

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

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Appellate Case No.: 2017-002396
WCC File No.: 1408826

MAY 25 2018
SC Court of Appeals

Gennette Sowell, Employee,Respondent,

v.

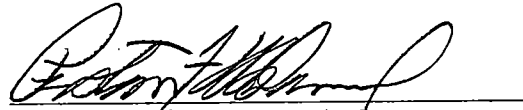
Piggly Wiggly, Employer, and
Auto Owners Insurance, Inc., Carrier,Appellants.

RETURN TO THE MOTION TO STRIKE
AND TO EXTEND TIME FOR THE
SUBMISSION OF THE RECORD ON APPEAL

TO: KENYA C. MILLER and KRISTEN C. BELL, Attorneys for the
Appellants.

YOU WILL PLEASE TAKE NOTICE that by way of Return to the
Motion to Strike and to Extend the Time for the submission of
the Record on Appeal, the Respondent would oppose the Motion for
the reasons as set forth in the Memorandum attached hereto and
incorporated herein by reference.

Respectfully submitted by:



Preston F. McDaniel
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

And

Gerald Malloy
MALLOY LAW FIRM
108 Cargill Way
Hartsville, SC 29551
(843) 339-3000
Attorneys for the Respondent

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Piggly Wiggly, Employer, and
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MEMORANDUM IN SUPPORT OF THE
RETURN TO THE MOTION TO
STRIKE AND TO EXTEND TIME FOR
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By way of Return to the Motion to Strike and to Extend the Time for the Submission of the Record on Appeal, the Respondent would reply as follows:

1. That as is reflected at the Record at the Court, the Appellants previously requested an extension of time to file the Record on Appeal. Thereafter the first notice of objection to the inclusion of the contested items from the Respondent's Designation of Matter to be included in the Record was by email

on Thursday, May 17, 2018 sent at 12:28 p.m. when the Record was due on Monday, May 21, 2018. See Appellant's Exhibit B.

2. That by waiting until the last minute after having requested an extension for the filing of the Record on Appeal and for the reasons set forth in the email to the Respondent that the Appellants "do not believe are material to the appeal," the Appellants failed to give the Respondent a meaningful opportunity to reply. The email clearly evidences a lack of understanding of the Rules and the responsibility of each counsel under Rule 209(c).

3. That the Respondent does not disagree with the recitation by the Appellants to the Rules of Court but contests the factual allegations concerning the Record below which is subject to review by the Court. The Court will find upon review, that at the hearings held in this matter the hearing Commissioner stated in the Record and it is included as part of the Order that "the Commission File with the exception of self-serving declarations and unstipulated medicals is made a part of the Record." Therefore, these items that are contested and sought to be struck from the Record on Appeal and the entire Commission Record were specifically made a part of the Record. There was no contest to any of these matters being self-serving or unstipulated medicals. The contested items are therefore part of the Record before the Workers' Compensation Commission.

4. That in addition to these items being a part of the Record before the South Carolina Workers' Compensation Commission, S.C. Code §1-23-380(4) requires that the Court shall review the Record before the Agency. This statute actually requires upon Appellate review a review of the entire Record before the Agency which thus mandates a review of the Record which in this case included the entire Commission file.

5. That as set forth in Respondent's Statement of the Case and as set forth in Argument III, the Respondent would submit that in the opinion of the Respondent, these matters are material to consideration of the issues raised on appeal. The attorney or attorneys representing the parties are required under the Appellate Court Rules to only submit those items that in their opinion are material to the issues on appeal and as required by Rule 209(c), SCACR, Respondent's counsel submitted a certification that the designation of Respondent contained no matter which was irrelevant to the appeal.

6. That the Appellate Court Rules do not contemplate an unlimited extension of time being granted on the basis that a party charged with the responsibility of filing the Record on Appeal verifiably believes that certain items should be struck from the Record. Instead what the Appellate Court Rules contemplate is that the Appellant and the Respondent shall timely submit their documents including their Initial

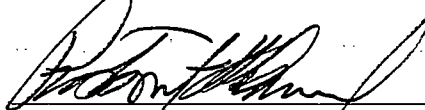
Appellant's Brief, Initial Respondent's Brief and Initial Reply Brief, if one is filed, and shall timely file the Record on Appeal. The Rules further contemplate and under SCACR Rule 240(b) specifically provides that the, "time limits imposed by these rules shall not be stayed by the filing of a motion or petition." SCACR Rule 267(b) specifically provides that a party when submitting a motion shall certify, "that it is not interposed for delay." The Appellants in this case instead of filing the Record on Appeal and filing a motion requesting that the contested items be struck, failed to comply with the Rules and file the Record on Appeal in a timely manner and instead of simultaneously or thereafter filing a Motion to Strike, did not file the Record on Appeal and violated the Rules by asking for an unlimited time delaying the Record on Appeal being filed and this appeal being heard. Thus, shifting the burden to this Court to find the time to Rule.

WHEREFORE having fully responded the Respondent would pray that the Motion to Strike be denied, that the unlimited Motion for an Extension of Time to file the Record on Appeal which was not timely filed pursuant to the Court Rules be denied and since the Record on Appeal was not timely filed that this Court pursuant to SCACR Rule 260(a) dismiss this matter for non-compliance. In that regard, the Respondent would note that this

is not the first time that the Appellants have failed to comply with the Rules of this Court.

Further, in reference to Respondent's prayer for relief, the Respondent would point out that this is a workers' compensation claim which was awarded at all levels before the Workers' Compensation Commission and that the very fundamental purpose of the Workers' Compensation Act is to insure, "swift and sure" benefits to the injured worker. The continued delay defeats the very fundamental purpose of the Act. This Court should not tolerate this blatant disregard for the Rules; this effort to shift responsibility to the Court to rule to prevent delay and this improper procedure which de facto is "interposed" for "delay" and should dismiss this appeal or at a minimum order that the Record be filed and Appellants sanctioned:

Respectfully submitted by:



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And

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Attorneys for the Respondent

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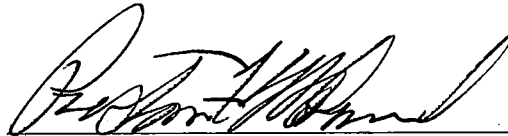
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PROOF OF SERVICE

I certify that I have served the RETURN TO THE MOTION TO STRIKE AND TO EXTEND TIME FOR THE SUBMISSION OF THE RECORD ON APPEAL and MEMORANDUM IN SUPPORT OF THE RETURN TO THE MOTION by depositing a copy of it in the United States Mail, postage prepaid, on May 24, 2018 addressed to:

Kenya C. Miller, Attorney
Kristin C. Bell, Attorney
Dickie, McCamey & Chilcote, PC
P. O. Box 2046
Lancaster, SC 29721

Dated: May 24, 2018



Preston F. McDaniel
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Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

May 24, 2018

Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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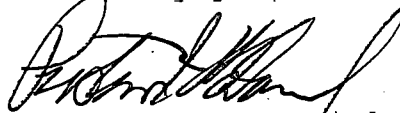
**RE: Gennette Sowell, Employee v. Piggly Wiggly, Employer
And Auto Owners Insurance, Inc., Respondents.
Appellate Case No. 2017-002396**

Dear Ms. Kitchings:

Please find attached the original and seven (7) copies of the **RETURN TO THE MOTION TO STRIKE AND TO EXTEND TIME FOR THE SUBMISSION OF THE RECORD ON APPEAL and MEMORANDUM IN SUPPORT OF THE RETURN TO THE MOTION** in the above-referenced matter. I would appreciate your returning a clocked-in copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter I am hereby serving Counsel of Record with a copy of this document.

Sincerely yours,



Preston F. McDaniel

PFM/abh
Enclosures

cc: Gerald Malloy, Esq. (via email gmalloy@bellsouth.net)
Kenya C. Miller, Atty. (via US Mail)
Kristin C. Bell, Atty. (via US Mail)

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