

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons
Circuit Court Judge

Civil Action No. 2022-CP-20-00104

Appellate Case No. 2023-001451

Bertha Goins, Respondent,

v.

Jenkinsville Water Company Inc., Appellant.

**RESPONDENT’S REPLY TO APPELLANT’S RETURN
TO MOTION TO STRIKE**

Respondent, by and through the undersigned counsel, respectfully submits this Reply to Appellant’s Return to the Motion to Strike. The Court should strike numbers 10, 11, 12, 13, 14, and 15 from Appellant’s Designation of Matter because these items were not presented to the circuit court. *See* Rule 210, SCACR (stating the Record on Appeal shall not include any matter which was not presented to the lower court and “the appellate court will not consider any fact which does not appear in the Record on Appeal”).

Appellant asserts that the original deposition transcripts of Greg Ginyard, Bertha Goins, and Clemart Camack “were filed with the court and were part of the court’s file when the motion for summary judgment was heard and decided upon.” (App. Ret. at 1.) In support of this assertion,

Appellant attached the filed copy of its Memorandum in Support of Summary Judgment. However, Appellant did not file any exhibits with its Memorandum. Appellant has not submitted any material to the Court to show that these transcripts were filed with the circuit court. A review of the public index in this case shows these materials were not filed with the circuit court. Appellant did not submit any exhibits to the circuit court in connection with the motions for summary judgment. In fact, the circuit court's April 28, 2023 Order expressly makes note that the record before the court "shows the 180 pages of exhibits in support of [Respondent's] position." Order 4 n. 2. The exhibits submitted by the Respondent as part of her Motion for Summary Judgment total 184 pages. *See* Goins Mem. Supp. Mot. Summ. J. Ex. A–V. It is clear that the evidentiary record before the circuit court only included the exhibits submitted as part of Respondent's Motion for Summary Judgment. Accordingly, the Court should strike number 10 from Appellant's Designation of Matter as it includes new evidence not presented to the circuit court.

Appellant argues items 11, 12, and 13 should be included in the record on appeal because Appellant mentioned these documents by bates number in its Memorandum in Opposition to Summary Judgment. However, documents must be presented to the circuit court in order to be included in the record on appeal. *See* Rule 210, SCACR ("The Record shall not, however, include [any] matter which was not *presented* to the lower court." (emphasis added)). Appellant does not indicate that it filed these documents with the circuit court. References to a document by counsel in a motion or at a hearing are not evidence in a case. *See South Carolina Dep't of Transportation v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (stating that "[a]rguments made by counsel are not evidence"). If Appellant wished the circuit court or this Court to consider the documents designated in its designation of matter, it was required to file them with the circuit

court. Therefore, items 11, 12, and 13 are improper for inclusion in the record on appeal as they were not presented to the circuit court.

Appellant argues that any material exchanged by the parties in discovery is proper for inclusion in the record on appeal. (App. Ret. 2.) This is incorrect. Items that the parties exchange in discovery are not proper for inclusion in the record on appeal when these items were never submitted to the circuit court. The circuit court does not have a copy of the materials exchanged in discovery. The only evidence presented to the circuit court were the exhibits submitted by Respondent, which Respondent has designated for the record on appeal. No other items exchanged in discovery were presented to the circuit court and, therefore, cannot be included in the Record on Appeal.

Further, it is immaterial that the circuit court “dismissed [the case] prior to a trial” or that “there are no trial exhibits.” Appellant had the opportunity to submit exhibits to the circuit court in support of its summary judgment motion. Appellant chose not to submit any exhibits.

Appellant does not make any argument in its Return that items 14 and 15 are proper. Therefore, the Court should strike these items.

Accordingly, Respondent respectfully requests this Court grant its Motion to Strike in its entirety.

(signature page follows)

RESPECTFULLY SUBMITTED,

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April 11, 2024

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PROOF OF SERVICE

I, the undersigned paralegal of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on April 11, 2024, I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court's Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Respondent's Reply to Appellant's Return to Motion to Strike

Counsel Served: Via E-Mail Only
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SMITH | ROBINSON
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Sherry Roth

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April 11, 2024