

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

JAN 08 2018

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

Robert F. Berry.....Respondent

vs.

Scott A. Spang, Wells Fargo Clearing Services, LLC,.....Appellants  
f/k/a Wells Fargo Advisors, LLC, Wachovia  
Securities Financial Holdings, LLC, Wells Fargo &  
Company, and Wells Fargo Bank, N.A.

**APPELLANTS' RETURN IN OPPOSITION TO MOTION TO STRIKE**

Scott A. Spang, Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A. (together, the "Wells Fargo Entities") have appealed the trial court's order denying their motion to dismiss or stay this action pending arbitration. As argued below, there are two separate bases for compelling arbitration: (1) the various Forms U4 signed by Robert Berry over the course of employment with various Wells Fargo entities and their predecessors; and (2) the rules of the Financial Industry Regulatory Authority ("FINRA"), which bind Berry as a member. Rather than responding to the Wells Fargo entities' arguments on these points, Berry has filed a motion to strike what he contends are "new, previously unraised below, and additional arguments

and citations.” Motion at 2. Nothing could be further from the truth. The arguments made on appeal are exactly the arguments that were made both in writing and at oral argument below. Namely, that as a regulated member of FINRA, every registered representative is required to agree that any and all disputes with that individual’s firm must be arbitrated. While this agreement is confirmed through each member’s regulatory filings, including the Form U4, the root of these requirements are the FINRA rules to which every member agrees. This was argued at length in the proceedings below.

As a general rule, motions to strike are directed to inclusions of factual matters in an initial brief or designations of matter to be included in the record on appeal that were not presented to the trial court. Jean H. Toal *et al.*, *Appellate Practice in South Carolina* 369 (3d ed. 2016); *see* Rule 210(c), SCACR (“The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal.”). Motions to strike do not go to the merits of the arguments presented by a party, but rather to whether factual matters fall within the universe of materials “presented to the lower court.” *See id.* The cases cited by Berry in his motion are consistent on this point.

On the other hand, Berry’s motion is directed solely to arguments and citations in the initial brief of the Wells Fargo entities and not the designation of matter to be included in the record on appeal. There is no precedent suggesting a party is limited to the same statutory, legal, regulatory or rule citations presented to the trial court. Berry has not presented any such authority, because no such authority exists. The citations of which Berry complains explain and support the application of FINRA Rule 13200 in this case. They do not advance new or different arguments than those raised below.

Contrary to Berry's statement on page 3 of his motion, the Wells Fargo entities' arguments before the trial court were not "based solely upon three (3) Form U4 registration statements." As stated in the introduction to Defendants' Memorandum of Law in Support of Their Motion to Dismiss or Stay Pending Arbitration (Motion at Ex. A):

All of Plaintiff's claims against all Defendants are subject to Plaintiff's U4 agreement executed with Wells Fargo Clearing Services' predecessor in interest and filed with FINRA, signed and dated November 5, 1994 (the "U4") (attached as Exhibit 1). The U4 contains a comprehensive arbitration provision, which provides that all disputes, claims or controversies that arise between Plaintiff and his employer, his customers or other persons must be arbitrated with FINRA. Plaintiff's claims against Defendants are based upon events that occurred during his employment, as well as his termination. This action, therefore, falls within the scope of the arbitration provision agreed to by Plaintiff in the U4.

Moreover, FINRA Rule 13200 specifically requires a dispute to be arbitrated under FINRA's Code if the dispute arises out of the business activities of a member or an associated person, and Plaintiff's claims regarding the end of his employment and breach of his compensation agreement certainly arise out of the business activities of Wells Fargo Clearing Services (formerly Wells Fargo Advisors), Plaintiff, and Scott Spang.

(footnotes omitted); *see also, id.* at 4-9.<sup>1</sup> Thus, even the materials Berry has presented to support his motion show that the motion lacks merit to the extent it is premised on or attempts to bootstrap preservation arguments. There is no question that the Wells Fargo entities argued to the trial court that the FINRA rules require arbitration in this case.<sup>2</sup> The trial court disagreed and denied their motion to compel arbitration, and the Wells Fargo entities appealed. To the extent Berry believes any portion of these arguments is unpreserved, he is welcome to address those matters in his initial brief and the Court can then make its determination, based on its review of all of the parties' arguments and the record on appeal. But a motion to strike what are, at bottom,

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<sup>1</sup> There are additional references that will be present in the full record.

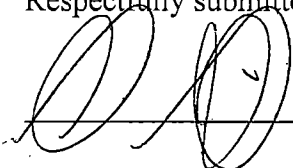
<sup>2</sup> Even the authorities cited by Berry undermine, rather than support, his arguments. In *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998), for example, the court concluded that the subject issues would be considered on the merits because they had been raised, as is the case here, in the proceedings below.

legal arguments supported by SEC and FINRA rules is inappropriate and should be summarily rejected.

With respect to judicial notice, Berry correctly notes that an appellate court may exercise judicial notice in the proper case. Motion at 11. That determination takes place on the merits, not on a motion to strike. Regardless, there is no question that under well-settled authority FINRA rules are subject to judicial notice.

Berry will have every opportunity to respond to these arguments on the merits and to address issues of preservation and judicial notice in his brief; however, a motion to strike is not the means of addressing these concerns and the motion should be denied.

Respectfully submitted,



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N.A., and SCOTT A. SPANG

Date: January 8, 2018

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Company, and Wells Fargo Bank, N.A.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 8th day of January, 2018, caused the forgoing *Return in Opposition to Motion to Strike of Appellants Scott A. Spang, Wells Fargo Clearing Services, LLC, et al.*, to be served via U.S. mail, postage prepaid, on counsel of record at the address shown below:

Mitchell Willoughby  
Elizabeth Zeck  
Chad N. Johnston  
Willoughby & Hoeffler, P.A.  
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SC Court of Appeals

January 8, 2018

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

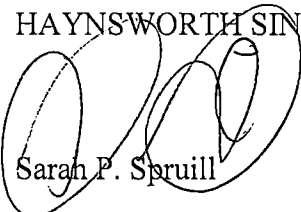
Re: Robert F. Berry v. Scott A. Spang, Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A.  
Appellate Case Number 2017-001690  
HSB File No.: 31686.0261

Dear Ms. Kitchings:

Enclosed herewith for filing is an original and seven (7) copies of the Return in Opposition to Motion to Strike of Appellants Scott A. Spang, Wells Fargo Clearing Services, LLC, et al., regarding the above-referenced case together with the original and one copy of the Proof of Service. Please file the originals and return clocked copies to me via my courier.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.



Sarah P. Spruill

SPS/jmb  
Enclosures

cc: Mitchell Willoughby  
Elizabeth Zeck  
Chad N. Johnston