

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 15 2016

SC Court of Appeals

Appeal From York County
Court of Common Pleas
S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2015-000079

Nadine Brantley Appellant,

v.

The City of Rock Hill, South Carolina,
a body politic and subdivision of the
State of South Carolina, and Wherry
Construction Co., Inc.,

Of which the City of Rock Hill is Respondent.

RETURN TO MOTION TO DISMISS

Respondent City of Rock Hill ("Respondent") hereby submits the following Return in response to Appellant's Motion to Dismiss dated April 2, 2016 ("Motion").

I.

Appellant's first grievance relates to the inclusion of the expert report of Ronald E. Wright and the attachments he incorporates into the report by reference (collectively, "Expert Report"). Ronald E. Wright was Appellant's expert witness.

Appellant's position on the relevance of her expert's report is unusual and surprising.

"The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210, SCACR.

As a threshold matter, the Expert Report was presented to the trial court and was part of the record considered by the trial court in deciding the City's Motion for Summary Judgment. The Expert Report was an exhibit to the deposition of Ronald E. Wright ("Wright"). During his deposition Wright reviewed the Expert Report including its attachments and identified it as being a complete and accurate copy of his report and opinions. (Wright Dep., R. p. 214, line 18 - p. 215, line 3.) The Expert Report contains the full scope of expert opinions in the matter. (Wright Dep., R. p. 209, line 24 - p. 210, line 17; R. p. 218, line 2 - p. 219, line 23.) In its Final Brief, several arguments of Respondent are supported by the absence of certain facts in the Record or by Appellant's experts not having certain material opinions. The inclusion of the entire Expert Report is necessary to substantiate Respondent's arguments.

Appellant's contention that the attachments can be separated from the Expert Report must be rejected. The Expert Report

specifically incorporates the attachments and Wright testified that his opinion testimony was based in large part on the attachments to the Expert Report. (Wright Dep., R. p. 192, lines 16-19.) Therefore, the attachments are necessary to the Expert Report and to the testimony offered by Wright in his deposition.

Given the interplay between the Expert Report and the deposition testimony,¹ the Expert Report, with attachments, is not only proper and relevant for inclusion in the Record on Appeal, it is necessary to provide the Court with sufficient information and a contextual framework when reviewing the Briefs in this appeal.

II.

Appellant's second grievance relates to the Affidavit of James G. Bagley, Jr. ("Bagley Affidavit") submitted in support of the City's Motion for Summary Judgment. This entire second argument is patently frivolous.

The Bagley Affidavit was hand-delivered to counsel for Appellant on August 7, 2014. Counsel for Appellant deposed James G. Bagley in the action and the content of the Bagley Affidavit is consistent with his deposition testimony. The hearing on the City's Motion for Summary Judgment (and Plaintiff's Cross-Motion for Summary Judgment) occurred on August 11, 2014. Appellant could

¹ Wright incorporates, generally and specifically, the content of the Expert Report and its exhibits into his deposition testimony when questioned regarding the scope, content and basis of his opinions. (Wright Dep., R. p. 192, lines 16-19; R. p. 209, line 24 - p. 210, line 17; R. p. 214, line 18 - p. 215, line 3.)

have addressed any concerns or contentions she has with the Bagley Affidavit through Rule 56(e), (f) or (g), SCRCP. Appellant did not raise any issue with respect to the Bagley Affidavit to the trial court during the summary judgment hearing. The trial court granted the City's Motion and Appellant filed a Motion to Reconsider which was heard on October 16, 2014. Appellant did not raise any issue with respect to the Bagley Affidavit to the trial court during the hearing on the motion to reconsider. In fact, Appellant did not raise any bad faith issue with respect to the Bagley Affidavit until this Motion, filed approximately one week before the deadline for Final Briefs. Substantively, the trial court's findings of fact, based on the totality of the record, are consistent with the Bagley Affidavit.

The timing and use of a motion to dismiss to attack an affidavit for bad faith is frivolous. Although a measure of latitude may be allowed for a *pro se* litigant, the Motion comes perilously close to warranting action by the Court to forestall repetition.

WHEREFORE, the City respectfully requests that the Appellant's Motion be denied and for such further relief as the Court deems just and proper.

Respectfully Submitted,

SPENCER & SPENCER, P.A.

Date: April 12, 2016

By: 

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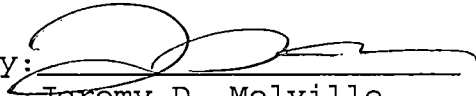
PROOF OF SERVICE

I certify that the foregoing Return to Motion to Dismiss
has been served by depositing a copy thereof in the United
States Mail, postage prepaid, on April 12, 2016, addressed to:

Nadine Brantley
9501 Greyson Ridge Drive
Charlotte, North Carolina 28277

SPENCER & SPENCER, P.A.

By:


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April 12, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

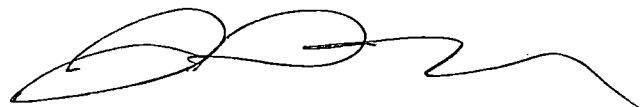
Re: Nadine Brantley v. The City of Rock Hill, et al.
Appellate Case No.: 2015-000079

Dear Ms. Kitchings:

Enclosed please find an original and 6 copies of the City's Return to Motion to Dismiss and Proof of Service in the matter referenced above. I have also enclosed a copy to be returned in the self-addressed stamped envelope. Thank you for your assistance.

Sincerely,

SPENCER & SPENCER, P.A.



Jeremy D. Melville

enclosures

cc: Nadine Brantley

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