

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

OCT 25 2017

SC Court of Appeals

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-000688

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.

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

Appellant Tippins-Polk Construction, Inc. ("Appellant") respectfully submits the following in opposition to Respondent Wildevco, LLC's ("Respondent") Motion to Strike Matter and Exclude Matter from Record on Appeal. For the reasons set forth below, this Court should deny Respondent's Motion to Strike.

ARGUMENT

Pursuant to Rule 209(b), SCACR, the designation of matter to be included in the record on appeal “may only propose to include portions of transcripts, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal” as outlined in Rule 210(c), SCACR. “A party may not include any matter in his Designation which is not relevant to the appeal.” Rule 209(b), SCACR. Rule 210(c), SCACR, states, in pertinent part, the following: “The Record shall not, however, include matter which was not presented to the lower court or tribunal.”

Id.

I. Appellant’s argument set forth in Section III of its Initial Brief is properly preserved in its post-trial motions pursuant to Rules 52(e) and 59(e), SCRCR, because it was not possible to raise such an argument until after judgment was entered by the circuit court.

“It is well settled that an issue cannot be raised for the first time on appeal.” Pye v. Estate of Fox, 369 S.C. 555, 564 (2006); see also Bank of N.Y. v. Sumter Cnty., 387 S.C. 147, 159 (2010) (“It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.”). However, the Supreme Court held in Buist v. Buist, 410 S.C. 569, 576 (2014), that the “conclusion that *any* request . . . at the Rule 59(e) stage of the proceedings was untimely . . . is clearly erroneous.” Id., 410 S.C. 569, 577 (2014) (emphasis in original).

In Buist, the Supreme Court heard a challenge to the award of attorneys’ fees in family court. The appellant objected to the award of attorneys’ fees in a Rule 59(e) motion filed post-trial. The respondent argued that appellant’s objection in his Rule 59(e) motion was untimely, and, therefore, not preserved for appellate review. The South Carolina Supreme Court, however, stated that “the conclusion that *any* request to reconsider an award of attorneys’ fees at the 59(e) stage of the proceedings was untimely because [the appellant] could have raised this issue at trial is clearly erroneous. This statement wrongly conflates the timing of [the appellant’s] objection with his

failure to object with specificity, prior to his appeal to the court of appeals, to the propriety of awarding attorneys' fees." Buist, 410 S.C. at 576. The Supreme Court, rather than adhering to the blanket statement that any issue raised in a post-trial Rule 59(e) motion is untimely, instead focused on the timing and propriety of objection if it would have occurred during trial.

Here, similarly, Appellant was not in a position to know for certain (and, therefore, raise the objection) whether the circuit could award damages not requested in Respondent's complaint until judgment was entered awarding such damages. Prior to judgment being entered, it was unnecessary and inappropriate to object to a circuit court potentially awarding such damages. In essence, the issue was not yet ripe until judgment was entered. When judgment was entered, Appellant timely raised the issue in its Rule 59(e), SCRCP, motion.

Furthermore, as this Court knows, "[t]he duty is on the litigant to make a timely objection in order to preserve the right of review." Doe v. S.B.M., 327 S.C. 352, 356 (Ct. App. 1997). "A contemporaneous objection is required to properly preserve an error for appellate review." Id. Judge Early, subsequent to the trial, took the matter under advisement. He thereafter entered an Order finding for Respondents on August 1, 2016, almost two months after the trial. Appellant had no opportunity to object to the circuit court's award of damages not requested in Respondent's complaint until notice of the entry of judgment. Like the Supreme Court in Buist, this Court must consider the timing and propriety of objecting before the issue became ripe.

A timely filed Rule 59(e), SCRCP, motion is a contemporaneous objection in this instance. Accordingly, the Court should deny Respondent's motion to strike Section III of Appellant's Initial Brief.

II. The settlement agreement is relevant to Appellant's appeal, and the issue arising therefrom was presented to the circuit court.

As stated above, Rule 210(c), SCACR, states, in pertinent part, the following: "The Record shall not . . . include matter which was not presented to the lower court or tribunal." Id. Further, Rule 209(b), SCACR, states that "[a] party may not include any matter in his Designation which is not relevant to the appeal." Id.

Here, including the settlement agreement between Plaintiff and Respondents Wildevco and Fred's, Inc. in the Record on Appeal is proper. First, it is undoubtedly relevant to the appeal. In Appellant's Initial Brief, Appellant argues that the settlement agreement acknowledges that Respondents were liable for Plaintiff's injuries, and that the equitable doctrine of judicial estoppel prevents Respondents from taking a position inconsistent therewith. This issue was timely raised and preserved for appeal, and Respondents do not refute this. Regardless of the validity of this argument, the settlement agreement is nonetheless relevant to the appeal. Therefore, this specific requirement of Rule 209(b), SCACR, is met.

Furthermore, this issue was presented to the circuit court within the meaning of Rule 210(c), SCACR. While the settlement agreement was not entered into evidence, upon information and belief, there is no rule which states that a document has to be entered into evidence for it to be included in the Record on Appeal. If this were the case, a party appealing a circuit court's refusing to admit certain evidence would not be entitled to present to the appellate court the excluded evidence. The settlement agreement was germane to the entire trial, and was addressed numerous times. See R. at _____ (Tr. Trans. June 6, 2016 at 6:5-8; 7:3-6; 10:19-20; 11:1; 12:18; 12:22-24; 14:3-4; 20:16-24; 21:1-3; 21:10-14; 24:21-25; 25:1; and 33:23-25); see also R. at _____ (Tr. Trans. June 7, 2016 at 66:22-25; 67:1-3; 68:11-13; 68:19-21; 68:22-24; 69:2-3; 69: 13-14; 69:16-19; 70:1-3; 70:8-10; 71:14-16; 72:9-12; 73:21-23; 74:16-17; 84:2-12; and 85:9-18).

Respondent states the same in its Motion to Strike. See Mot. to Strike Matter and Exclude Matter from Record on Appeal at p.2 (“[T]he parties and witnesses did reference it during testimony and argument during the trial of this matter.”). Lastly, Respondent cites to pertinent provisions of the settlement agreement in its Initial Brief. See Resp. Initial Br. at p.23.


Given the importance of the settlement agreement and the number of times it is referenced in the trial transcripts and initial briefs of the parties, the agreement should be included in the Record on Appeal. Appellant respectfully urges this Court to consider the foregoing, and avers that the Court needs the full settlement agreement to fully consider the issues raised on appeal. Accordingly, Appellant respectfully requests this Court deny Respondent’s Motion to Exclude Matter from Record on Appeal.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court deny Respondent’s Motion to Strike Matter and Exclude Matter from Record on Appeal.

Dated this 23 day of October, 2017.

Respectfully submitted,



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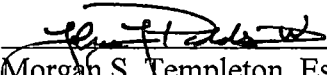
PROOF OF SERVICE

I, John J. Dodds, IV, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Response to Respondent's Motion to Strike Matter and Exclude Matter from Record on Appeal on counsel for Respondents, by depositing the same in the United States Mail, properly posted on October 23, 2017 addressed as follows to counsel of record:

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October 23, 2017

The Honorable Jerry Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
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RECEIVED
OCT 25 2017
SC Court of Appeals

Re: *Martha M. Foundain v. Fred's Inc., et al.*
Civil Action No.: 2010-CP-06-101

Dear Mr. Kitchings:

Please find enclosed an original and six (6) copies of Appellant's Response to Motion to Strike Matter and Exclude Matter from Record on Appeal and Proof of Service in the above referenced matter. I am also enclosing an original and one copy of Appellant's Initial Reply Brief.

Please file the originals with the Court and return a filed-stamped copy of each to me in the envelope provided for your convenience.

By copy of this letter to all counsel of record, I am serving them with the enclosed Response to Motion and Reply Brief of Appellant.

Thank you for your time and attention to this matter.

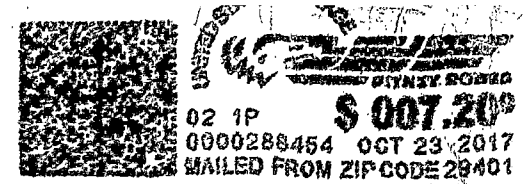
Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

John J. Dodds, IV

JJD,IV/sjs
enclosures

cc: Lee Ellen Bagley, Esquire (w/ *encl*)
Matthew C. LaFave, Esquire (w/ *encl*)



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