

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

---

**RECEIVED**  
OCT 05 2018  
SC Court of Appeals

Lallie Qualls.....Appellant,

v.

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

---

RESPONDENTS' REPLY TO APPELLANT'S RETURN TO  
RESPONDENTS' MOTION TO STRIKE

---

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(b)(4), and 211(b), hereby reply to Appellant's Return to Respondent's Motion to Strike Appellant's Improper Revisions to Appellant's Final Brief.

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. The DVR footage is sixty minutes in duration. (R. p. 43).
4. Before the lower court **and** in her Initial Brief filed with this Court, Appellant cited to the DVR footage in its entirety as “Def. Ex. 2” to support her various arguments, instead of identifying a specific time-stamp on the sixty-minute DVR footage. *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. Upon receipt of Appellant’s Initial Brief, Respondent raised the *alternative* argument pursuant to Rule 56(e), SCRCPP, that entry of summary judgment was appropriate in this case because Appellant failed to meet her procedural evidentiary burden before the trial court. (Respondent’s Initial Brief, pp. 18-19, p. 24, and pp. 34-35). Specifically, Respondent argued that Appellant’s failure, before the trial court, to delineate the specific time of the footage she was referring to, by way of the minute or second, constituted a failure to comply with Rule 56(e), SCRCPP, 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), SCRCPP.
6. Appellant responded to that argument by retroactively changing the nature of her citations in her Final Brief. In her Final Brief, for the first time, she inserted time-specific citations to the exact second and minute of the DVR footage in place of her general citations to “Def. Ex. 2”. (App. Final Brief, p. 3, ¶2)<sup>1</sup>, (App. Final Brief, p. 4,

---

<sup>1</sup> Respondent 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).

¶1)<sup>2</sup>, (App. Final Brief, p. 8, ¶1-2)<sup>3</sup>, (App. Final Brief, p. 9, ¶1)<sup>4</sup>, (App. Final Brief, p. 10, ¶1)<sup>5</sup>, (App. Final Brief, p. 14, ¶3)<sup>6</sup>.

7. 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).

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).

8. For the first time, in her Final Brief, Appellant broke down the DVR footage second by second, and cited to specific moments in the video to support her proposition that specific facts existed creating a genuine issue for trial. Her motivation for making these changes was clearly to rebut Respondent’s alternative argument (made in Respondent’s Initial Brief) that Appellant did not, at the lower court level, meet her procedural evidentiary burden pursuant to Rule 56(e), SCRCP.
9. Appellant never argued to the lower court that these specific portions of the video created a material issue of fact. Further, Appellant did not identify any precise moments in the DVR footage in her Initial Brief. She waited until Respondent’s

---

<sup>2</sup> Respondent 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).

<sup>3</sup> Respondent 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).

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

<sup>5</sup> Respondent 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).

<sup>6</sup> Respondent 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).

Initial Brief was locked-in to change her presentation of the evidence. As discussed in detail in Respondent’s Motion to Strike, this type of gamesmanship is not permitted by Rules 208(b)(4) and 211(b), SCACR.

10. Moreover, “[u]nder the present rules, a respondent- the “winner” in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court ... **in contrast, different preservation rules apply to an appellant**—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record.” *I’ON, LLC v. Town of Mt. Pleasant*, 526 S.E.2d 716, 338 S.C. 406, 419-422 (2000) [emphasis added]. “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Id* at 422 [internal citations omitted].
11. “The requirement also serves as a keen incentive **for a party to prepare a case thoroughly**. It prevents a party from keeping an ace card up his sleeve— intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, **give him another opportunity to prove his case.**” *I’ON, LLC v. Town of Mt. Pleasant*, 526 S.E.2d 716, 338 S.C. 406 at 422 (2000) [emphasis added].
12. Appellant’s decision to include new citations to precise moments in the DVR footage during the Final Briefs stage of an appeal is especially problematic because not only is an appellant bound by the record when appealing an order; but also, within the context of summary judgment, a non-movant to a summary judgment motion has a burden at

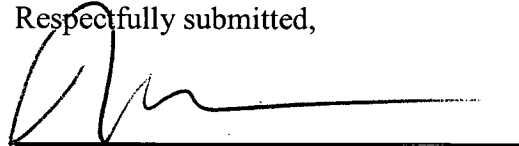
the trial court level to present **specific facts showing there is a genuine issue for trial pursuant to Rule 56(e), SCRCP.**

13. At the lower court level, Appellant essentially asked the trial judge to view the **entire** video in real time. She did not break down the video and focus the Court's attention on any one particular moment. Similarly, in her Initial Brief, Appellant directed Respondent to view the **entire** video in real time. However, in her Final Brief, Appellant specifically encourages this Court to pause, slow down, and review specific seconds of the DVR footage. Appellant is retroactively revising her presentation of the evidence.
14. By retroactively changing her citations to the video footage in her Final Brief, Appellant essentially argues, for the first time, that the lower court erred in failing to properly weigh these specific portions of the DVR video footage; however, Respondent never presented these specific portions of the DVR video footage to the lower court.
15. This Court should not allow Appellant to attempt to rectify her failure to comply with Rule 56(e) on appeal, when she failed to meet her burden before the lower court.
16. Moreover, by waiting until the Final Briefs stage to present this specific view of the evidence, Appellant denied the Respondent any meaningful opportunity to respond to Appellant's specific time-stamped citations since Respondent is bound by Rules 208(b)(4) and 211(b), SCACR.
17. Appellant's changes to her Final Brief went beyond what is permitted by the final brief rule. *See* Rule 211(b)(1) and (2), SCRCP (stating in pertinent part: "[t]he references in the initial brief shall be revised to indicate where the material appears in the Record on Appeal" and "[n]o other changes may be made"). Further, including this new

information for the first time in her Final Brief renders Respondent's Rule 56(e) argument confusing. It also constitutes a new argument that was never actually raised before the lower court -- that the court erred by failing to properly weigh these specific portions of the DVR footage, even though these specific portions of the DVR footage were never identified to the lower court.

WHEREFORE, the Respondent respectfully requests that this Court grant an order, pursuant to Rules 208(b)(4) and 211(b), SCACR, striking Appellant's improper revisions to her citations to the DVR footage such that Appellant is bound by her original citations to the DVR footage as "Def. Ex. 2" as set forth in her Initial Brief, and for all other relief the court deems just and appropriate.

Respectfully submitted,



Nick Mermiges, Esq. (SCBN 101640)  
Jaime McSweeney, Esq. (SCBN 101639)  
Law Office of Nick Mermiges, LCC  
Attorneys for Respondents  
1720 Main St., Suite 202  
Columbia, SC 29201  
803-724-1258

DATE: October 5, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM RICHLAND COUNTY

OCT 05 2018

Court of Common Pleas

Honorable George M. McFaddin, Jr., Circuit Court Judge

**SC Court of Appeals**

Circuit Court Case No. 2016-CP-40-01699

Appellate Case No.: 2017-002433

Lallie Qualls.....Appellant,

v.

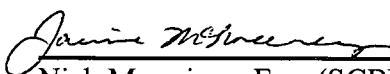
Burlington Coat Factory of South Carolina, LLC  
and Burlington Coat Factory Direct Corp. ....Respondents.

PROOF OF SERVICE

I certify that I have served a true copy of "Respondents' Reply to Appellant's Return to Respondent's Motion to Strike" by hand-delivery of a copy of same on October 5, 2018 to the following:

Robert F. Goings, Esq.  
Jessica L. Gooding, Esq.  
The Goings Law Firm  
1510 Calhoun Street  
Columbia, SC 29201

Respectfully submitted,

  
\_\_\_\_\_  
Nick Mermiges, Esq. (SCBN 101640)  
Jaime McSweeney, Esq. (SCBN 101639)  
Law Office of Nick Mermiges, LCC  
*Attorneys for Respondents*  
1720 Main St., Suite 202  
Columbia, SC 29201  
Phone: 803-724-1258  
Nick@NDMLaw.com  
mcsweeney@NDMLaw.com

DATE: October 5, 2018  
Columbia, SC