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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable George M. McFaddin, Jr., Circuit Court Judge

Circuit Court Case No. 2016-CP-40-01699
Appellate Case No.: 2017-002433

Lallie Qualls.....Appellant,

v.

Burlington Coat Factory of South Carolina, LLC
and Burlington Coat Factory Direct Corp.Respondents.

RESPONDENTS' MOTION TO STRIKE APPELLANT'S IMPROPER REVISIONS TO
APPELLANT'S FINAL BRIEF PURSUANT TO RULES 211 AND 208, SCACR

Respondents, Burlington Coat Factory of South Carolina, LLC, and Burlington Coat Factory Direct Corp. (hereinafter referred to as "Respondent"), by and through the undersigned counsel and pursuant to South Carolina Appellate Court Rules 240, 208(4), and 211(b), respectfully request that this Court enter an order striking Appellant's improper revisions to her Final Brief for failure to conform to Rules 208(4) and 211(b), SCACR, and in support thereof state the following:

1. This appeal concerns an order entering summary judgment in favor of the Respondent in an alleged slip-and-fall case filed by the Appellant, Lallie Qualls (hereinafter "Appellant").

2. Time-stamped DVR footage of the incident was captured on Respondent's DVR system and Respondent specifically preserved the 30 minutes before and after Appellant's fall. (R. p. 40-43).
3. In all filings before the lower court, Appellant failed to cite to any specific time-stamped portion of the DVR video footage, and instead simply referred the Court to the one-hour video as a whole, referring to said video as "Def. Ex. 2." *See e.g., Plaintiff's Memorandum in Opposition to Summary Judgment* (R. pp. 48-56).
4. In her Initial Brief before this Court, Appellant again cited to the 1 hour of DVR footage as a whole, and again referred to said video as "Def. Ex. 2." *See* Appellant's Initial Brief, p. 3 (four references to "Def. Ex. 2"), p. 4 (three references to "Def. Ex. 2"), p. 8 (five references to Def. Ex. 2), p. 9 (two references to Def. Ex. 2"), p. 10 (one reference to "Def. Ex. 2"), and p. 14 (one reference to "Def. Ex. 2"); *see* Defendant's Memorandum, (R. p. 49 - three citations to "Def. Ex. 2"), (R. p. 52 - one citation to "Def. Ex. 2").
5. To be clear, Appellant never cited to any specific time stamped portion of the DVR footage in any filing before the lower court, and never did so in her Initial Brief before this Court. Plaintiff used the same non-specific abbreviation (Def. Ex. 2) before both courts.
6. In Respondent's Initial Brief, Respondent argued that Appellant's failure to delineate the specific time of the footage she is referring to, constituted a failure to comply with the **procedural prerequisites** of Rule 56(e), SCRCF, which provides that a nonmovant to a motion for summary judgment "must set forth specific facts showing there is a genuine issue for trial". Rule 56(e), SCRCF.

7. On August 22, 2018, having had the opportunity to review Respondent’s argument as raised in Respondent’s Initial Brief, Appellant filed her Final Brief wherein, for the first time, she inserted time-specific citations to the DVR footage in place of her general citations to “Def. Ex. 2”. (App. Final Brief, p. 3, ¶2)¹, (App. Final Brief, p. 4, ¶1)², (App. Final Brief, p. 8, ¶1-2)³, (App. Final Brief, p. 9, ¶1)⁴, (App. Final Brief, p. 10, ¶1)⁵, (App. Final Brief, p. 14, ¶3)⁶.
8. By way of example Appellant wrote the following in her Initial Brief:

“Surveillance footage also clearly shows these patrons conspicuously altered their paths or took exaggerated steps to avoid the spill. (Def. Ex. 2).”

(App. Initial Brief, p. 4).⁷ However, in Appellant’s Final Brief, Appellant wrote:

“Surveillance footage also clearly shows these patrons conspicuously altered their paths or took exaggerated steps to avoid the spill. (R. p. 40, timestamps 26:39, 28:04, 29:53).”

(App. Final Brief, p. 4).

9. Appellant never directed the lower court to pause the DVR footage at timestamps 26:39, 28:04, 29:53; instead, Appellant advised the lower court to see “Def. Ex. 2”.

¹ Appellant seeks an order striking the following citations on page 3 of Appellant’s Final Brief: (R. p. 40, timestamp 25-30-32:00), (R. p. 40, timestamp 0:00-29:05), (R. p. 40, timestamp 23:37-29:05), (R. p. 40, timestamp 25:35).

² Appellant seeks an order striking the following citations on page 4 of Appellant’s Final Brief: (R. p. 40, timestamp 25:45), (R. p. 40, timestamps 26:39, 28:04, 29:53), (R. p. 40, timestamps 26:39, 28:04, 29:53).

³ Appellant seeks an order striking the following citations on page 8 of Appellant’s Final Brief: (R. p. 40, timestamp 25-:35), (R. p. 40, timestamps 26:39, 28:04, 29:53), (R. p. 40; timestamp 25:35), (R. p. 40; timestamp 25:35-25:45), (R. p. 40; timestamp 29:05-29:15).

⁴ Appellant seeks an order striking the following citations on page 9 of Appellant’s Final Brief: (R. p. 40, timestamp 29:12-29:15).

⁵ Appellant seeks an order striking the following citations on page 10 of Appellant’s Final Brief: (R. p. 40, timestamps 26:39, 28:04, 29:53).

⁶ Appellant seeks an order striking the following citations on page 14 of Appellant’s Final Brief: (R. p.40, timestamps 26:39, 28:04, 29:53).

⁷ In her Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment, Appellant wrote: “Between the time the spill occurred and the time Ms. Qualls fell, at least three customers noticed the spill when passing by and conspicuously altered their paths or took exaggerated steps to avoid the spill Def. Ex. 2)”. (R. p. 49).

Appellant never directed the lower court's attention to these particular times during the sixty-minute video. Moreover, Appellant never apprised the Respondent by way of citation in her Initial Brief, that she intended this Court to review the DVR footage at the specific moments of 26:39, 28:04, 29:53.

10. Rule 208(4), SCACR, states in pertinent part that: “[t]he [initial] brief **shall** contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal (see Rule 210(c)) to support the salient facts alleged ... In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. After the Record on Appeal is prepared, these references shall be revised as provided by Rule 211(b)(1).” Rule 208(4), SCACR (emphasis added).

11. Rule 211(b), SCACR, states:

“[t]he final brief(s) shall be identical to the brief(s) previously served under Rule 208, except for the following:

(1) **References to the Record.** The references in the initial brief shall be revised to indicate **where the material appears in the Record on Appeal.** These revised references may be in place of or in addition to the initial references, and shall be in the form indicated by the following examples: (R. p. 15, line 4) (R. p. 75, lines 8-20) (R. p. 90, line 1-p. 101, line 14) (R. pp. 29-31).

(2) **Correction of Typographical Errors and Misspellings.** The party may correct obvious typographical errors and misspellings which were contained in the initial brief. **No other changes may be made.**

Rule 211(b), SCACR (emphasis added).

12. Appellant's choice to include timestamp citations to the DVR footage after filing her Initial Brief, and after she failed to raise such specific timestamp citations

before the lower court, constitutes a failure to conform to Rules 208(4) and 211(b), SCACR.


13. Appellant's citations in her Final Brief are not revised references to indicate *where the material appears* in the Record on Appeal. Instead, Appellant has attempted to retroactively revise Appellant's presentation of the evidence. This is especially significant since the order being appealed is an entry of summary judgment pursuant to Rule 56, SCRCR, which requires nonmovants to set forth specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCR.
14. Numerous federal circuit courts have held that in the context of a motion for summary judgment and Rule 56(e), failure to cite to the page and line numbers when referring to a deposition transcript constitutes a defect warranting exclusion of the evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002) (holding that "[t]he efficient management of judicial business mandates that parties submit evidence responsibly" and "when a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence"); *see also Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) ("[J]udges need not paw over the files without assistance from the parties."); *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (parties must designate specific facts and their location in the record when relying on deposition testimony).
15. Appellant's retroactive inclusion of specific time-stamps in her Final Brief will likely result in confusion when this Court considers the aforementioned procedural

argument raised in Respondent's Final Brief. In short, this violation of Rule 211, will prejudice Respondent.

16. Additionally, by waiting until the Final Briefs stage of the appellate process to insert these specific citations to the sixty-minute video, Appellant has denied Respondent an opportunity to respond to her argument concerning these specific DVR timestamps.

WHEREFORE, the Respondent respectfully requests that this Court grant an order striking Appellant's improper revisions to her citations to the DVR footage in her Final Brief, and for all other relief the court deems just and appropriate.

Respectfully submitted,



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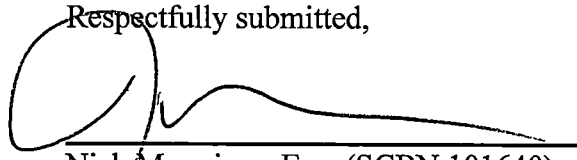
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PROOF OF SERVICE

I certify that I have served a true copy of "Respondents' Motion to Strike Appellant's Improper Revisions to Appellant's Final Brief Pursuant to Rules 211 and 208, SCACR" by mailing a copy of same, via U.S. Mail, on September 10, 2018 to the following:

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Respectfully submitted,



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