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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court Of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No: 2011-CP-18-1892
Appellate Case No. 2013-001225

Cynthia D. Bales, individually and as Personal Representative
Of the Estate of Frank R. Bales, on behalf of the Estate and
Statutory BeneficiariesAppellant,

v.

Buy Right Autos, Inc. and Northbrook Indemnity Co., Defendants,

Of Whom Northbrook Indemnity Co. is the Respondent.

RESPONDENT'S MOTION TO STRIKE

Pursuant to Rules 240, 209, and 210 of the South Carolina Appellate Court Rules, Respondent Northbrook Indemnity Co. ("Northbrook") moves this Court for an order striking Item Number 4, "Memorandum in Opposition to Summary Judgment (January 20, 2013)," from the Designation of Matter filed by Appellant Cynthia D. Bales, individually and as Personal Representative Of the Estate of Frank R. Bales, on behalf of the Estate and Statutory Beneficiaries (collectively, the "Estate"). Northbrook has moved to strike this designation because no "Memorandum in Opposition to Summary Judgment (January 20, 2013)" was either served on Northbrook or filed in the circuit court.

Northbrook further requests that this Court strike from the Estate's brief any references to the above-referenced material and prohibit the Estate from relying on this material in its arguments on appeal.

In support of this Motion and in accordance with Rule 240(c), SCACR, Northbrook has attached hereto a memorandum of authority and Exhibit A.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

By:  *With permission
for JOHN T. Lay*

John T. Lay, Jr.

Laura W. Jordan

Janice Holmes

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ATTORNEYS FOR RESPONDENT

NORTHBROOK INDEMNITY COMPANY

Columbia, South Carolina
March 10, 2014.

**THE STATE OF SOUTH CAROLINA
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v.

Buy Right Autos, Inc. and Northbrook Indemnity Co., Defendants,

Of Whom Northbrook Indemnity Co. is the Respondent.

**RESPONDENT'S MEMORANDUM IN SUPPORT
OF ITS MOTION TO STRIKE**

Pursuant to Rules 240, 209, and 210 of the South Carolina Appellate Court Rules, Northbrook has moved for an order striking the “Memorandum in Opposition to Summary Judgment (January 20, 2013)” listed as Item No. 4 on the Estate’s Designation of Matter. No “Memorandum in Opposition to Summary Judgment” was ever served on Northbrook or filed in the circuit court prior to the court’s decision to grant summary judgment in favor of Northbrook. The circuit court’s docket sheet does not reflect the filing of any document by that name. (See Exhibit A, Dorchester County First Judicial

Circuit Public Index for Case No. 2011-CP-18-1892). Indeed, the Estate’s listing of “Memorandum in Opposition to Summary Judgment (January 20, 2013)” in its Designation of Matter is Northbrook’s *first notice that such a document even exists*.¹

The South Carolina Appellate Court Rules make clear that the Estate must certify that its Designation of Matter contains no “matter which is irrelevant to the appeal,” Rule 209(b),(c), SCACR, and “only propose[s] to include portions of . . . materials which may be properly included in the Record on Appeal.” Rule 209(b), SCACR. It is axiomatic that the Estate cannot designate “matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR. Because this “Memorandum in Opposition to Summary Judgment” was never served on opposing counsel nor filed in the circuit court, it did not and could not have formed the basis for rulings of the circuit court, from which the Estate now appeals.

The plain language of Rule 210(c), SCACR, requires that the “Memorandum in Opposition to Summary Judgment (January 20, 2013)” be excluded from the Record and not considered by this Court. *See also State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 618-19 (Ct. App. 2007) (agreeing with the position taken by the State that the Appellate Court should not consider a co-defendant’s written statement because it was not raised to or ruled on by the trial court and, therefore, was not properly before the Appellate Court). “[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the

¹ Presumably, this Memorandum was not submitted to the circuit court without service on Northbrook. If it had been, Northbrook would have objected to the circuit court’s consideration of a memorandum that was not served in accordance with Rule 5, SCRCP. Without service, and in the absence of a docket entry showing that this document was filed, Northbrook could not have divined that this document even existed. As this Court has already recognized, the South Carolina Rules of Civil Procedure do not require nor set a deadline for submitting memoranda of law prepared in conjunction with summary judgment motions. *Jones v. Doe*, 372 S.C. 53, 60, 640 S.E.2d 514, 518 (Ct. App. 2006).

parties and this Court with an orderly mechanism through which to guide appeals in this State.” *Henning v. Kaye*, 307 S.C. 436, 437-38, 415 S.E.2d 794, 794-95 (1992). It is “incumbent” upon the Estate “to provide material that complies with the Rules and facilitates appellate review,” and neither “substantial compliance” nor “instances of non-compliance” is sufficient. *Henning*, 307 at 437-38; 415 S.E.2d at 794-95.

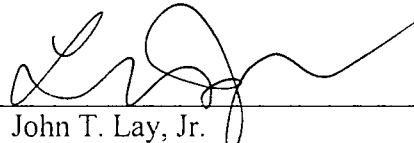
Conclusion

Northbrook respectfully requests that this Court strike Item No. 4 of the Estate’s Designation of Matter, which is the “Memorandum in Opposition to Summary Judgment (January 20, 2013),” and prohibit the Estate from citing to, or relying on, this Memorandum in its briefs and arguments to this Court on appeal.

Northbrook expressly reserves its right to seek costs at the conclusion of this appeal, pursuant to Rule 222(c), SCACR, to recoup the costs of addressing this irrelevant and non-compliant material.

Respectfully Submitted,

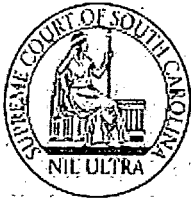
GALLIVAN, WHITE & BOYD, P.A.

By:  *With permission
for John T. Lay*

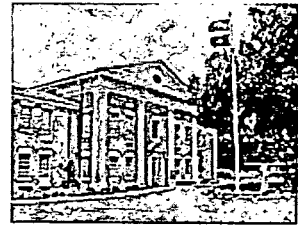
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**ATTORNEYS FOR RESPONDENT
NORTHBROOK INDEMNITY COMPANY**

Columbia, South Carolina
March 10, 2014

EXHIBIT A



Dorchester County First Judicial Circuit Public Index



Dorchester County Home Page [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

Cynthia Bales , plaintiff, et al VS Buy Right Autos, Inc , defendant, et al

Case Number:	2011CP1801892	Court Agency:	Common Pleas	Filed Date:	09/30/2011
Case Type:	Common Pleas	Case Sub Type:	Torts/Other 399	File Type:	Jury
Status:	Dismissed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Dismissed per Rule 40J	Disposition Date:	05/20/2013	Disposition Judge:	Dickson, Edgar W.
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Bales, Cynthia	Notice of Appeal (of 4/29/13 Order)	Filing		05/22/2013-14:36		
Bales, Cynthia	Consent Order/40J	Filing		05/20/2013-16:07	05/20/2013-16:07	
Fulmer, Henry Asby III	Roster/Notice of Motions Roster Publication Sent	Action		05/09/2013-10:12	05/20/2013-10:12	
Anastopoulo, Akim Angelo	Roster/Notice of Motions Roster Publication Sent	Action		05/09/2013-10:12	05/20/2013-10:12	
Poulin, Eric Marc	Roster/Notice of Motions Roster Publication Sent	Action		05/09/2013-10:12	05/20/2013-10:12	
Northbrook Idemnity Co	Order Granting SJ as to Northbrook	Order		04/29/2013-09:02	04/29/2013-09:02	
Poulin, Eric Marc	Roster/Notice of Motions Roster Publication Sent	Action		04/12/2013-09:27	05/20/2013-09:27	
Anastopoulo, Akim Angelo	Roster/Notice of Motions Roster Publication Sent	Action		04/12/2013-09:27	05/20/2013-09:27	
Fulmer, Henry Asby III	Roster/Notice of Motions Roster Publication Sent	Action		04/12/2013-09:27	05/20/2013-09:27	
Lay, John Thomas	Roster/Notice of Motions Roster Publication Sent	Action		04/12/2013-09:27	05/20/2013-09:27	
Bales, Cynthia	Amended Consent Scheduling Order	Filing		03/01/2013-15:08	03/01/2013-15:08	
Fulmer, Henry Asby III		Action		02/11/2013-14:35	05/20/2013-14:35	

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	Roster/Notice of Motions Roster Publication Sent				
Lay, John Thomas	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2013-14:35	05/20/2013-14:35
Poulin, Eric Marc	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2013-14:35	05/20/2013-14:35
Anastopoulos, Akim Angelo	Roster/Notice of Motions Roster Publication Sent	Action		02/11/2013-14:35	05/20/2013-14:35
Northbrook Idemnity Co	Memo/Memorandum in support of motion for summary judgment	Filing		01/28/2013-14:25	05/20/2013-14:25
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Poulin, Eric Marc	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Poulin, Eric Marc	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Poulin, Eric Marc	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
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Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		01/07/2013-09:49	05/20/2013-09:49
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Poulin, Eric Marc		Action			

	Roster/Notice of Case Roster Publication Sent			12/06/2012-12:51	05/20/2013-12:51
Poulin, Eric Marc	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		12/06/2012-12:51	05/20/2013-12:51
Bales, Cynthia	Motion/Motion For Protective Order	Motion		11/20/2012-15:26	01/10/2013-15:26
Bales, Cynthia	Consent Scheduling Order	Filing		10/25/2012-16:38	10/25/2012-16:38
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		10/19/2012-13:17	05/20/2013-13:17
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		10/19/2012-13:17	05/20/2013-13:17
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		10/19/2012-13:17	05/20/2013-13:17
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		10/19/2012-13:17	05/20/2013-13:17
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		10/19/2012-13:17	05/20/2013-13:17
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		10/19/2012-13:17	05/20/2013-13:17
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		10/03/2012-11:42	05/20/2013-11:42
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		10/03/2012-11:42	05/20/2013-11:42
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		10/03/2012-11:42	05/20/2013-11:42
Fulmer, Henry Asby III	Roster/Notice of Case Roster Publication Sent	Action		10/03/2012-11:40	05/20/2013-11:40
Anastopoulos, Akim Angelo	Roster/Notice of Case Roster Publication Sent	Action		10/03/2012-11:40	05/20/2013-11:40
Lay, John Thomas	Roster/Notice of Case Roster Publication Sent	Action		10/03/2012-11:40	05/20/2013-11:40
Northbrook Idemnity Co	Motion/Summary Judgment	Motion		09/26/2012-13:12	01/10/2013-13:12
Fulmer, Henry Asby III	Notice of Case Publication Sent	Action		09/19/2012-15:24	05/20/2013-15:24
Fulmer, Henry Asby III	Notice of Case Publication Sent	Action		09/19/2012-15:24	05/20/2013-15:24
Lay, John Thomas	Notice of Case Publication Sent	Action		09/19/2012-15:24	05/20/2013-15:24
Lay, John Thomas	Notice of Case Publication Sent	Action		09/19/2012-15:24	05/20/2013-15:24
Fulmer, Henry Asby III	Notice of Case Publication Sent	Action		09/19/2012-12:49	05/20/2013-12:49

Fulmer, Henry Asby III	Notice of Case Publication Sent	Action		09/19/2012-12:49	05/20/2013-12:49
Lay, John Thomas	Notice of Case Publication Sent	Action		09/19/2012-12:49	05/20/2013-12:49
Lay, John Thomas	Notice of Case Publication Sent	Action		09/19/2012-12:49	05/20/2013-12:49
Northbrook Indemnity Co	Motion/Protective Order	Motion		08/01/2012-13:43	10/17/2012-13:43
Bales, Cynthia	Defendant Northbrook Indemnity Co's offer of judgment to pla	Judgment		08/01/2012-12:46	05/20/2013-12:46
Northbrook Indemnity Co	Def NorthBrook Indemnity Co Notice of Motion/Motion to Sever	Motion		05/18/2012-14:10	01/10/2013-14:10
Northbrook Indemnity Co	Answer of Def. Northbrook Indemnity, Co.	Filing		11/15/2011-16:55	05/20/2013-16:55
Bales, Cynthia	Acceptance Of Service c/o CT Corporation System	Filing		11/02/2011-14:00	05/20/2013-14:00
Buy Right Autos, Inc	Answer of Defendant Buy Right Autos Inc	Filing		10/21/2011-16:25	05/20/2013-16:25
Bales, Cynthia	Service/Acceptance Of Service on Buy Right Autos, Inc	Filing		10/17/2011-14:22	05/20/2013-14:22
Bales, Cynthia	Service/Acceptance Of Service	Filing		10/17/2011-11:00	05/20/2013-11:00
Bales, Cynthia	ADR/Alternative Dispute Resolution (Workflow)	Filing		09/30/2011-15:28	05/20/2013-15:28
Bales, Cynthia	Summons & Complaint	Filing		09/30/2011-15:16	05/20/2013-15:16

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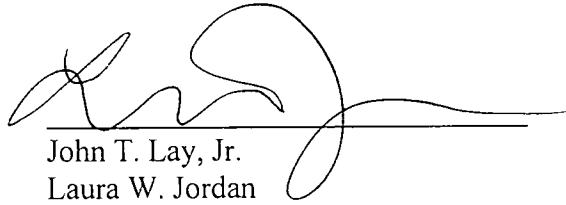
PROOF OF SERVICE

I certify that on March 10, 2014, I served copies of Respondent Northbrook Indemnity Co.'s Motion and Memorandum in Support of Motion to Strike by United States mail, postage prepaid, addressed to:

Akim A. Anastopoulos, Esq.
Eric M. Poulin, Esq.
Anastopoulos Law Firm, LLC
2557 Ashley Phosphate Road
N. Charleston, SC 29418

Signature on next page

GALLIVAN WHITE & BOYD, P.A.

A handwritten signature in black ink, appearing to read 'John T. Lay, Jr.', is written over a horizontal line. The signature is stylized and extends to the right of the line.

John T. Lay, Jr.

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