

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

RECEIVED
OCT 11 2017
SC Court of Appeals

Case No. 2017-00068

Martha M. Fountain and Curtis Fountain.....Plaintiffs,

v.

Fred’s, Inc., and Wildevco, LLC.....Respondents,

v.

Tippins-Polk Construction, Inc., and Rhoad’s Excavating Services, LLC.....Third-Party
Defendants.

Of Whom Tippins-Polk Construction, Inc. is the Appellant.

**RESPONDENT WILDEVCO, LLC’S MOTION TO STRIKE MATTER AND EXCLUDE
MATTER FROM RECORD ON APPEAL**

Respondent, Wildevco, LLC hereby moves this Honorable Court for an Order striking Section III. of Appellant’s Initial Brief as well excluding the Settlement Agreement between Plaintiffs, Fred’s, Inc. and Wildevco, LLC from the record on appeal.

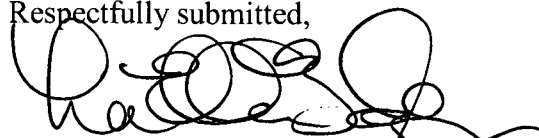
Specifically, Appellant’s argument set forth in Section III. of its Initial Brief, titled “Respondents are Bound by Their Own Pleadings and are Estopped from Recovering Damages not Requested within the Complaint,” was not preserved for appeal as Appellant failed to raise the issue prior to or during the trial of this matter and raised it for the first time in its post-trial Motion to Make Additional Findings and Motion to Reconsider and/or Amend pursuant to Rules 52(b) and 59(e), SCRCF; therefore, the issue was not preserved and is not properly before the

Court for consideration. *See* June 6 Trans., pp. 15: 3 – 18: 24; June 7 Trans., pp. 77: 8 – 86: 24, 121: 12 – 122: 10; Tippins-Polk Motion to Make Additional Findings and Motion to Reconsider and/or Amend, pp. 25-26. *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) (“It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.”); *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct.App.2003) (“A party cannot raise an issue for the first time in a Rule 59(e), SCRCP[,] motion which could have been raised at trial.”).

Additionally, in its Designation of Matter to be Included in the Record on Appeal, Appellant designates the Settlement Agreement between Plaintiffs, Respondent Fred’s, Inc. and Respondent Wildevco, LLC. However, the Settlement Agreement was never offered nor introduced into evidence, although the parties and witnesses did reference it during testimony and argument during the trial of this matter. *See, e.g.*, June 7 Trans., pp. 66: 22 – 67: 2, 68:11 – 72: 5, 84: 2 – 12, 85: 9 -18. Therefore, the Settlement Agreement is not a proper matter for inclusion in the record on appeal.

Based upon the foregoing, Respondent Wildevco, LLC respectfully requests that this Honorable Court issue an Order striking Section III. of Appellant’s Initial Brief and excluding the Settlement Agreement from the record on appeal.

Respectfully submitted,



Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77072
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, SC 29204
(803) 790-8838

October 11, 2017

Attorneys for Respondent Wildevco, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 11 2017
SC Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-00068

Martha M. Fountain and Curtis Fountain.....Plaintiffs,

v.

Fred's, Inc., and Wildevco, LLC.....Respondents,

v.

Tippins-Polk Construction, Inc., and Rhoad's Excavating Services, LLC.....Third-Party
Defendants.

Of Whom Tippins-Polk Construction, Inc. is the Appellant.

PROOF OF SERVICE

I do hereby certify, on this 11th day of October, 2017, that a copy of the foregoing **Respondent Wildevco, LLC's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Motion to Strike Matter and Exclude Matter from Record on Appeal, and Proof of Service** were served by depositing copies of the same in the United States Mail, first-class, postage prepaid, addressed to Morgan S. Templeton, Esquire, PO Box 1200, Charleston, South Carolina 29402 and Matthew C. LaFave, Esquire PO Box 1149, Columbia, South Carolina 29202.



Regina Hollins Lewis, SC Bar No. 68539
Lee Ellen Bagley, SC Bar No. 77672
GAFFNEY LEWIS & EDWARDS, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)
803.790.8841 (facsimile)

Attorneys for Respondent Wildevco, LLC



**GAFFNEY LEWIS
& EDWARDS**

3700 Forest Drive, Suite 400, Columbia, SC 29204 | T: 803.790.8838 | F: 803.790.8841
www.glelawfirm.com

October 11, 2017

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

RECEIVED
OCT 11 2017
SC Court of Appeals

Re: *Martha M. Fountain and Curtis Fountain v. Fred's Inc., and Wildevco, LLC v. Tippins-Polk Construction, Inc, and Rhoad's Excavating Services, LLC*
Case No : 2017-00068

Dear Clerk Kitchings:

Enclosed for filing please find the original and two (2) copies of **Respondent Wildevco, LLC's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Motion to Strike Matter and Exclude Matter from Record on Appeal, and Proof of Service**. We would appreciate you filing the original with the Court and returning the clocked copy for our records to the courier.

By copy of this letter, I herewith serve all counsel of record with same. Should you have any questions or need additional information please do not hesitate to contact our office.

Sincerely,

Kelli F. Hall
Paralegal

/kfs

Enclosures

cc: Morgan S. Templeton, Esq.
Matthew C. LaFave, Esq.