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MAR 23 2013  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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' REPLY TO APPELLANT'S RETURN TO  
MOTION TO STRIKE**

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Pursuant to Rule 209(b) and Rule 210(c), as well as Rule 240(f),  
SCACR, Respondents respectfully reply to Appellant's Return regarding  
Respondents' Motion to Strike.

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.

**I. This Court Should Not Consider Potential Testimony of Appellant's Expert, Bryan Durig, Had Durig Been Deposed By Respondents**

Appellant opines that Durig's affidavit was properly submitted to the Circuit Court, and should be considered in the Record on Appeal. However, Respondents moved 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. Respondents' motion to strike was made on the grounds discussed supra, not as to Durig's affidavit.

Respondents move to strike Appellant's attorney's unsworn statement as to what a witness may testify to at some unknown time in the future carries no weight whatsoever. 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 Seeks to Offer Inadmissible Hearsay**

Appellant admits that Hunt's human factors report is unsworn, but that this Court should still consider the report. Appellant cites no case law for this proposition.

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

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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).

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”).

The unsworn Hunt report is not properly before this Court, and is not a basis for appeal. Therefore, Respondents reassert their motion to strike the aforementioned portions of Appellant’s Initial Reply Brief on the grounds previously asserted, as well as those stated herein.

[Signature Page to Follow]

Respectfully submitted

COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER

[cstegmaier@collinsandlacy.com](mailto:cstegmaier@collinsandlacy.com)

CLAUDE T. PREVOST

[cprevost@collinsandlacy.com](mailto:cprevost@collinsandlacy.com)

1330 Lady Street, Suite 601

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660 (voice)

(803) 771-4484 (facsimile)

**ATTORNEYS FOR  
RESPONDENTS**

**RESPONDENTS' MOTION TO  
STRIKE**

Columbia, South Carolina  
March 19, 2015

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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' Reply to Appellant's Return to Respondents' Motion to Strike on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2015, addressed to the following attorneys of record:

**RECEIVED**  
MAR 23 2015  
**SC Court of Appeals**

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.

By: 

CHRISTIAN STEGMAIER  
[cstegmaier@collinsandlacy.com](mailto:cstegmaier@collinsandlacy.com)

CLAUDE T. PREVOST  
[cprevost@collinsandlacy.com](mailto:cprevost@collinsandlacy.com)

1330 Lady Street, Suite 601

Post Office Box 12487

Columbia, South Carolina 29211

(803) 256-2660 (voice)

(803) 771-4484 (facsimile)

**PROOF OF SERVICE –  
ATTORNEYS FOR THE  
RESPONDENTS, 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**



Christian Stegmaier | D: 803.255.0454 | E: cstegmaier@collinsandlacy.com

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MAR 23 2015

**SC Court of Appeals**

March 19, 2015

**VIA UNITED STATES MAIL**

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

**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 Reply to Appellant's Return to 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 using the enclosed envelope.

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,

A handwritten signature in black ink, appearing to read 'C. Stegmaier', is written over the typed name.

Christian Stegmaier

CS:mmm

Enclosures

cc: Melissa G. Mosier, Esquire  
L. Lisa McPherson, Esquire

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Columbia, SC 29211

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