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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

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

Respondent Wildevco, LLC ("Wildevco") respectfully submits the following in reply to Appellant's Response to Wildevco's Motion to Strike Matter and Exclude Matter from Record on Appeal ("Response"). For the reasons set forth herein, as well as Wildevco's subject Motion, this Honorable Court should grant Wildevco's Motion and strike Section III. of Appellant's Initial Brief as well exclude the Settlement Agreement between Plaintiffs, Fred's, Inc. and Wildevco, LLC from the record on appeal.

I. Appellant’s argument as set forth in Section III of its Initial Brief was not properly preserved as it was raised for the first time in Appellant’s post-trial Motion to Make Additional Findings and Motion to Reconsider and/or Amend.

A party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003); *see also Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). “It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.” *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010).

As set forth in Wildevco’s Motion to Strike Matter and Exclude Matter from Record on Appeal (hereinafter, “Wildevco’s Motion to Strike”), Appellant’s argument 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 only raised it for the first time in Appellant’s post-trial Motion to Make Additional Findings and Motion to Reconsider and/or Amend pursuant to Rules 52(b) and 59(e), SCRPC (hereinafter “Appellant’s Rule 59(e) Motion”). In its Response to Wildevco’s Motion to Strike, Appellant relies on the family court case of *Buist v. Buist*, 410 S.C. 569, 576, 766 S.E.2d 381, 384 (2014), in which the Supreme Court of South Carolina ultimately held that it was error to conclude “that *any* request...at the Rule 59(e) stage of the proceedings was untimely.” (emphasis in original). However, Appellant fails to provide context for our Supreme Court’s aforementioned holding, which was in reference to “the appropriate procedure to object to an award of attorneys’ fees in family court.” *Buist*, 410 S.C. at 575, 766 S.E.2d at 384. Given the narrow context in which

Buist was decided, it is inapplicable to the present appeal where the underlying trial involved the sole cause of action for equitable indemnification. Accordingly, Appellant fails to establish that it preserved this argument for the Court's review.

Notwithstanding Appellant's misapplication of *Buist* to the present appeal and contrary to Appellant's contention, Wildevco does not argue that *any* request to reconsider a trial court's award of attorneys' fees at the Rule 59(e) stage is untimely. Rather, Wildevco maintains that proper procedure required Appellant to raise its particular issue—that the trial court erred in granting Wildevco attorneys' fees because Wildevco did not request such relief in its Complaint—during trial before the Court of Common Pleas and its failure to do so renders the issue unpreserved according to well-established case law.

In the present matter, Wildevco specifically alleged with regard to its claim of equitable indemnification that it was entitled to indemnity “for the costs and attorneys’ fees associated with defending this civil action against the claims of the Plaintiffs.” Third Amended Third-Party Complaint, pp. 4-5. Additionally, Wildevco prayed generally for all relief requested in its Amended Answer to Plaintiffs’ Complaint and, further, for all relief requested in the Third Amended Third-Party Complaint, including any relief over and against the Third-Party Defendant “for all or part of any verdict or judgment that may be recovered by the Plaintiffs directly or indirectly against [Wildevco], together with costs and disbursements herein, as well as for all damages sustained by Wildevco, **including attorneys’ fees and costs**, and for such other and further relief as the Court would deem just and proper.” *Id.* pp. 5-6.

Significantly, at trial, Wildevco presented a detailed fee report as well as witness testimony as to its attorneys’ fees, all without objection by Appellant. June 7, 2016 Trial Tr., pp. 62-68; 73-77. Appellant now contends that it was not in a position to know for certain whether

the trial court would award damages not requested in Wildevco's Complaint and, thus, could not raise an objection to the same; however, this contention is erroneous as no party to a civil action can be certain of a trial court's decision. The proper time for Appellant's objection as to the ability of Wildevco to recover attorneys' fees arrived at trial when Appellant was fully aware and on notice that Wildevco sought attorneys' fees as part of its judgment award in the underlying trial. Appellant failed to object at the proper time; accordingly, this issue is not preserved for appeal.

II. Appellant's designation of the Settlement Agreement in its entirety in Appellant's Designation of Matters on Appeal was improper as only a single section is relevant to Appellant's appeal.

In relation to the confidential Settlement Agreement between Plaintiff and Respondents Wildevco and Fred's, Inc., Appellant's sole argument is that a limited section of the Settlement Agreement acknowledges that Respondents were liable for Plaintiff's injuries. While Wildevco disputes such argument, Wildevco acknowledges that the subject section of the Settlement Agreement on which Plaintiff relies for this narrow argument is appropriate for inclusion in Appellant's Designation of Matters on Appeal; however, Appellant improperly enlarged the scope of its Designation of Matters on Appeal by designating the entire Settlement Agreement, the overwhelming majority of which is wholly irrelevant to Appellant's appeal. As Appellant provides no basis whatsoever to support its argument that the remaining portions of the Settlement Agreement are relevant to the present appeal, this Honorable Court should exclude such portions from the record on appeal.

CONCLUSION

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,



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November 2, 2017

Attorneys for Respondent Wildevco, LLC

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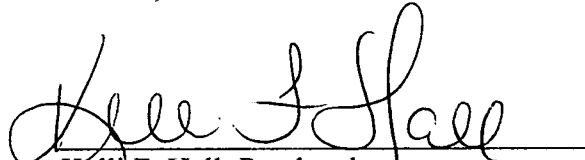
Of Whom Tippins-Polk Construction, Inc. is the Appellant.

CERTIFICATE OF SERVICE

I do hereby certify, on this 2nd day of November, 2017, that a copy of the foregoing
**Respondent Wildevco's Reply to Appellant's Response to Wildevco, LLC's Motion to
Strike Matter and Exclude Matter From Record on Appeal** was served by depositing a copy
of the same in the United States Mail, first-class, postage prepaid, addressed to counsel of record
as follows:

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November 2, 2017

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

Re: *Martha M. Foutain and Curtis Foutain 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 seven (7) copies of Respondent Wildevco, LLC's Reply to Appellant's Response to Wildevco, LLC's Motion to Strike Matter and Exclude Matter From Record on Appeal. 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,

A handwritten signature in black ink that reads 'Kelli'.

Kelli F. Hall
Paralegal

/kfs

Enclosures

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

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