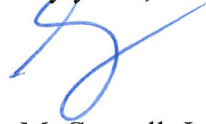
Dear Ms. Kitchings:

Enclosed please find Respondent's Motion to Strike and to Stay Briefing, Memorandum of Law in Support and Proof of Service in the above-captioned matter. Our check for the \$50.00 filing fee is being mailed this date.

By copy of this letter, we hereby serve Respondent's Motion on counsel of record.

Should you have any question or need anything further at this time, please do not hesitate to contact me.

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm  
Enclosures

cc w/enc.: Thomas C. Hildebrand, Jr., Esquire  
William G. DesChamps, IV, Esquire  
Paul N. Nybo, Esquire  
Katon E. Dawson, Jr., Esquire  
Jeffrey A. Turner, Esquire (Pro Hac Vice)  
Stephanie A. Douglas, Esquire (Pro Hac Vice)  
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