

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2014-CP-23-5266
Appellate Case No.: 2015-001667

RECEIVED
FEB 26 2016
SC Court of Appeals

Blanche G. Creswell.....Appellant.

v.

Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and
Asheville Cotton Company.....Respondents.

RESPONDENTS' MOTION TO PARTIALLY STRIKE APPELLANT'S
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON
APPEAL

Respondents Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and Asheville Cotton Company ("Moving Respondents"), hereby respectfully move this Court for an Order to strike that portion of the matters designated by Appellant for inclusion in the Record on Appeal consisting of items: "6. Defendants' Answers to Plaintiff's Interrogatories" and "7. Defendants' Answers to Plaintiff's Request for Production of Documents. As discussed below, these matters designated by Appellant were not introduced into evidence at the hearing on Respondents' Motion to Dismiss on May 26, 2015,

which is the subject of this appeal. In short, these materials were not proffered to the trial court with the parties' legal memorandums or considered by the trial court in rendering its Order granting the Respondents' Motion to Dismiss.

Pursuant to Appellate Court Rule 209(b), a party "may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal. A party shall not include any matter in his Designation which is not relevant to the appeal." Appellate Court Rule 209(c) further requires that a party provide "a certificate signed by the party's counsel of record that the Designation contains no matter which is irrelevant to the appeal."

The discovery responses of Respondents were not introduced into evidence or considered by the trial court in reaching its decision. Rather, only those materials attached to the parties' legal memorandums and some deposition testimony were considered. The transcript of the record for the hearing which occurred on May 26, 2015, indicates that no exhibits were offered by either party at the hearing. Nonetheless, it is clear from the transcript that the trial court considered the depositions of Robin Culbertson and William Culbertson. See R. ___ (Hearing Transcript dated May 26, 2015, p. 11 stating: "Greg Morton for the plaintiff. If I could han[d] up to the court, for filing, two depositions that I am arguing"). See also Id. at 17 ("THE COURT: All right. I want to take a look at [the] depositions in this case a little bit more").

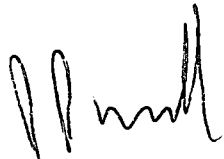
In summary, because the Respondents' discovery responses were not considered by the trial court in ruling on Respondents' Motion to Dismiss,

Respondents respectfully request that these items be stricken from the record on appeal. See Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (S.C.App.1997) (recognizing that “[t]his court may not consider a fact which does not appear in the record on appeal [and] ... where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record”). See also In re National Century Financial Enterprises, Inc., 334 B.R. 907 (Bkrcty.S.D.Ohio 2005) (granting motion to strike portion of Record on Appeal and holding that evidence regarding summary judgment which was presented by the nonmoving party after a district court's grant of a summary judgment motion is not considered by the Court of Appeals in reviewing the grant of summary judgment).

For all of the reasons discussed above, Respondents respectfully request that the court grant Respondents' Motion to Partially Strike Appellant's Designation of Matter to be Included in the Record on Appeal.

Dated this 23rd day of February, 2016.

CLARKSON, WALSH, TERRELL & COULTER, P.A.



James P. Walsh (S.C. Bar No. 15180)
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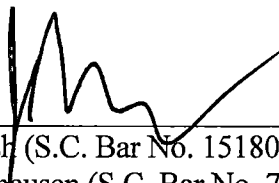
Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and
Asheville Cotton Company.....Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Motion to Partially Strike Appellant's Designation of Matter to Be Included in the Record on Appeal on Blanche G. Creswell, by depositing copies in the United States Mail, postage prepaid, on January 20, 2016, to her attorney of record, Gregory A. Morton, 4 Arborland Way, Greenville, SC 29615.

February 23, 2016.

CLARKSON, WALSH, TERRELL & COULTER, P.A.



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ATTORNEYS AT LAW

February 23, 2016

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SC Court of Appeals

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

Re: Blanche G. Creswell, Appellant v. Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and Asheville Cotton Company, Respondents
Case No. 2014-CP-23-5266
Appellate Case No.: 2015-001667

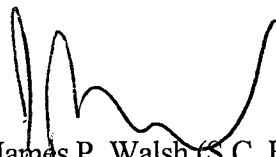
Dear Ms. Kitchings:

Enclosed for filing are an original and six (6) copies of the Respondents Motion to Partially Strike Appellants' Designation of Matter to be Included in the Record on Appeal and Proof of Service. Also enclosed is a check in the amount of \$25.00 for the filing fee.

Thank you for your kind consideration and assistance. Please feel free to call if you should have any questions regarding this matter.

Yours very truly,

CLARKSON, WALSH, TERRELL & COULTER, P.A.



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JPW/jdh

Enclosure(s)

cc: Gregory A. Morton, Esq.

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