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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group,

Respondent,

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants.

RECEIVED
MAY 01 2017
SC Court of Appeals

APPELLANTS' MOTION TO EXCLUDE AND STRIKE

Pursuant to Rules 208, 209, 210 and 240, SCACR, the Appellants, Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, by and through their undersigned counsel, hereby file their Motion to Exclude and Strike on the following grounds:

FACTS/PROCEDURAL HISTORY

The Appellants commenced the instant appeal on November 14, 2016, appealing the Orders of the Honorable Mikell R. Scarborough dated July 14, 2016 and October 28, 2016. On December 2, 2016, the Respondent filed a Motion to Dismiss Appeal. On February 1,

2017, the Court of Appeals issued an order denying Respondent's Motion to Dismiss Appeal and directing Appellants to file their initial brief and designation of matter.

On March 3, 2017, the Appellants served and filed their Initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal. On April 18, 2017 the Respondent served and filed its Initial Brief of Respondent and Respondent's Designation of Matter on Appeal.

LAW/ANALYSIS

A. The Respondent's Designation of Matter on Appeal Contains Documents Which Were Not Presented To The Lower Court And, Therefore Violates Rules 209 And 210, SCACR Requiring Exclusion And Striking Of These Documents

SCACR 209(b) requires that the Designation of Matter to be Included in the Record on Appeal *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. (Emphasis added).

SCACR 210(c) mandates that the Record on Appeal **shall not include matter which was not presented to the lower court or tribunal**. (Emphasis added)

The Respondent's Designation of Matter on Appeal violates both of these South Carolina Appellate Court Rules inasmuch as it contains documents that were not presented to the lower court and cannot be properly included in the Record on Appeal. Specifically, the documents listed as items 2., 3. and 4. in Respondent's Designation of Matter on Appeal were never presented to the lower court in the proceeding below. *Affidavit of A. Bright Ariail, Esq.* The referenced documents are not a part of any pleading, motion, legal memoranda, order, exhibit or other filings with the lower court. (Id.). Likewise, these documents were not made a part of the record at any of the hearings before the lower court in this matter. (Id.). In short, none of these documents are a part of the record in the lower court. (Id.).

Since these documents were never presented to the lower court, they cannot be

properly included in the Record on Appeal. *See* SCACR 210(c). Thus, the inclusion of these documents in the Respondent's Designation of Matter on Appeal violates SCACR 209(c). As such, these documents should all be excluded and stricken from the Respondent's Designation of Matter on Appeal.

B. The Initial Brief of Respondent Is Replete With References to Documents Which Were Not Presented To The Lower Court And, Therefore Violates Rules 208, 209 And 210, SCACR Requiring Exclusion And Striking Of These References

The Initial Brief of Respondent contains numerous citations to the documents contained in Items 2., 3. and 4. of Respondent's Designation of Matter on Appeal. These documents were never presented to the lower court and cannot be properly included in the Designation of Matter on Appeal or Record on Appeal. *See* Appellants Motion to Strike and Exclude, Section A.

The specific documents in question include the following:

- (1): VA Contract;
- (2): Subcontract, Attachment 1;
- (3): Indemnity Agreement;
- (4): PCG letter;
- (5): Hanover demand;
- (6): final pay application;
- (7): Appellants' answers to discovery;
- (8): job cost billing detail;
- (9): AR history report;
- (10): Subcontract, Attachment;
- (11): Subcontract Breakdown;
- (12): PCG Subcontract Breakdown;
- (13): Ward email dated January 11, 2016;
- (14): Appellants Answers to Interrogatories;
- (15): Restoration Specialists' contract log;

- (16): Restoration Specialists' monthly expenses spreadsheet;
- (17): Restoration Specialists' subcontract log;
- (18): Proof of Profitability Breakdown.

The Respondent references the above-enumerated documents as proof of factual allegations asserted throughout its Initial Brief. Furthermore, the Respondent references these documents as authority for certain legal conclusions argued in its Initial Brief. Respondent's multiple references to these documents in its' Initial Brief are set forth below:

LIST OF REFERENCES TO DOCUMENTS NOT PRESENTED TO LOWER COURT CONTAINED IN INITIAL BRIEF OF RESPONDENT:

(1): "Appellant Restoration Specialists, LLC ("Restoration Specialists") was awarded a contract with the VA for completion of a parking garage for the VA facility in Augusta, Georgia (the "VA Project"). The contract between Restoration Specialists and the VA is dated March 29, 2012, though the project was delayed for several years before commencement. The total contract price was in excess of \$8.1 Million. (VA Contract). Restoration Specialists was the general contractor on the VA Project, responsible for hiring subcontractors and obtaining a payment and performance bond. (VA Contract)." (*Initial Brief of Respondent, Page 3, Lines 1-7*).

(2): "Pursuant to the subcontract, PCG was to be paid as a concrete subcontractor for its work and was also to share the profits equally with Restoration Specialists. (Subcontract, Attachment 1)." (*Initial Brief of Respondent, Page 4, Lines 2-4*).

(3): "However, Hanover required that both PCG and Restoration Specialists, as well as their respective principals and their spouses sign an indemnity agreement, requiring them to indemnify Hanover for any sums it expends in paying claims made on the bond. (Indemnity Agreement)." (*Initial Brief of Respondent, Page 4, Lines 6-9*).

(4): "The concrete work was performed by PCG, and as the Project neared completion, PCG asked that the parties meet to discuss the profit split provided for in the subcontract. (See PCG letter)." (*Initial Brief of Respondent, Page 4, Lines 10-12*).

(5): "PCG too, was owed over \$180,000.00 pursuant to its own subcontract with Restoration Specialists. (Id.)." (*Initial Brief of Respondent, Page 4, Lines 13-14*).

(6): "It soon became apparent that multiple subcontractors were owed money, which Hanover was required to pay, in the amount of \$1,425,144.00. (Hanover demand)." (*Initial Brief of Respondent, Page 4, Lines 15-17*).

(7): "Hanover in turn made a demand under its indemnity agreement and upon the VA for the contract balance but by this time Mr. Ward had collected all but \$90,000 of the \$8.1 Million contract. (See final pay application)." (*Initial Brief of Respondent, Page 4, Lines 17-20*).

(8): "Appellants provided answers to PCG's interrogatories and requests for production on July 7, 2016. (Appellants' answers to discovery)." (*Initial Brief of Respondent, Page 6, Lines 6-7*).

(9): "Despite being paid over \$8 Million dollars by the Department of Veterans Affairs. (See final pay application signed by Ward...)." (*Initial Brief of Respondent, Page 14, Lines 1-3*).

(10): "There is no basis to support this allegation, and in fact, the records, including those provided by Restoration Specialists in discovery, show that PCG is owed \$184,858.69. (See checks to PCG written by Restoration Specialists, subcontract pay

application breakdown, job cost billing detail, ..., AR history report).” (*Initial Brief of Respondent, Page 14, Lines 16-19*).

(11): “The profit-sharing provision is found in the parties’ agreement, which delineates all sums that Restoration Specialists is to pay PCG, including the “RS/PCG Projected 50% Profit Share.” (Subcontract, Attachment and Subcontract Breakdown made part of the Subcontract by way of Subcontract Provision 16.1.4.2 titled “Other documents.” Provision 16.1.4.2 states “[l]ist here any additional documents that are intended to form part of the Subcontract Documents...#1. PCG Subcontract Breakdown”)” (*Initial Brief of Respondent, Page 15, Lines 10-16*).

(12): “However, in its most recent demand letter to all indemnitors, Hanover states:
Hanover conducted its own investigation of the claims pursuant to the Miller Act, 40 U.S.C.S. § 270a et seq., and has sought your input in the payment of these claims including whether any viable defenses to the claims exist, and has made payment to the bond claimants and secured releases of the claims.

Hanover demand dated September 30, 2016, emphasis added).” (*Initial Brief of Respondent, Page 16, Lines 2-8*).

(13): “As of the date of Hanover’s demand, Appellants had no defenses to the subcontractors’ claims, which is why they were paid by Hanover. For example, Mr. Ward’s email exchanges with Hanover show that after several attempts by Hanover to obtain information from Mr. Ward regarding the bond claim made by a subcontractor of Restoration Specialists’ called Tupperway, Hanover finally asks Mr. Ward, “So I should just pay them?” and Mr. Ward responds, “Certainly not what I want but I don’t think we can win this argument.” (Ward email dated January 11, 2016).” (*Initial Brief of Respondent, Page 16, Lines 8-15*).

(14): “Appellants’ records and answers to interrogatories establish that the VA is holding approximately \$90,887.08 in retainage, and this because the VA received

notice of subcontractor claims. (Appellants Answers to Interrogatories). (*Initial Brief of Respondent, Page 16, Lines 21-23*).

(15): “However, Appellants can hardly claim that the lack of a \$90,887.08 payment has resulted in sixteen of Restoration Specialists’ subcontractors making \$1,425,144.00 in claims on the payment bond. (Hanover Demand).” (*Initial Brief of Respondent, Page 16, Line 24 & Page 17, Lines 1-2*).

(16): “Further, the documents provided by Appellants in discovery also show that Restoration Specialists received over \$8.1 Million from the VA. This sum, based solely on the contract with the VA and the subcontracted cost (\$6,929,212.00 per Appellants) and in house cost (\$1,038,724.04 per Appellants) provided by Appellants in discovery, should have been more than enough to pay all the subcontractors in full and produce a profit of \$226,092.67.” (See VA Contract, Restoration Specialists’ contract log, Restoration Specialists’ monthly expenses spreadsheet).” (*Initial Brief of Respondent, Page 17, Lines 2-8*).

(17): “Footnote 4 – The profit of \$226,092.67 is based on the figures provided by Appellants. When the inflated in house costs is adjusted per industry standards to \$642,385.80, and the subcontract cost is adjusted up in favor of Appellants to \$7,108,182.00 (based on an error in Restoration Specialists’ subcontract log), the VA Project produced a profit of \$443,460.91. (See Proof of Profitability Breakdown).” (*Initial Brief of Respondent, Page 17, Lines 19-23*).

SCACR 208(b)(4) requires that the parties’ briefs shall contain only references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged. The above-enumerated references violate SCACR 208(b)(4) inasmuch as they reference documents that were never presented to the lower court and cannot be properly included in the Record on Appeal. *See Appellants’*

Motion to Strike and Exclude, Section A. As such, these references should all be excluded and stricken from the Initial Brief of Respondent.

CONCLUSION

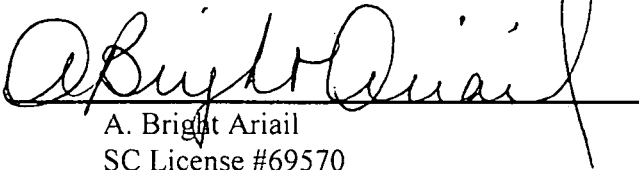
Based on the foregoing, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward are entitled to an Order:

(1): Excluding and striking the documents listed as items 2., 3. and 4. in the Respondent's Designation of Matter on Appeal; and

(2): Excluding and striking all references to these documents contained in the Initial Brief of Respondent.

For these reasons, the Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward hereby respectfully request that their Motion to Exclude and Strike be granted.

LAW OFFICE OF A. BRIGHT ARIAIL, LLC



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P: (843) 814-8805
F: (843) 266-0538
ATTORNEY FOR APPELLANTS

April 28, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC Respondent

v.

Restoration Specialists, LLC, Appellants
Reuben Mark Ward, and
Lynnette Pennington Ward

AFFIDAVIT OF A. BRIGHT ARIAIL, ESQ.

PERSONALLY APPEARED BEFORE ME, A. Bright Ariail, Esq., who
having been first duly sworn deposed, states as follows:

1. I am a licensed attorney in South Carolina, SC Bar No. 69570.
2. I represent the Appellants, Restoration Specialists, Reuben Mark Ward, and Lynnette Pennington Ward in the above-referenced matter.

3. Respondent filed and served its Initial Brief and Designation of Matter on April 18, 2017.
4. There are documents included in Respondent's Designation of Matter that were not presented to the lower court including:
 - 1) Item 2 – Appellants' Answers to interrogatories and requests for production
 - 2) Item 3 – Appellants' document productions dated July 6, 11 and 13, 2106
 - 3) Item 4 – Respondent's exhibit notebook in support of its proffer of damages.
5. I have performed a complete review of all documents filed with the Charleston County Clerk of Court that appear on the Clerk's Public Index and none of the documents listed in 4. a., b. or c. were part of any pleading, motion, legal memoranda, order, exhibit or other filings with the lower court.
6. I have performed a complete review of the transcripts for the three hearings held in front of the Master in Equity, and none of the documents listed in 4. a., b. or c. were a part of the record at any of the hearings before the lower court in this matter.
7. Accordingly, the following documents cited in Respondent's Initial Brief are not in the record:
 - (1): VA Contract;
 - (2): Subcontract, Attachment 1;
 - (3): Indemnity Agreement;
 - (4): PCG letter;

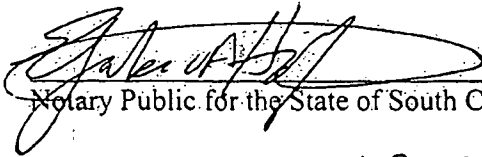
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 - (16): Restoration Specialists' monthly expenses spreadsheet;
 - (17): Restoration Specialists' subcontract log;
 - (18): Proof of Profitability Breakdown.
8. There are numerous references made to those documents and allegations of facts that those documents purportedly contain within Respondent's Initial Brief.
9. Furthermore, the Respondent references these documents as authority for certain legal conclusions argued in its Initial Brief.

FURTHER DEPONENT SAYETH NAUGHT.

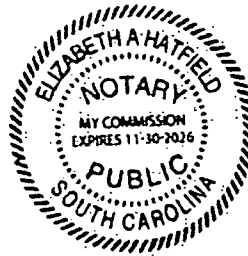
- SIGNATURE PAGE FOLLOWS -


A. Bright Arjail, Esq.

Sworn to before me
This 28th day of April, 2017.


Notary Public for the State of South Carolina

My Commission Expires: 11.30.2026



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2016-CP-10-1143
[Appellate Case No. 2016-002308]

Palmetto Construction Group, LLC Respondent

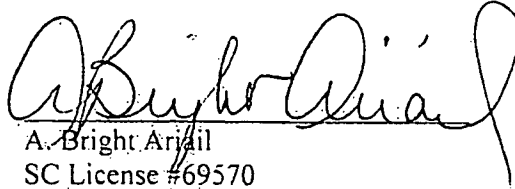
v.

Restoration Specialists, LLC, Appellants
Reuben Mark Ward, and
Lynnette Pennington Ward

PROOF OF SERVICE

I certify that I have served the Affidavit of A. Bright Ariail, Esq. on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on April 28, 2017, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401.

April 28, 2017

A handwritten signature in cursive script, appearing to read "A. Bright Ariail". The signature is written in black ink and is positioned above the typed name and contact information.

A. Bright Ariail

SC License #69570

Law Office of A. Bright Ariail, LLC

125E Wappoo Creek Drive, Suite 202

Charleston, SC 29412

843/814-8805

Attorney for Appellants

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Palmetto Construction Group, LLC

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v.

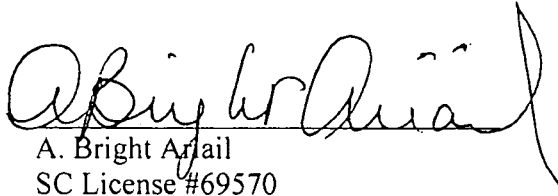
Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward

Appellants

PROOF OF SERVICE

I certify that I have served Appellants' Motion to Exclude and Strike on Palmetto Construction Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on April 28, 2017, addressed to Palmetto Construction Group, LLC's attorneys of record, Andrew K. Epting, Jr. and Michelle N. Endemann, Andrew K. Epting, LLC, 46A State Street, Charleston, South Carolina, 29401.

April 28, 2017

A handwritten signature in cursive script, reading "A. Bright Ariail". The signature is written in black ink and is positioned above the typed name and contact information.

A. Bright Ariail

SC License #69570

Law Office of A. Bright Ariail, LLC

125E Wappoo Creek Drive, Suite 202

Charleston, SC 29412

843/814-8805

Attorney for Appellants

Law Office of A. Bright Ariail, LLC

April 28, 2017

VIA PRIORITY MAIL

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

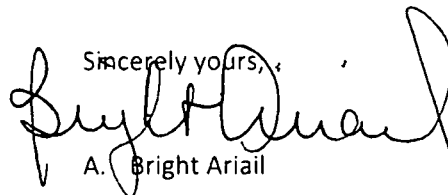
RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
Appellate Case No. 2016-002308

Dear Ms. Kitchings;

Enclosed, please find for filing the original and seven copies of Appellants' Motion to Exclude and Strike and Proof of Service with a firm check for the \$25 filing fee. By copy of this letter, I am serving opposing counsel with a copy of same.

Please return a file stamped copy to me via the enclosed SASE.

With kindest regards, I am

Sincerely yours,

A. Bright Ariail

Enclosures as stated

cc: Andrew Epting, Esquire
Michelle Endemann, Esquire

RECEIVED

MAY 01 2017

SC Court of Appeals

Law Office of A. Bright Ariail, LLC

April 28, 2017

VIA PRIORITY MAIL

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

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MAY 01 2017

SC Court of Appeals

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
Appellate Case No. 2016-002308

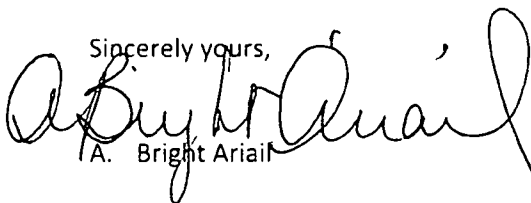
Dear Ms. Kitchings;

Enclosed, please find for filing the original and two copies of the Affidavit of A. Bright Ariail, Esquire with Proof of Service which is being filed in support of Appellants' Motion to Exclude and Strike. By copy of this letter, I am serving opposing counsel with a copy of same. A copy of the Affidavit is being attached to Appellant's Motion to Exclude and Strike as a document in support of that motion.

Please return a file stamped copy to me via the enclosed SASE.

With kindest regards, I am

Sincerely yours,


A. Bright Ariail

Enclosures as stated

cc: Andrew Epting, Esquire
Michelle Endemann, Esquire