

STATE OF MICHIGAN
IN THE COURT OF APPEALS

GUY BOYD,
Plaintiff-Appellee,

vs.

NOT AN LLC d/b/a JSD SUPPLY,
Defendant-Appellant,

And KYLE THUEME,
Defendant.

Court of Appeals No. 372372
Lower Court Case No. 2024-000304-NP
22nd Circuit Court Washtenaw County

CIVIL-CRIMINAL LITIGATION CLINIC By: David Santacroce (P61367) Attorney for Plaintiff 863 Legal Research Building 801 Monroe Street Ann Arbor, MI 48109-1215 (734) 763-4319	PENTIUK, COUVREUR & KOBILJAK, P.C. By: Kerry L. Morgan (P32645) And Randall A. Pentiuk (P32556) Attorneys for Defendant/Appellant Not an LLC d/b/ JSD Supply, Only 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100 kmorgan@pck-law.com rpentiuk@pck-law.com
BLOCH & WHITE LLP Benjamin White Counsel for Plaintiff – Pro Hac Vice 152 West 57 th Street New York, NY 10019 (212) 702-8670 (Main) (646) 780-8052 (Direct)	The Law Firm of William Amadeo William Amadeo (P76194) Attorney for Defendant Kyle Thueme 3913 Jackson Road Ann Arbor, MI 48103 (609) 816-9438

APPELLANT NOT AN LLC d/b/a JSD SUPPLY’S MOTION TO STRIKE
APPELLEE GUY BOYD’S NON-CONFORMING REPLY BRIEF

Appellant Not an LLC d/b/a JSD Supply (“JSD”) respectfully moves this Court pursuant to MCR 7.211(A) and MCR 7.212(I) for entry of an order striking Appellee Guy Boyd’s (“Boyd”) non-conforming Reply Brief for the following reasons:

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A. Procedural History

1. On September 6, 2024, JSD filed its Application for Leave to Appeal which was granted by this Court on March 17, 2025.

2. On April 4, 2024, Boyd filed a Claim of Cross-Appeal.

3. JSD and Boyd then filed various appellate briefs, including Boyd's non-conforming Reply Brief which was filed on September 5, 2025.

B. Boyd's Non-Conforming Reply Brief Should Be Stricken Because It Impermissibly Includes an "Affidavit" Which is Not Part of the Lower Court Record

4. MCR 7.211 governs motions in this Court and MCR 7.211(E)(2)(c) specifically provides: "Administrative motions include, but are not limited to...a motion to strike a nonconforming brief".

5. Additionally, MCR 7.212(I), entitled "Nonconforming Briefs", provides as follows:

If, on its own initiative or on a party's motion, the court concludes that a brief does not substantially comply with the requirements in this rule, the court may order the party who filed the brief to file a supplemental brief within a specified time correcting the deficiencies, or it may strike the nonconforming brief.

6. Next, MCR 7.210, entitled "Record on Appeal", states:

(A) Content of Record. Appeals to the Court of Appeals are heard on the original record.

(1) Appeal From Court. In an appeal from a lower court, **the record consists of the original documents filed in that court** or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced. (emphasis added).

7. Similarly, MCR 2.302(H)(3) provides "on appeal, only disclosure and discovery materials that were filed or made exhibits are part of the record on appeal".

8. Appellate review is limited to the record in the trial court, each and every document cited on appeal must have actually been presented in the lower court and this Court does not

entertain evidence that a party did not submit in the lower court. *See Wolfenbarger v Wright*, 336 Mich App 1, 27; 969 NW2d 518 (2021)(“a party may not expand the record on appeal, and this Court may only consider the record established by the trial court”); *People v Gingrich*, 307 Mich App 656, 659 n 1; 862 NW2d 432 (2014)(“[A] party may not expand the record on appeal”, recognizing that attachment of records not previously filed in the lower court is an impermissible attempt to expand the record on appeal, considering the Court of Appeals’ review is limited to mistakes apparent on the record).

9. In *Coburn v Coburn*, 230 Mich App 118 1998 (rev’d in part 459 Mich 875), the Court of Appeals granted a motion to strike a non-conforming brief where the opposing party’s brief “appended...as exhibits, affidavits that were not part of the lower court record”).

10. In this case, Boyd’s non-conforming brief should be stricken because he impermissibly attempts to expand the record on appeal by including the affidavit of ATF agent Tolliver Hart (Exhibit A to Boyd’s Reply Brief, the “Affidavit”), despite the fact that this Affidavit was never filed in the trial court.

11. The Affidavit is not part of the lower court record as defined by MCR 7.210 and MCR 2.302(H)(3), should not be considered on appeal pursuant to *Wolfenbarger* and *People v Gingrich* and should be stricken pursuant to MCR 7.211(E)(2)(c), MCR 7.212(I) and *Coburn, Id.*

12. Moreover, the Affidavit is obviously not binding, legal precedent yet Boyd impermissibly treats it as though it were. Specifically, he relies upon the Affidavit for the following statement: “JSD’s assertion that the Buy Build Shoot kit included magazine and ammunition is neither accurate nor relevant. The kit did *not* include ammunition”. (Boyd’s Reply Brief, pg. 7, emphasis in original).

13. But JSD included the exact photographs the U.S. Supreme Court cited in its *VanDerStok* opinion, which unequivocally depict a magazine and ammunition as being part of the Buy Build Shoot kit specifically defined in its opinion. (See JSD's Response to Boyd's Omnibus Brief on Appeal, p. 13).

14. The Affidavit Boyd now impermissibly attempts to introduce for the first time on appeal was not part of the opinion, is prejudicial, contradicted by the *VanDerStok* Opinion and should be stricken together with Boyd's Reply Brief. *Coburn, Id.*

WHEREFORE, JSD respectfully requests that this Court grant its Motion to Strike Appellee Guy Boyd's Non-Conforming Reply Brief, order Boyd to submit a revised brief with deletions of all facts and citations that were not part of the lower court record, including but not limited to the Affidavit, without any other changes, and award JSD any other relief this Court deems appropriate.

Respectfully submitted,

PENTIUK, COUVREUR & KOBILJAK, P.C.

/s/ Kerry L. Morgan

By: Kerry L. Morgan (P32645)

And: Randall A. Pentiuk (P32556)

Attorneys for Defendant/Appellant Not an LLC d/b/ JSD Supply

2915 Biddle Avenue, Suite 200

Wyandotte, MI 48192

(734) 281-7100

kmorgan@pck-law.com

Dated September 15, 2025

PROOF OF SERVICE

The undersigned hereby certifies that on September 15, 2025, they electronically filed the foregoing pleading, along with this Proof of Service, with the Clerk of the Court using the MiFILE System, which will send a copy of same to the attorneys/parties of record.

I declare that the statement above is true to the best of my information, knowledge and belief.

Respectfully submitted,

PENTIUK, COUVREUR & KOBILJAK, P.C.

/s/ Kerry L. Morgan

By: Kerry L. Morgan (P32645)

And: Randall A. Pentiuk (P32556)

Attorneys for Defendant/Appellant Not an LLC d/b/ JSD Supply

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