

**RECEIVED**

**Mar 20 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge  
Trial Court Case No. 2020-CP-26-06420

Appellate Case No. 2022-001035

Grand Strand Resort III Homeowners Association, Inc. .... Plaintiff

v.

PGP III, LLC, Philip "Phil" G. Pate, South Atlantic Bank and United Community  
Bank ..... Defendants,

of whom

PGP III, LLC and Philip "Phil" G. Pate ..... Appellants,

v.

Grand Strand Resort III Homeowners Association, Inc. .... Respondent.

RESPONDENT'S MOTION TO EXCLUDE MATTER

Pursuant to Rules 208(b)(4), 209, and 210(c), SCACR, and the case law of the State of South Carolina, Respondent Grand Strand Homeowners III Association, Inc. ("HOA") respectfully moves this Court for an Order striking certain portions of Appellants' Initial Brief and Designation of Matter. Respondent is simultaneously herewith filing its Initial Brief as well as its Designation of Matter. Respondent would refer to its Initial Brief for its position on the issues on appeal, statement of the case and facts and argument in support of its position that the lower court's



Order to refer the within action, a condominium common expense foreclosure lien, to the Master-in-Equity of Horry County should be affirmed. Respondent would refer to its Initial Designation of Matter as to its position on the matters which were presented, considered, and/or ruled upon by the lower court.

The South Carolina Appellate Court Rules contain limitations on matter to be included in the Record on Appeal and referenced in the parties' briefs. The Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may properly be included in the Record on Appeal. Rules 209(b) and 210(c), SCACR. In addition, a party may not include any matters which are not relevant to the appeal. Rule 210(c), SCACR, further provides that the Record on Appeal shall not include matters which were not presented to the lower court. The brief shall contain references only to materials properly included in the Record on Appeal. Rule 208(b)(4), SCACR.

The Appellants have chosen not to include in their Designation of Matter the transcript of the October 11, 2021 hearing before the lower court. There is no record of the Affidavit of Phil G. Pate being admitted into evidence at the October 11, 2021 hearing or being served two (2) days prior to said hearing in accordance with Rule 6(d), SCRCR. Therefore, the inclusion of said Affidavit in Appellants' Designation of Matter is improper as those alleged facts are not before the Appellate Court. There is no record that the Affidavit was brought to the Court's attention or referenced during the hearing on the motion to refer. Likewise, the Affidavit was not presented or considered by the lower court in ruling on Appellants' motion for reconsideration. Therefore, said Affidavit is irrelevant to the appeal under Rule 209(b), SCACR, and cannot be considered by the Appellate Court.

The arguments of counsel as to factual issues contained in the transcript of the January 27,

A handwritten signature in black ink, appearing to be the initials 'WJ' followed by a stylized flourish.

2022 hearing on Appellants' motion for reconsideration are not evidence and should be excluded in the record on appeal. "Every trial judge knows, as every trial lawyer knows, and every Appellate Court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual view...." *Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962). Appellants ignore this rule in their Initial Brief with conclusory, unsupported, statements of fact. In South Carolina, "a representation of fact by counsel...made during oral argument may not be considered by the Court where it is unsupported by the record." *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997).

Additionally, Respondent moves this Court to exclude from the record the deposition of Renee M. Paige and its attached exhibits pursuant to Rule 209(c) and (h), SCACR. The deposition, which was commenced subsequent to the hearing on the motion for reconsideration, is not properly preserved since it was not part of the lower court's record. In fact, the deposition was not even commenced until after the hearing on the Appellants' motion for reconsideration was completed. Appellants' counsel's argument during the motion for reconsideration as to allegations against Renee M. Paige do not equate to an issue being "raised" to the lower court. As stated in *Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d. 690, 293 (2006) "nothing in the appellate court rules permits a party to unilaterally add after created evidence to the record." Said deposition transcript, its attached exhibits and the arguments of counsel characterizing same must be excluded from the record on appeal and all reference made thereto in Appellants' brief, as well as the record on appeal, must be stricken.

Respondent further moves this Court to exclude from the record a letter from Appellants' counsel to Respondent's counsel dated November 10, 2021. Said letter was not presented to the

lower court at the hearing on the motion to refer on October 11, 2021 as it was not in existence at the time. Rule 210(c), SCACR, provides that the record shall not include matter which was not presented to the lower court or tribunal. It is patently obvious that correspondence between counsel that had not even occurred prior to the time of the hearing could not have been presented to the lower court or tribunal and, therefore, should be stricken from the Appellants' Designation of Matter.

Respondent further moves this Court to exclude from the record the Appellants' motion to compel discovery responses filed October 6, 2021. The hearing on the motion to refer was held October 11, 2021. The motion to compel discovery responses was filed October 6, 2021 and was not before the Court at the October 11, 2021 hearing on the motion to refer. Further, said motion to compel discovery responses is irrelevant to the issues on appeal.

Respondent further moves this Court to exclude from the record the Appellants' Motion to Amend Answer and Third-Party Complaint filed January 27, 2022 and its proposed draft of the Amended Complaint filed January 27, 2022. The hearing on the motion to refer was held by the lower court on October 11, 2021. A party may not use a post-trial motion to raise an issue that could have been raised at trial. *Paterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995), *see Kiawah Prop. Owners Grp., Inc. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 597 S.E.2d 145 (2004), finding the issue was not properly preserved for appellate review where a party raised the argument for the first time in its petition for rehearing. Rule 210(c), SCACR, provides that the record on appeal must not include matter not presented to the lower court or tribunal.

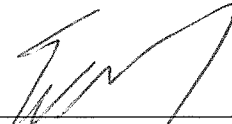
Appellants' Initial Brief contains numerous purportedly factual statements without any citation or reference to designated documents or documentary support. Said purportedly factual statements violate Rule 208, SCACR, and should be stricken.

**CONCLUSION**

For the aforementioned reasons, the Respondent respectfully requests this Court for an Order striking the above referenced materials from the Appellants' Designation of Matter and all reference made thereto in Appellants' Initial Brief.

Respectfully submitted,

DESCHAMPS LAW FIRM



---

William W. DesChamps, Jr.  
(S.C. Bar No. 1658)  
1357 21<sup>st</sup> Avenue North, Suite 102  
Myrtle Beach, South Carolina 29577  
(843) 448-2391  
*Attorney for Respondent*  
[wwd@deschampsfirm.com](mailto:wwd@deschampsfirm.com)

Dated: March 20, 2023