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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In Equity

Appellate Case No. 2024-000788
Case No.: 2019-CP-10-01108

Balfour Beatty Construction, LLC, Appellant,

v.

Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation, Defendant

And

Library Associates, LLC, Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf Stream Construction Company, Inc., Precision Walls, Inc., Palmetto Automatic Sprinkler Company, Inc., Cook & Boardman, LLC, Strong Tower Construction, LLC d/b/a Koch Corporation, Watson Electrical Construction Co., LLC, Trimark Foodcraft, LLC, Pleasant Places, Inc., David Allen Company, Inc., Premier Exteriors, LLC, Warco Construction, Inc., Old North State Masonry, LLC, Tom Rochester & Associates d/b/a Southeastern Architectural Systems, Forton Company, LLC, Low Country Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc., Third-Party Defendants.

Of which Library Associates, LLC is the Respondent.

APPELLANT'S NOTICE OF RESPONDENT'S NON-COMPLIANCE AND MOTION TO STRIKE OR LIMIT RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL AND TO HOLD IN ABEYANCE THE DEADLINE FOR SERVICE OF THE RECORD ON APPEAL

Pursuant to Rule 240, SCACR, the Appellant, Balfour Beatty Construction, LLC ("Balfour"), submits this Notice of Respondent's Non-Compliance with Rule 209, SCACR, and

moves the Court to enter an Order striking Respondent's Designation of Matter to be included in the Record on Appeal and/or limiting Respondent's Designation of Matter to the 334 pages of the trial transcript and 18 trial exhibits specifically referenced in Respondent's Initial Brief.

Rule 209(b), SCACR, states, "A party shall not include any matter in his Designation which is not relevant to the appeal." The Designation of Matter filed by Respondent on May 21, 2025, does not comply with Rule 209(b). Specifically, Respondent's Designation of Matter designates the following to be included in the Record on Appeal:

1. The entirety of the Trial Transcript, including all offered deposition testimony;
2. The entirety of the post-trial Transcripts and Orders;
3. The March 17, 2020, Order of the Trial Judge;
4. The June 17, 2020, Order of the Trial Judge; and
5. All Respondent's Exhibits admitted into evidence.

To comply with Respondent's voluminous and overly broad Designation would require the inclusion of 5,054 pages of the trial transcript, 820 pages of deposition transcripts, 18 videos of deposition testimony, and 155 trial exhibits. However, Respondent's Initial Brief only cites to 334 pages of the trial transcript, 18 trial exhibits, and one (1) video of a deposition. Specifically, Respondent cites—without reference to any individual line, page, or video time-stamp as required by Rule 208(b)(4), SCACR—to the video of the deposition of Mike Baumbach for the simple proposition that "[t]hough the parties utilized the AIA form [contract], significant changes were made to the contract terms through extensive negotiations." (Respondent's Brief p. 4). Respondent makes no other specific reference in its Initial Brief to any of the 820 pages of deposition transcripts or the 16 other videos of deposition testimony included in its Designation. Moreover,

Respondent designates that all 322 pages of post-trial transcripts also be included in the Record on Appeal, despite making no reference to the content of the post-trial transcripts in its Initial Brief.

In reviewing similar issues related to improper designations of matter to be included in the record on appeal, the South Carolina Supreme Court has issued a strong rebuke regarding the over-designation of irrelevant matter in the proposed record. In *State v. Harris*, 278 S.C. 46, 46–47, 292 S.E.2d 40, 40 (1982), the Court, interpreting Supreme Court Rule 4 in the earlier version of the South Carolina appellate court rules, stated:

> Rule 4 repeatedly insists the record comprise only relevant material. We see in this appeal no hint of effort to cull irrelevant matter from the record. We denounce not only this casual violation of Rule 4, but also the shocking waste such disobedience begets. At the expense of the State, the mass of irrelevant material in this record has been photocopied, bound, transported, served and stored. We cannot countenance such cavalier disregard of this State's fiscal resources and of conscientious appellate practice.
>
> Both attorneys signed the certificate of relevance demanded by Rule 4. The certificate of relevance is the attorneys' personal assurance to the Supreme Court that the record complies with Rule 4. We admonish the attorneys to make certain any future record complies with Rule 4 before they certify the relevance of all it holds.
>
> The Court expects this opinion will awaken appellate lawyers to their office and duty of presenting only relevant matter in the transcript of record. If that purpose fails, however, the Court reserves the right to impose sanctions, including an order that the offending lawyer pay the cost of reproducing the irrelevant material.

Similarly, in *Merritt v. Grant*, 285 S.C. 150, 158–59, 328 S.E.2d 346, 351 (Ct. App. 1985), the Court of Appeals stated:

> Counsel for both parties in this case certified that all irrelevant matter had been deleted and the requirements of Rule 4 of the Supreme Court Rules had been satisfied. Yet, the 219-page transcript of record contains much material that seems irrelevant to any issue on appeal. For example, none of Grant's exceptions concerns damages. Nonetheless, testimony apparently relating

> solely to damages is included. A chiropractor's testimony alone takes up approximately 42 pages.

Just like the parties in *Harris* and *Grant*, the Respondent has grossly over-designated the matter to be included in the Record on Appeal in comparison to the actual facts placed in issue and the arguments presented in the briefs. It is apparent that Respondent has made no "effort to cull irrelevant matter from the record" as required by the appellate court rules or otherwise comply with Rule 209(b). Respondent's conduct is frankly worse than that of the parties in *Grant*, where the Court admonished the parties for designating a 219-page transcript that contained at least 42 pages of testimony that was not relevant to the issues on appeal. Here, Respondent cites to only 334 pages of the trial transcript, yet designates more than 5,000 pages of the trial transcript for inclusion in the Record on Appeal.

Furthermore, while Respondent's Initial Brief only cites to 18 trial exhibits, its Designation demands the inclusion of all 155 exhibits Respondent introduced into evidence at trial. Balfour should not be required to compile a Record on Appeal that includes thousands of pages of trial testimony, over 130 trial exhibits that are not even mentioned in the Respondent's Initial Brief, and all post-trial transcripts and orders that likewise receive no mention in Respondent's Initial Brief. Nor should this Court be expected to read a single page of testimony that the parties did not deem sufficiently relevant or appropriate to reference in their briefs.

Balfour respectfully requests the Court issue an Order striking Respondent's Designation of Matter in its entirety or, alternatively, limiting Respondent's Designation of Matter to the, 334 pages of the trial transcript, the March 17, and June 17, 2020 Orders of the trial court, the excerpts

of the video deposition of Mike Baumbach, and 18 trial exhibits specifically referenced in Respondent's Initial Brief.[1]

Furthermore, because Respondent's failure to follow the simple instructions of Rule 209(b) impairs Balfour's ability to compile the Record on Appeal, Balfour also requests that its deadlines to serve the Record on Appeal be held in abeyance pending the Court's decision on this Motion.

PARKER POE ADAMS & BERNSTEIN LLP

s/James Lynn Werner

James Lynn Werner (SC Bar No. 6029)
Katon Edwards Dawson Jr. (SC Bar No. 101167)
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Thomas C. Hildebrand, Jr. (S.C. Bar No. 2501)
Robert C. Byrd (S.C. Bar No. 1069)
P. Nicholas Nybo (S.C. Bar No. 105825)
850 Morrison Drive, Suite 400
Charleston, SC 29403
(843) 727- 2650 (Office)
tomhildebrand@parkerpoe.com
bobbybyrd@parkerpoe.com

Attorneys for Appellant Balfour Beatty Construction, LLC

June 5, 2025
Columbia, South Carolina

[1] Balfour previously designated the relevant post-trial orders and transcripts for inclusion in the Record on Appeal.

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Of which Library Associates, LLC is the Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on June 5, 2025, a copy of **Appellant's Notice of Respondent's Non-Compliance and Motion to Strike or Limit Respondent's Designation of Matter to be Included in Record on Appeal and to Hold in Abeyance the Deadline for Service**

of the Record on Appeal was served on all counsel of record via email containing the above referenced documents to counsels' individual AIS email addresses:

Walter H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Bundy McDonald, LLC
1516 Old Trolley Rd 2nd Floor
Summerville, SC 29485-8209
walter@bundymcdonald.com
brent@bundymcdonald.com

and

John P. Linton, Sr.
Mary Kathleen Linton
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
jlinton@duffyandyoung.com
mlinton@duffyandyoung.com

Attorneys for Library Associates, LLC

PARKER POE ADAMS & BERNSTEIN LLP

By:/s/Katon E. Dawson, Jr.
James Lynn Werner (SC Bar No. 6029)
Katon E. Dawson, Jr. (SC Bar No. 101167)
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Thomas C. Hildebrand, Jr. (S.C. Bar No. 2501)
Robert C. Byrd (S.C. Bar No. 1069)
P. Nicholas Nybo (S.C. Bar No. 105825)
850 Morrison Drive, Suite 400
Charleston, SC 29403
(843) 727- 2650 (Office)
tomhildebrand@parkerpoe.com
bobbybyrd@parkerpoe.com
nicknybo@parkerpoe.com

June 5, 2025
Columbia, South Carolina

Attorneys for Appellant Balfour Beatty Construction, LLC

Parker Poe

Katon E. Dawson, Jr.
t: 803.253.6854
f: 803.255.8017
katondawson@parkerpoe.com

Atlanta, GA
Charleston, SC
Charlotte, NC
Columbia, SC
Greenville, SC
Raleigh, NC
Spartanburg, SC
Washington, DC

June 5, 2025

VIA E-MAIL & HAND DELIVERY:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: ***Balfour Beatty Construction, LLC v. Library Associates, LLC, et al.***
Appellate Case No.: 2024-000788; Trial Court Case No.: 2019-CP-10-01108

Dear Mrs. Kitchings:

Enclosed please find Check No. 522245 in the amount of $50.00 in satisfaction of the filing fee for Appellant's Notice of Respondent's Non-Compliance and Motion to Strike or Limit Respondent's Designation of Matter to be Included in Record on Appeal and to Hold in Abeyance the Deadline for Service of the Record on Appeal.

Should you have any questions or need anything further, please do not hesitate to contact me.

Sincerely,

s/Katon E. Dawson, Jr.

Katon E. Dawson, Jr.

KED/tlc
Enclosures
cc: Respondent's Counsel of Record (via email only)