

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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MAR 04 2015

**SC Court of Appeals**

15250

APPEAL FROM SUMTER COUNTY  
W. Jeffrey Young, Circuit Court Judge

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Case No. 2012-CP-43-00707

Case No. 2014-001861

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Rebecca Jackson, ..... Appellant.

v.

OSI Restaurant Partners, LLC, Outback  
Steakhouse of South Carolina, Inc., Outback  
Steakhouse of Florida, LLC, Private Restaurant  
Properties, LLC, Private Restaurant Master Lessee, LLC,  
each d/b/a Outback Steakhouse, ..... Respondents.

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**RESPONDENTS'  
MOTION TO STRIKE**

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF  
APPEALS:

Pursuant to Rule 209(b) and Rule 210(c), SCACR, Respondents  
respectfully move this Court for an order, striking from Appellant's Initial

Reply Brief (and Record on Appeal where applicable) certain matters and arguments presented by Appellant as improper argument and irrelevant to the matter on appeal.

In the Initial Reply Brief of Appellant, Appellant attempts to offer potential testimony which was not included in the Record on Appeal, and arguments on matters not relevant to the appeal:

- Appellant seeks this Court's consideration of potential testimony of Appellant's expert, Bryan Durig, had Durig been deposed by Respondents.
- Appellant makes improper arguments relating to matters of proximate cause, which were not the basis for disposition by the Circuit Court, and further seeks to offer inadmissible hearsay.

#### **I. Appellant Seeks This Court's Consideration of Potential Testimony of Appellant's Expert, Bryan Durig, Had Durig Been Deposed By Respondents**

Respondents move to strike those portions of the Initial Reply Brief of Appellant that relate to Appellant's engineering expert Bryan Durig, and any potential testimony by Durig at deposition or otherwise. In the Initial Reply Brief of Appellant, Appellant opines to what Appellant's expert Bryan Durig, **would have** testified to had he been deposed by Respondents. (Init. Reply Br. of App. at 3-4). Such envisaged statements do not qualify as actual witness

testimony, nor does it qualify as testimony in the Record on Appeal, because this testimony has never been elicited. Rule 210(c), SCAR; see also Associates Discount Corp. v. Hiers, 248 S.C. 430, 150 S.E.2d 611 (1966); Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (record may not be supplemented with matters not presented to trial judge). Any contemplated testimony that Appellant references in relation to Durig is improper. A trial court does not rule on an issue based on what someone *may* say about it. Durig's proposed or anticipated testimony was not presented to the Circuit Court, nor was it given any consideration by the Circuit Court in granting Summary Judgment on behalf of the Respondents. Furthermore, matters not presented to the Circuit Court will not be given substantive consideration on appeal. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999). Rather, the court is obligated to rule only on issues that are properly presented and supported by admissible evidence.

An attorney's unsworn statement as to what a witness may testify to at some unknown time in the future carries no weight whatsoever. It is certainly not sufficient to raise an issue for appeal. Therefore, Respondents respectfully request all arguments related to Durig's potential testimony, had

he been deposed by Respondents, be stricken from Appellant's Initial Reply Brief.

**II. Appellant Makes Improper Arguments Relating to Matters of Proximate Cause, Which Were Not the Basis for Disposition By the Circuit Court and Further Seeks to Offer Inadmissible Hearsay**

Respondents moved for summary judgment on two grounds: (1) Appellant could not prove the existence of applicable/colorable/recognized duty of care, which was breached by Respondents; and (2) the absence of component expert testimony from Appellant regarding proximate cause. See Jackson v. Outback Steakhouse of Florida, No. 2012-CP-43-0707 (May 18, 2014) (order granting summary judgment on duty issue only). Following oral argument and a review of the memoranda and other supporting documentation respectively submitted by the parties, the Circuit Court granted summary judgment to the Respondents, holding Appellant could not prove the existence of a colorable duty of care, which was breached by Respondents. See Id. The Circuit Court did not reach the matter of proximate cause.

Appellants Initial Reply Brief attempts to argue issues regarding proximate cause that were not reached by the Circuit Court below. Specifically, Appellant requests this Court to consider Russ Hunt's

testimony, Appellant's Human Factors engineer, as it relates to proximate cause. (Init. Reply Br. of App. at 7-9). Respondents move to strike the entirety of Appellant's Section III entitled "Outback's poor-constructed and unmarked ramp proximately caused Mrs. Jackson's fall" because these matters are irrelevant to the question involved in the appeal. Rule 209(b), SCACR; 15 S.C. Jur. Appeal and Error § 63 ("Matters irrelevant to the question involved in the appeal are also disallowed.") Respondents respectfully submit that these matters as presented by Appellant relating to proximate cause are not ripe for review by the South Carolina Court of Appeals because they were never reached by the Circuit Court. The Circuit Court granted Summary Judgment to Respondents because holding Appellant could not prove the existence of a colorable duty of care, which was breached by Respondents. Because the Circuit Court judge did not consider proximate cause in reaching his decision to grant summary judgment in favor of Respondents, Appellants arguments relating to proximate cause are improper.

Furthermore, Appellant's "Section III" relating to proximate cause is additionally improper because it seeks to offer an unsworn report as a basis for appeal. (Init. Reply Br. of App. at 8). Appellant cites to portions of Hunt's Report, however, Hunt has provided no sworn Affidavit, nor was Hunt

deposed. The wholesale inclusion of Hunt's unsworn report violates the Appellate Court Rules regarding designation of the matter to be included in the record on appeal, and the supporting case law.<sup>1</sup> South Carolina appellate courts may only consider those matters which are both in the Record and which would be admissible in evidence. Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."). Appellants' expert's unsworn report is inadmissible hearsay. See Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); Hall, 349 S.C. at 175, 561 S.E.2d at 657 (holding "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence").

In short, an attorney's unsworn statement as to what a witness may testify to at some unknown time in the future is not a basis for appeal. Furthermore, the Circuit Court judge did reach the issue of proximate cause

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<sup>1</sup> Respondents also timely objected to consideration of this unsworn report at the Summary Judgment hearing. (Hr'g Tr. 19:8-24, Apr. 7, 2014).

in rendering his decision to grant summary judgment in favor of Respondents, and such unsupported and unsworn reports as relied upon by the Appellants would be inadmissible. Accordingly, because these matters relating to proximate cause were not reached in rendering summary judgment, and such unsworn reports regarding the same are inadmissible hearsay. Therefore, Respondents move to strike the aforementioned portions of Appellant's Initial Reply Brief on the grounds stated herein.

Respondents respectfully request all pending deadlines remain in abeyance while the instant motion is under review by this Court. Counsel for Respondents has consulted with counsel for Appellant, who consents to this request.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted

COLLINS & LACY, P.C.

By: 

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**ATTORNEYS FOR  
RESPONDENTS**

**RESPONDENTS' MOTION TO  
STRIKE**

Columbia, South Carolina  
March 4, 2015

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Case No. 2012-CP-43-00707  
Case No. 2014-001861

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Rebecca Jackson, .....Appellant.

v.

OSI Restaurant Partners, LLC, Outback  
Steakhouse of South Carolina, Inc., Outback  
Steakhouse of Florida, LLC, Private Restaurant  
Properties, LLC, Private Restaurant Master Lessee, LLC,  
each d/b/a Outback Steakhouse, ..... Respondents.

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**PROOF OF SERVICE**

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Counsel for Respondents certifies that he has served Respondents' Motion to Strike on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 4, 2015, addressed to the following attorneys of record:

Melissa Garcia Mosier, Esquire  
L. Lisa McPherson, Esquire  
McWhirter, Bellinger & Associates, P.A.  
119 East Main Street  
Lexington, South Carolina 29072  
*Counsel for Appellant*

Respectfully submitted,

COLLINS & LACY, P.C.

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**PROOF OF SERVICE –  
ATTORNEYS FOR THE  
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RESTAURANT PARTNERS,  
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STEAKHOUSE OF SOUTH  
CAROLINA, INC., OUTBACK  
STEAKHOUSE OF FLORIDA,  
LLC, PRIVATE RESTAURANT  
PROPERTIES, LLC, PRIVATE  
RESTAURANT MASTER  
LESSEE, LLC, EACH D/B/A  
OUTBACK STEAKHOUSE**



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SC Court of Appeals

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**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Filing Desk  
Edgar A. Brown Building  
1205 Pendleton Street  
Columbia, SC 29201

**Re: *Rebecca Jackson v. Outback Steakhouse***  
**Civil Action No.: 2012-CP-43-0707**  
**Appellate Case No.: 2014-001861**  
**C&L File No.: 1613-102**

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Respondent's Motion to Strike and Proof of Service in the above-referenced matter. Please file the original and necessary copies and return a clocked copy of same via our courier. Respondent respectfully requests all pending deadlines remain in abeyance while the instant motion is under review by this Court.

We are also enclosing a check in the amount of \$25.00, as the required filing fee of the Motion.

By copy of this correspondence, a copy of same is being served upon all counsel.

Thank you for your time and attention. As always, please contact me with any questions or concerns.

Respectfully,  
  
Christian Stegmaier

CS:mmm  
Enclosures  
cc: Melissa G. Mosier, Esquire  
L. Lisa McPherson, Esquire