

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
OCT 01 2018
SC Court of Appeals

Appellate Case No.: 2017-002433

Lallie Qualls.....Appellant,

v.

Burlington Coat Factory of South Carolina, LLC and
Burlington Coat Factory Direct CorpRespondents,

**APPELLANT’S RETURN TO RESPONDENTS’ MOTION TO STRIKE
APPELLANT’S IMPROPER REVISIONS TO APPELLANT’S FINAL BRIEF**

Appellant Lallie Qualls (“Ms. Qualls”) hereby responds to Respondents’ Motion to Strike Appellant’s Improper Revisions to Appellant’s Final Brief (hereinafter, “Motion to Strike”). Respondents Burlington Coat Factory of South Carolina, LLC and Burlington Coat Factory Direct Corp. (collectively, “Burlington”) assert that the timestamp citations¹ Ms. Qualls included in her Final Brief should be stricken because they were not included in her Initial Brief. Ms. Qualls will respond to each of Burlington’s arguments in turn.

Burlington claims that Ms. Qualls’ “choice to include timestamp citations to the DVR footage after filing her Initial Brief” and failure “to raise such specific timestamp citations before

¹ The Record on Appeal includes a surveillance video, which captured Ms. Qualls falling at Burlington Coat Factory and injuring her knee. Burlington does not assert that the video is improperly included in the Record on Appeal.

the lower court constitutes a failure to conform to Rules 208(4) [sic]² and 211(b).” (Motion to Strike ¶ 12). First, Ms. Qualls submissions to the lower court cannot, by definition, constitute a failure to comply with the Appellate Court Rules. These rules do not apply until a case is on appeal. See Rule 101(a), SCACR. Second, Ms. Qualls conformed with Rules 208(b)(4) and 211(b), SCACR, in filing her initial and final briefs. Rule 208(b)(4) requires that citations in initial briefs be made to the “page of the material to be referenced; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231;” whereas Rule 211(b)(1) requires the citations in final briefs to “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).” (emphasis added). As is clear from the examples given, it is appropriate to cite to page numbers the initial briefs and add references to more specific line or paragraph numbers in the final briefs, which is exactly what Ms. Qualls did. For example, the citation “(Pl. Depo. p. 19)” in Appellant’s Initial Brief became “(R. p. 117, lines 6-12)” in Appellant’s Final Brief. (App. Br. p. 3). In the same vein, Ms. Qualls cited to the video in her initial briefs and added the more specific timestamps in her final briefs. These citation changes are the type specifically contemplated by the rules.

Next, Burlington claims that Ms. Qualls “attempted to retroactively revise [her] presentation of the evidence,” which 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.” (Motion to Strike, ¶ 13). This argument is without merit. This Court must decide whether Ms. Qualls set presented to the trial court specific facts showing a genuine issue for trial. The Record on Appeal shows exactly what Ms. Qualls presented to the trial court, without any alteration. Ms. Qualls did not and cannot

² It appears that Burlington intended to refer to subsection (b)(4) of Rule 208.

“present evidence” in her Initial Brief, and therefore, adding more specific citations to Appellant’s Final Brief cannot “retroactively revise [her] presentation of the evidence.” Further, Ms. Qualls’ Final Brief did not point to any additional facts that were not included in the Initial Brief; it only provided more specific citations.

Third, Burlington argues that, in the context of a motion for summary judgment, “failure to cite to the page and line numbers when referring to a deposition transcript constitutes a defect warranting exclusion of the evidence.” (Motion to Strike, ¶ 14). Although not clear, Burlington is presumably arguing that Ms. Qualls’ failure to cite to timestamps in her Initial Brief warrants this court’s refusal to consider the information to which she was citing, i.e., the surveillance video. This argument is flawed because (a) Burlington also relies on the surveillance video in support of its arguments,³ so the evidence cannot be excluded; (b) the trial court considered the video in deciding the Motion for Summary Judgment without objection from either party (R. pp. 83-97); and (c) the cases to which Burlington cites in support of this argument (paragraph 14) are clearly distinguishable. The primary reason the cases Burlington cites are inapplicable in this case is that they discuss what a trial court must consider in deciding a motion for summary judgment, not what an appellate court should consider when deciding an appeal. They are also distinguishable because the parties’ failures in those cases are not analogous to Ms. Qualls’ failure to provide a precise timestamp for something that occurred in a five-minute timeframe on a video.

³ In *Orr v. Bank of Am., NT & SA*, 285 F.3d 764 (9th Cir. 2002), one of the cases Burlington cites in support of its argument, the court held that the trial judge “manifestly erred” in excluding deposition testimony submitted by the non-moving party when the same deposition was properly relied upon by the moving party. *Id.* at 776.

In *Orr v. Bank of America*, the plaintiff submitted at least twenty-five exhibits in opposition to a motion for summary judgment filed against him, many of which contained unauthenticated testimony or even failed to identify the person whose testimony was contained in the exhibit, and then failed to cite to page or line numbers in supporting his argument. The court held that the trial judge was justified in deciding to exclude the testimony. *Id.* at 774-76. In *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir. 1988), the plaintiff, in responding to a motion for summary judgment, “designate[d] no specific facts to which she testifie[d] in her first deposition—her only deposition of record at the time the court below ruled on [the] motion—that would support her version of this case.” *Id.* at 1307. The court excluded evidence that was not “before the lower court at the time the ruling was made.” *Id.* In *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084 (7th Cir. 1999), the defendant filed a motion for summary judgment, and the plaintiff did not file any response. *Id.* at 1085. After the court *sua sponte* extended the deadline to respond and contacted the lawyer, the plaintiff submitted an affidavit/brief that “in many respects, did not address [defendant’s] submissions at all,” and the court held that “judges need not paw over the files” to find evidence of an issue of material fact. *Id.* These cases are a far cry from standing for the proposition that specific citations must be stricken from an appellate brief for failure to include them in the initial brief. The cases deal with very different scenarios than the one present in this case, and they are not persuasive on this issue.

Fourth, Burlington argues that Ms. Qualls’ “failure to delineate the specific time of the footage she [referred] to, [sic] constituted a failure to comply with the procedural prerequisites of Rule 56(e), SCRPC,” and inclusion of timestamps in Appellant’s Final Brief “will likely result in confusion when this Court considers the aforementioned procedural argument raised in

Respondent's Final Brief." (Motion to Strike, ¶¶ 6, 15). Ms. Qualls' failure to include timestamp citations in her Initial Brief cannot constitute a failure to comply with the procedure set forth in Rule 56(e), SCRCP. The standard set forth in Rule 56(e), SCRCP applies to the proceedings before the trial court, and nothing Ms. Qualls did or did not do in her Initial Brief has any effect on her meeting that standard. Further, even if Burlington has a valid argument, the Court is capable of understanding Burlington's argument without the need to strike Ms. Qualls' citations. The citations are included for the convenience of the Court, and as previously set forth, Ms. Qualls added the timestamps in compliance with the Appellate Court Rules.

Fifth, Burlington argues that Ms. Qualls "denied [Burlington] an opportunity to respond to her argument concerning these specific DVR timestamps." (Motion to Strike, ¶ 16). Burlington was denied no such opportunity. In Burlington's Motion for Summary Judgment, it establishes that the drink was spilled at timestamp 25:35, and Ms. Qualls falls at timestamp 30:00. (R. p. 31-32).⁴ In opposition to Burlington's Motion for Summary Judgment, Ms. Qualls stated, "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." (R. p. 49). Ms. Qualls also indicated that after the customers who spilled the drink left the store but before Ms. Qualls fell, the Burlington employee, Ms. Simon, walked within inches of the spill and even looked toward it. (R. p. 49). It is clear from the record that these things occurred in the less-than-five-minute time frame between the drink being spilled and Ms. Qualls' fall. Further, Ms. Qualls sets forth in her brief that "video surveillance confirms that between the time the spill occurred and the time Ms. Qualls fell, at least three customers noticed the spill when passing by it," (App. Br. p. 4) arguing that these customers' actions were evidence

⁴ Burlington filed a copy of the video with the trial court, and it is properly included in the Record on Appeal. (R. p. 43).

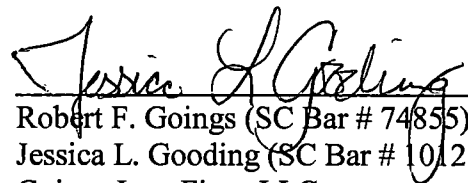
that the spill was visible and/or noticeable to passers by (App. Br. pp. 8, 10). Ms. Qualls' arguments are unchanged by the addition of timestamp citations. Because Ms. Qualls' arguments are plainly set forth and the relevant portion of the video is limited and clearly established, Burlington's assertion that it was somehow prejudiced by Plaintiff's addition of timestamps is disingenuous.

CONCLUSION

Burlington has provided no compelling reason or authority indicating that the citations in Ms. Qualls' Final Brief should be stricken. Ms. Qualls included the timestamps for the Court's convenience in compliance with all applicable rules. For all the reasons stated herein, Burlington's Motion to Strike Appellant's Improper Revisions to Appellant's Final Brief Pursuant to Rules 211 and 208, SCACR should be denied.

Respectfully submitted,

By:



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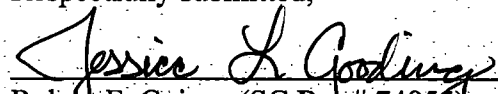
PROOF OF SERVICE

I certify that I have served Appellant's Motion for Extension to File Return to Respondents' Motion to Strike Appellant's Improper Revisions to Appellant's Final Brief on Respondents by mailing a copy of the same, via United States Mail, on October 1, 2018 to the following:

Nicholas D. Mermiges, Esquire
Law Office of Nick Mermiges LLC
1720 Main Street, #202
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Respectfully submitted,

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VIA HAND-DELIVERY

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

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SC Court of Appeals

Re: Lallie Qualls v. Burlington Coat Factory of South Carolina, LLC and Burlington
Coat Factory Direct Corp.
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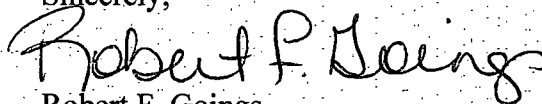
Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Appellant's Return to Respondents' Motion to Strike Appellant's Improper Revisions to Appellant's Final Brief in the above-referenced matter.

By copy of this letter, a copy of same is being forwarded for service upon counsel for Respondents.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


Robert F. Goings

RFG:lcc

Enclosures

cc: Nicholas D. Mermiges, Esquire