

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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AUG 12 2019

Jocelyn Newman, Circuit Court Judge

SC Court of Appeals

Case No. 2018-002095

Jeanne Knollinger,

Appellant,

v.

Ryan Noel Oliver,

Respondent.

**APPELLANT'S RETURN TO RESPONDENT'S MOTION TO STRIKE PORTIONS OF
APPELLANT'S DESIGNATED MATTER IN THE RECORD ON APPEAL**

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Appellant hereby responds to Respondent's Motion to Strike Portions of Appellant's Designated Matter in the Record on Appeal and requests that this Court deny the same.

NATURE OF THE CASE

This appeal arises from a defense verdict from a motor vehicle collision trial in which Appellant submits that the trial court erred in prohibiting the introduction of certain evidence. At the time of the collision, Respondent was operating a vehicle owned by Enterprise Leasing Company – Southeast, LLC d/b/a Enterprise Rent-A-Car (herein referred to as "Enterprise"). At the scene of the collision, both Appellant and Respondent testified in their respective depositions that they heard an unknown witness state that Respondent had pulled out in front of Appellant.

Appellant filed suit against Enterprise and Respondent. Enterprise asserted a counterclaim against Appellant in which separate counsel was retained on behalf of Appellant. Over the course of nearly a year and a half the parties engaged in discovery. Months after Respondent's deposition had been taken, at the 30(b)(6) deposition of Enterprise, counsel for Respondent and Enterprise produced an accident report from Enterprise that stated Respondent "was involved in an accident and pulled out in front of a car and was struck on the drivers [sic] side of the box." The 30(b)(6) witness also confirmed that Enterprise would have sued Respondent for damage as well but were unable to do so because Respondent signed a damage waiver with Enterprise. Appellant took the *de bene esse* deposition of the Enterprise employee, Tyler Thiede, who took the report from Respondent, and confirmed that the information in the report came from Respondent himself. Later, well over a year after filing its counterclaim, counsel for Respondent and Enterprise voluntarily dismissed its counterclaim against Appellant after Appellant declined to consent to a South Carolina Rule of Civil Procedure Rule 40(j) dismissal with leave to restore.

Over the course of the litigation, several court hearings transpired regarding motions to compel and motions for summary judgment. Respondent sought to exclude at trial the above-referenced Enterprise accident report, testimony from Enterprise employees, including the above-referenced *de bene esse* deponent, testimony regarding the unknown witness' statement concerning how the accident occurred, and testimony regarding Enterprise's counterclaim. The trial court issued a final ruling granting Respondent's requests. The jury later returned a defense verdict. This appeal followed.

ARGUMENT

This Court should deny Respondent's request to strike numerous portions of Appellant's Designation of Matter to be included on the Record on Appeal.¹ Rule 210, S.C.A.C.R., states that "[t]he 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." Further, this court requires a statement of a case that:

. . . shall contain a *concise history* of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and *shall contain, as a minimum*, the following information: the date of the commencement of the action or matter; *the nature of the action or matter; the nature of the defense or of the response*; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of service of the notice of appeal; *[and] the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal.* . . . S.C.A.C.R. 208(b)(1)(C) (emphasis added).

From the outset, Respondent is unexplainably requesting this Court to exclude the following documents actually filed with the lower court regarding this action:

6. Enterprise's Motion for Summary Judgment filed October 11, 2017
7. Enterprise's Memorandum in Support of Summary Judgment filed December 6, 2017
8. Appellant's Motion for Partial Summary Judgment filed November 27, 2017
9. Appellant's Memorandum in Support of Summary Judgment filed December 14, 2017
10. Form 4 Order filed December 20, 2017
11. Order filed January 26, 2018
12. Stipulation of Dismissal filed March 19, 2018
13. Stipulation of Dismissal filed August 31, 2018

¹ Appellant would consent to the striking of the emails between counsel. However, in order to properly inform the court of the entire progression of the case, Appellant would argue that she should be permitted to state that the counterclaim against Appellant was voluntarily dismissed after Appellant refused to consent to a Rule 40(j) dismissal.

The above referenced filings were undeniably presented to the lower court and entered into the record. In addition, given the complexity of the progression of the litigation and the parties, Appellant submits that such documents would better explain the nature of the appeal, and “throw light upon the questions involved in the appeal.” *Id.* Indeed, after nearly a year and a half of discovery and motions and with a current and former party voluntarily dismissing claims against one another, such filings are certainly helpful for this Court in knowing how the case got to this point. Accordingly, Respondent’s Motion to Strike Appellant’s Designation of Matter to be Included in the Record on Appeal Numbers 6-13 should be denied.

Respondent also wishes this Court to strike its’ Response to Appellant’s First Requests for Admission. Specifically, Respondent seeks to strike reference to an admission by the Respondent as to the genuineness and authenticity of the Enterprise report in question. South Carolina Rule of Civil Procedure 36 states that “[a]ny matter admitted under this rule *is conclusively established.* . . .” (emphasis added). What Respondent is attempting to do is to prevent the inclusion of a matter he actually admitted to during the course of this action. Appellant submits that such admissions, should be considered like a pleading and accordingly, requests this Court to deny the Respondent’s Motion to Strike the same.

Regarding the *de bene esse* Deposition of Tyler Thiede, Appellant summarized the deponent’s testimony before the lower court. *See* Trial Transcript pp. 23-24. Specifically, the majority of the testimony was that the substance of the above-referenced Enterprise report came directly from Respondent and “that it was a fair and accurate representation of what [Respondent] told him.” Trial Transcript p. 23. While the transcript was not read word for word before the lower court issued its final ruling excluding the same (immediately after Appellant’s argument), Appellant succinctly described its contents and accordingly, presented the matter

where it should be permitted to be part of the record on appeal. Therefore, Appellant requests that Respondent's Motion be denied.

In Respondent's Motion, his argument appears to rely on allegations that "[b]ecause Appellant never made a proffer of the excluded evidence, Appellant is barred from asking this court to consider it[.]" and also that because the trial court ruled upon these matters *in limine*, this Court cannot consider it. *See* Respondent's Motion to Strike. While Respondent is correct that normally a motion *in limine* is not a final determination of a matter, there are exceptions to this rule "when the trial court's ruling is not preliminary, but *instead is clearly a final ruling*, [and] there is no need to renew the objection." *State v. Wiles*, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009) (citing *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001) and *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995)); *see also State v. Atieh*, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012) (acknowledging *State v. Wiles*). Moreover, the rule regarding being barred from considering excluded evidence that was not proffered "has been relaxed where the appellate court is able to determine from the record what the testimony was intended to show and that the prejudice clearly exists." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) (citing *State v. Jenkins*, 322 S.C. 360, 367, 474 S.E.2d 812, 816 (Ct. App. 1996)).

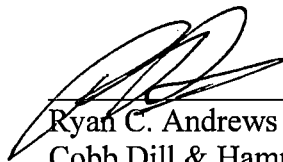
The record in this case undeniably indicates that the trial court issued a final ruling regarding the exclusion of the Enterprise accident report, testimony of Enterprise witnesses, testimony of the unknown witness, and testimony concerning the counterclaim. When ruling about the Enterprise report and *de bene esse* deposition, Appellant sought a final judgment by requesting that "[a]t the very least [Counsel] should be able to impeach [Respondent] [with the Enterprise Report]" to which the court replied, "it's not [Respondent's] statement, that's hearsay,

and it is excluded.” Trial Transcript p. 24. Regarding excluding evidence from other Enterprise witnesses and its counterclaim, the court issued a final ruling by stating it does not “see what any Enterprise witnesses have anything to do with whether this gentleman is at fault. . .so for those reasons, the Motion in Limine is—to exclude those things is granted. . .so no mention of Enterprise. . . I mean maybe an ancillary mention that he got the car from Enterprise. . .but no discussion of Enterprise’s investigation or claims or counterclaims or anything like that.” Trial Transcript pp. 24 & 26-27. With the excluded testimony regarding the unknown witness’ statements, the court issued a final ruling by stating that “it has to be excluded too. You don’t know who the person is. You – no one knows who the person is. There’s no indication of reliability, which is what the Rules of Evidence are there to guard against.” Trial Transcript p. 28. Additionally, Appellant succinctly informed the court of the expected testimony regarding the excluded evidence, by quoting verbatim and summarizing previous testimony and documents produced during the course of depositions and discovery—a majority of which were previously filed with the court. Accordingly, Respondent’s argument that this court should not consider any of these matters because the evidence was ruled upon in a Motion in *Limine* and not proffered is unavailing and accordingly, this court should deny his motion.

For the foregoing reasons, Appellant respectfully requests this Court deny Respondent’s Motion to Strike Portions of Appellant’s Designated Matter in the Record on Appeal.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



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ATTORNEY FOR APPELLANT

August 8, 2019
Mt. Pleasant, South Carolina

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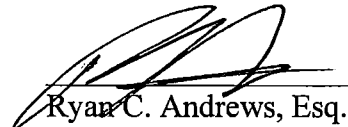
AUG 12 2019

SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned hereby certifies Appellant's Return to Respondent's Motion to Strike Portions of Appellant's Designated Matter in the Record on Appeal regarding the above-referenced case has been served upon all parties to this matter this 8th day of August 2019, by depositing a true copy of the same by electronic mail and U.S. Mail, proper postage prepaid, addressed to counsel as follows:

Langdon Cheves III
Sarah Day Hurley
Turner Padget Graham & Laney, PA
PO Box 1509
Greenville, SC 29602



Ryan C. Andrews, Esq.



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August 8, 2019

SENT VIA FIRST CLASS MAIL

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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AUG 12 2019
SC Court of Appeals

Re: *Jeanne Knollinger v. Ryan Noel Oliver*
Appellate Case No.: 2018-002095

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of Appellant's Return to Respondent's Motion to Strike Portions of Appellant's Designated Matter in the Record on Appeal. Please file the original, six (6) copies, and return a clocked copy in the envelope provided. Thank you very much and should you have any questions concerning the matter, please do not hesitate to contact me.

Sincerely,

Ryan C. Andrews
Enclosures

Cc: Langdon Cheves III (w/ enclosures)

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&H HAMMETT, LLC
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MT. PLEASANT, SC 29464

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