

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Charles B. Simmons, Jr., Master-in-Equity
Common Pleas Case No.: 2014-CP-23-01871

Appellate Case No.: 2016-1787

RECEIVED

JUN 30 2017

SC Court of Appeals

China Construction America of South Carolina, Inc., Appellant/Respondent,

v.

MS Production Solutions LLC a/k/a MSPS Steel Fabricators,
Manfred Sprenger and Patricia Sprenger, Respondents-Appellants.

RESPONDENTS/APPELLANTS' RETURN TO MOTION

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Respondent/Appellants

RETURN

The document in question is the agreement between Sprenger and MSPS setting forth Sprenger's compensation and was introduced at the March 2, 2016 hearing in Defendants' Exhibit 14. Also included in Defendants' Exhibit 14 is a summary of payments or entitlement to pay pursuant to that agreement. As a business record of MSPS, this document is admissible under SCRE Rule 803 which provides:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

SCRE 803.

Sprenger was the president of MSPS and therefore could testify to the businesses' records.

The document in question was introduced in evidence as part of Exhibit 14 during the March 2, 2016 hearing. Page 7, l. 25-5. Leading up to the introduction of Exhibit 14 Mr. Burney asks Mr. Sprenger about having a set draw or set payment that he receives every month. P. 18, l. 24-25. Mr. Sprenger testified that when he purchased the business that there was an agreement that set his duties, benefits and pay, and referring to the agreement, specifically states he should get \$12,000 per month. Mr. Burney has Mr. Sprenger identify Exhibit 14, which contains a

breakdown of what he should have received based on the \$12,000 agreement. Exhibit 14 also contains the written agreement underlying Sprenger's testimony. On page 19, line 24, Exhibit 14 was introduced into evidence without objection. Mr. Burney specifically asked about the \$12,000 a month salary. Mr. Burney also asked if Exhibit 14 set out how much the company should have paid and how much actually was paid. P. 20, 1-7. There was no objection to the testimony that Sprenger was entitled to receive \$12,000 per month salary based on the agreement. There was no objection to the testimony about the existence of the agreement. There was no objection to the exhibit itself and, the exhibit was introduced into evidence.

The admission and exclusion of evidence "are matters largely within the [circuit] court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 725 (Ct. App. 2001); First Citizens Bank & Trust Co., Inc. v. Park at Durbin Creek, LLC, 419 S.C. 333, 339, 797 S.E.2d 409, 412 (Ct. App. 2017), *reh'g denied* (Mar. 16, 2017). "The admission of evidence is within the [circuit] court's discretion." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.*; *see also* Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) (noting a ruling on the admission or exclusion of evidence will not be disturbed on appeal absent a clear abuse of discretion). First S. Bank v. S. Causeway, LLC, 414 S.C. 434, 448, 778 S.E.2d 493, 500 (Ct. App. 2015).

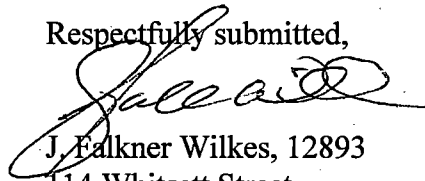
South Carolina Rule of Appellate Procedure 210(c) provides: The Record shall not, however, include matter which was not presented to the lower court or tribunal. Therefore, matter

that was presented to the lower court is appropriate for inclusion in the record on appeal. Here the document was introduced and considered by the trial court. There was testimony concerning the contents of the document. Having been introduced in evidence without objection, it is therefore appropriate for inclusion in the record on appeal in this case.

Appellant/Respondent argues the existence of an agreement between counsel not to introduce the document in question however, admits that trial counsel for Respondent/Appellant has not indicated that he can not recall any agreement to remove the document from the exhibit. (Exhibit 1, Motion). It appears that the document in question would be admissible as a business record. The Appellant/Respondent has failed to show how it would have been excluded if a timely objection had been raised, or even what objection it contends it was prepared to raise. The evidence was admitted into evidence, considered by the trial judge, and therefore, is appropriate for inclusion in the record on appeal.

Appellants' respectfully submit that the Motion to exclude evidence in record from the record on appeal be denied or remanded to the Master to settle the record.

Respectfully submitted,



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Counsel for Respondent/Appellants

June 27, 2017.

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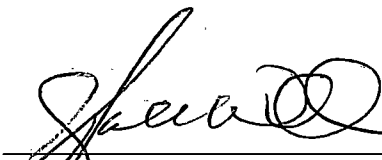
v.

MS Production Solutions LLC a/k/a MSPS Steel Fabricators,
Manfred Sprenger and Patricia Sprenger, Respondents-Appellants.

CERTIFICATE OF SERVICE

I certify that on the 27th day of June, 2017, I served the Return of Respondents/Appellants on the Appellant/Respondent by placing a copy of same into the United States Mail, first class postage pre-paid, addressed to counsel of record as indicated below, and by facsimile if so indicated:

Henry P. Wall
Caitlin C. Heyward
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June 27, 2017

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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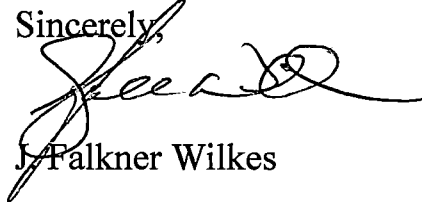
Re: China Construction America v. MS Production, et al.
Circuit Court Case No.: 2014-CP-23-01871
Appellate Case No.: 2016-001787

Dear Ms. Kitchings,

I represent the MS Production, et al., in this case. I am enclosing a Return to the Motion of China Const.

I will be out of the office July 11th through July 28th.

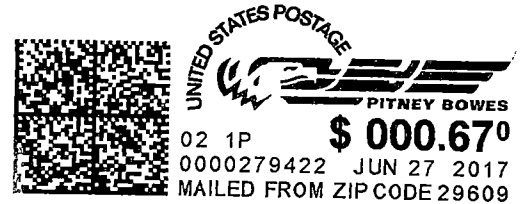
Sincerely,



J. Falkner Wilkes

c:
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