

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

SC Court of Appeals

The Honorable Doyet A. Early, III Circuit Court Judge

**Case Tracking No: 2012209587**  
Civil Action No. 2009-CP-32-3870

Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez.....Respondents.

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**FINAL BRIEF OF RESPONDENTS**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	4
ARGUMENT.....	9
<i>Summary of Argument</i> .....	9
<i>Argument as to all of Appellants' Issues</i> .....	11
I. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED, PURSUANT TO THE DISCOVERY RULE FOR BREACH OF CONTRACT.....	15
II. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED BY RESPONDENTS' DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE THERE IS NO EVIDENCE THAT RESPONDENTS INDUCED THE APPELLANTS TO DELAY FILING THEIR LEGAL ACTION MORE THAN THREE YEARS AFTER APPELLANTS KNEW THEY HAD A CLAIM AGAINST RESPONDENTS.....	18
III. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED BY RESPONDENTS' DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE THE DOCTRINE OF EQUITABLE TOLLING IS NOT APPLICABLE TO THE FACTS OF THIS APPEAL.....	20
IV. RESPONDENTS RESPECTFULLY REQUEST, PURSUANT TO RULE 220(C) OF THE SOUTH CAROLINA APPELLATE COURT RULES, THAT THIS COURT AFFIRM THE DECISION OF THE TRIAL JUDGE ON ANY GROUND APPEARING IN THE RECORD.....	22
CONCLUSION.....	23

## TABLE OF AUTHORITIES

### CASES

<u>Anonymous Taxpayer v. S.C. Dep't of Revenue</u> , 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008).....	15
<u>Armstrong v. Weiland</u> , 267 S.C. 12, 225 S.E.2d 851 (1976).....	11
<u>Black v. Lexington School Dist. No. 2</u> , 327 S.C. 55, 488 SE 2d 327 (1997).....	18, 20
<u>Bowen v. Lee Process Sys. Co.</u> , 342 S.C. 232, 536 S.E.2d 86 (S.C. Ct. of App. 2000).....	11
<u>Burgess v. American Cancer Society</u> , 300 S.C. 182, 386 SE 2d 798 (S.C. Ct. of App. 1989).....	16
<u>Cook v. Elter</u> , 298 S.C. 395, 380 S.E.2d 853 (Ct. of App. 1989).....	23
<u>Darien Capital Mgmt., Inc. v. Public School Employes' Retirement Sys.</u> , 668 A.2d 210 (Pa.Cmwlt.1995).....	19
<u>Duckett by Duckett v. Payne</u> , 279 S.C. 94, 302 S.E.2d 342 (1983).....	11, 23
<u>Epstein v. Brown</u> , 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).....	15
<u>Fields v. Melrose Ltd. P'ship</u> , 312 S.C. 102, 106 & n.3, 439 S.E.2d 283, 285 & n.3 (S.C. Ct. of App. 1993).....	11
<u>Gaymon v. Richland Memorial Hosp.</u> , 327 S.C. 66, 488 SE2d 332 (1997).....	16, 20
<u>Gibson v. Bank of America, NA</u> , 383 S.C. 399, 680 SE 2d 778 (S.C. Ct. of App. 2009).....	12, 13, 16
<u>Grabert v. Lightfoot</u> , 571 So.2d 293 (Ala.1990).....	18
<u>Hooper v. Ebenezer Sr. Services</u> , 386 S.C. 108, 687 SE 2d 29 (2009).....	20
<u>Howe v. Groover</u> , 219 Ga. App. 112, 464 S.E.2d 240, 242 (1995).....	18
<u>Johnston v. Bowen</u> , 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993).....	16
<u>Knight v. Stroud</u> , 212 S.C. 39, 46 S.E.2d 169 (1948).....	20
<u>McKinney v. CSX Transp., Inc.</u> , 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (S.C. Ct. of App. 1989).....	15
<u>Moates v. Bobb</u> , 322 S.C. 172, 176, 470 S.E.2d 402, 404 (S.C. Ct. of App. 1996).....	15

**CASES (Cont.)**

Ocana v. American Furniture Company, 2004 NMSC 18 (2004).....20, 21

Rushing v. McKinney, 370 S.C. 280, 633 S.E.2d 917 (S.C. Ct. of App. 2006).....20

Sanchez v. City of Sand Springs, 789 P.2d 240 (Okla.1990).....19

Sldltvan Co., Inc. v. New Swirl, Inc., 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993).....11

Smith v. South Carolina Dep't of Soc. Svcs., 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985).....11

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636 (S.C. Ct. of App. 2009).....12, 13, 16

Vierre v. Zayre Stores, Inc., 212 Ill. App.3d 505, 156 Ill.Dec. 622, 571 N.E.2d 209 (1991).....19

**STATUTES**

S.C. Code Ann. § 15-3-530 (1) (1976, as amended).....22

**OTHER AUTHORITIES**

54 C.J.S. Limitations of Actions § 115.....20

## STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED, PURSUANT TO THE DISCOVERY RULE FOR BREACH OF CONTRACT.
- II. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED BY RESPONDENTS' DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE THERE IS NO EVIDENCE THAT RESPONDENTS INDUCED THE APPELLANTS TO DELAY FILING THEIR LEGAL ACTION MORE THAN THREE YEARS AFTER APPELLANTS KNEW THEY HAD A CLAIM AGAINST RESPONDENTS.
- III. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED BY RESPONDENTS' DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE THE DOCTRINE OF EQUITABLE TOLLING IS NOT APPLICABLE TO THE FACTS OF THIS APPEAL.
- IV. RESPONDENTS RESPECTFULLY REQUEST, PURSUANT TO RULE 220(C) OF THE SOUTH CAROLINA APPELLATE COURT RULES, THAT THIS COURT AFFIRM THE DECISION OF THE TRIAL JUDGE ON ANY GROUND APPEARING IN THE RECORD.

## STATEMENT OF THE CASE

Appellants' Complaint with Causes of Action for Breach of Contract, Breach of Action (*sic*) Accompanied by Fraudulent Acts (*sic*) and Unjust Enrichment/Quantum Meruit, was filed against the Respondents on August 24, 2009, (*Complaint, R. pp. 18-20*). A timely Answer and Counterclaims was filed by Respondents and later amended by Respondents on April 28, 2011, (*Amended Answer and Counterclaims, R. pp. 24-30*).

Extensive discovery and depositions of the Parties was completed.

The Respondents moved for Summary Judgment on November 15, 2010 (*Motion, R. pp. 31-32*); (*Affidavit of Suzie Ferez and Affidavit of Frank Ferez, R. pp. 32(c)-32(j)*). The Motion was denied and an Order was filed on January 19, 2011, (*Order, R. pp. 1-5*).

On February 4, 2011, the Respondents filed a Motion to Alter or Amend the Order denying Summary Judgment, (*Motion, R. pp. 33-36*). The Motion to Alter or Amend was denied and an Order was filed on February 25, 2011, (*Order, R. pp. 6-14*).

On May 19, 2011, Respondents filed a Motion to Strike Appellant Chris Phillips' as a Plaintiff and to strike Plaintiff's [Appellant's] demand for Punitive Damages, (*Motion, R. pp. 37-38*). The Motion to Strike was denied and a Form Order was filed on June 15, 2011, (*Order, R. p. 15*).

The Respondents filed their second Motion for Summary Judgment on July 15, 2011, (*Motion, R. pp. 39-40*), with Affidavit of Francis Michael Ferez (*R. pp. 41-45*) and Affidavit of Suzanne C. Wilson (Formally known as Suzanne C. Ferez) (*R. pp. 46-50*). That Motion was denied by the Court.

## STATEMENT OF THE CASE (Cont.)

A Jury Trial was convened in the Lexington County Judicial Center, on March 12, 2012, before the Honorable Doyet A. Early, (*Transcript, R. p. 82*). Appellants presented their case and at the conclusion of their case-in-chief, counsel for the Respondents made a Motion for a Directed Verdict (*Transcript, R. p. 271, Line 17 – R. p. 273, Line 11*). Counsel for Appellants was heard in opposition to Respondents' Motion for Directed Verdict (*Transcript, R. p. 273, Line 15 – R. p. 276, Line 11*).

Thereafter, the Trial Judge considered Respondents' Motion for Directed Verdict and (i) summarized the evidence in the case at length (ii) provided citations to appropriate South Carolina case law and (iii) then found that Respondents' Motion for Directed Verdict should be, and was granted (*Transcript, R. p. 277, Line 2 – R. p. 280, Line 8*). The Trial Judge then summarized his decision to the Jury, before dismissing the Jury, (*Transcript, R. p. 280, Line 20 – R. p. 283, Line 3*).

Counsel for the Appellants filed a Notice of Appeal, on March 15, 2012, (*Notice of Appeal, R. p. 51*), three days after the Trial Judge's oral decision, the Trial Judge decided not to issue a written Order<sup>1</sup>, (*Correspondence from Trial Judge, R. p. 52*). Appellants re-filed their Notice of Appeal, dated April 10, 2012, (*Second Notice of Appeal, R. pp. 53-54*). This Appeal Followed:

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<sup>1</sup>On March 22, 2012, the Trial Judge contacted the Parties by way of electronic mail, and acknowledged that Appellants had filed a Notice of Appeal and that the Trial Judge did not intend to issue a written Order, (*R. p. 52*).

## STATEMENT OF THE FACTS

The Parties entered into a Contract, on or about March 10, 2005, for the construction of a residence by Appellants, located in, Lexington County, South Carolina (hereinafter as the, "Residence") for \$550,000.00 to be paid to Appellants, (hereinafter as the, "Contract"), (*Contract*, R. pp. 55-57). The construction of the Residence was completed on or about February 1, 2006, (*Transcript*, R. p. 258, Lines 13-23 - R. p. 262 Lines 15-17); (*Affidavit and Release*, R. pp. 32(k)-32(l)). It is uncontroverted that the Respondents paid the full \$550,000 consideration required by the Contract (*Deposition of Appellant Chris Phillips*, R. p. 61, Line 16 - R. p. 62, Line 3; R. p. 64, Lines 9-17; R. p. 67, Lines 10-12); (*Plaintiffs' [Appellants'] Supplemental Answer "2.1" to Defendants' [Respondents'] Supplemental Interrogatories*, R. p. 58); (*Appellants' Customer Quickreport, January 1, 2005 through June 1, 2010*, R. p. 73), for the construction of the Residence, and in fact, the Respondents overpaid the amount of consideration required by the Contract by \$3,375, (*Deposition of Appellant Chris Phillips*, R. p. 61, Line 16 - R. p. 62, Line 3); (*Appellants' Customer Quickreport, January 1, 2005 through June 1, 2010*, R. p. 73).

### No Written Change Orders Were Executed, As Required By Contract.

The Contract drafted by Appellants, required, on its face, that "written change orders" be issued for any claimed overage, (*Deposition of Appellant Chris Phillips*, R. p. 65, Lines 6-22; R. p. 66, Lines 2-11; R. p. 67, Lines 6-9); (*Transcript*, R. p. 248, Lines 15-23); (*Contract*, R. p. 56); (*Plaintiffs' [Appellants'] Admission number "2"* R. p. 78). It is uncontroverted that Appellants failed to issue and present a single, written change order to Respondents, (*Transcript*, R. p. 248, Line 1 - R. p. 249, Line 9); (*Plaintiffs' [Appellants'] Admission number "3"* R. p. 78); (*Plaintiffs' [Appellants'] Answer to Defendants' [Respondents'] Interrogatory number "8"*, R. p. 77); (*Deposition of Appellant Chris Phillips*, R. p. 65, Lines 6-22 ; R. p. 66, Lines 2-11; R. p. 67, Lines 6-9).

## STATEMENT OF THE FACTS, (Cont.)

The Contract was drafted by Appellants, (*Deposition of Appellant Chris Phillips, R. p. 66, Lines 12-17; R. p. 248, Lines 15-23*); (*Plaintiffs' [Appellants'] Admission number "1" to Defendants' [Respondents'] Requests for Admissions, R. p. 78*), and the Contract may be properly construed against the Appellants.

### Bank Affidavit and Release

On February 1, 2006, at the closing of the loan for the residence, the Appellants and Respondents, both executed a sworn Bank Affidavit and Release<sup>2</sup>, which stated:

(i) the construction of the residence agreed to by the Appellants and Respondents, had been fully completed (ii) the building Contract consideration of \$550,000 was paid in full by the Respondents, after the final check was received by Appellants on February 1, 2006 (iii) that the Respondents were required to pay an additional amount of \$0.00, to pay in full all overages (iv) all total obligations of Respondents, in connection with the construction of the Residence had been paid in full and (v) all sub-contractors, material men and laborers had been paid in full, (*Deposition of Appellant Chris Phillips, R. p. 62, Line 13 – R. p. 63, Line 4*); (*Transcript, R. p. 259, Line 9 – R. p. 260, Line 7*); (*Affidavit and Release, R. pp. 32(k) – 32(1)*).

It is uncontroverted that Appellants executed the Bank Affidavit and Release and presented it to the Bank, (*Deposition of Appellant Chris Phillips, R. p. 62, Line 5 – R. p. 63, Line 4*); (*Transcript, R. p. 259, Lines 9-11*); (*Affidavit and Release, R. pp. 32(k) – 32(1)*).

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<sup>2</sup> The Bank Affidavit and Release, Appellants signed thereon and swore under oath, stated that, "... Upon receipt of a final advance of \$104,500.00 from First Citizens, the building contract amount of \$550,000.00 will be paid in full [copy of check of \$104,500.00, attached to Affidavit]. Also, if applicable, receipt of payment from Francis M. Ferez & Suzanne C. Ferez in the amount of \$0.00 has paid in full all overages. All total obligations [\$550,000] in connection with said construction improvements have been paid in full. The undersigned [Appellant Phillips Inc.] hereby affirms that all sub-contractors, materialmen and laborers have been paid in full for settlement of all claims and there are no claims outstanding which would entitle the holder thereof to claim a lien against the said property..." (*Transcript, R. p. 259, Line 9 – R. p. 260, Line 7*); (*Affidavit and Release, R. pp. 32(k) - 32(1)*).

## STATEMENT OF THE FACTS, (Cont.)

However, Appellants argued later that Respondents still owed Appellants monies for construction overages for the Residence, notwithstanding (i) Appellants' failure to complete the Contract's required, written change orders (*Deposition of Appellant Chris Phillips, R. p. 65, Lines 6-22; R. p. 66, Lines 2-11; R. p. 67, Lines 6-9*); (*Transcript, R. p. 248, Line 1 – R. p. 249, Line 9*); (*Contract R. p. 56*); (*Plaintiffs' [Appellants'] Admission number "2" to Defendants' [Respondents'] Requests for Admissions, R. p. 78*) and (ii) the affirmations in the sworn Bank Affidavit and Release, which the Appellants later claimed, was falsely executed, (*Deposition of Appellant Chris Phillips, R. p. 67(b), Line 16 – R. p. 67(c), Line 7; R. p. 67(e), Lines 11 -17*); (*Transcript, R. p. 259, Line 9 – R. p. 262, Line 14*).

Appellant Phillips testified under oath and admitted that, Appellant Phillips never informed the Bank during the closing or afterwards, that the Appellants had presented a fraudulent document to the Bank, (*Deposition of Appellant Chris Phillips, R. p. 67(d), Lines 7-13*). Appellant Phillips did claim at Trial, under oath, that he made false representations on the Release and Affidavit, which was given to the bank at the closing of the Residence, (*Transcript, R. p. 260, Line 23 – R. p. 261, Line 2; R. p. 261, Lines 8-14*). Despite Appellants' unsupported bare allegations in their Initial Brief, Respondents have always and consistently denied that such sums were due, (*Deposition of Respondent Frank Ferez, R. p. 69, Lines 13-16*); (*Deposition of Respondent Suzie Ferez, R. p. 72, Lines 14-16*); (*Transcript, R. p. 158, Line 10 – R. p. 159, Line 3; R. p. 188, Line 25 – R. p. 189, Line 5; R. p. 194, Lines 4 -13*).

Although Appellants now claim that the Respondents induced the Appellants to refrain from filing the legal action within the Statute of Limitations, at deposition Appellant Phillips testified under oath, and stated that, he did not know whose idea it was to submit the false Release and Affidavit to the bank (*Deposition of Appellant Chris Phillips, R. p. 67(d), Lines 14-19*).

## STATEMENT OF THE FACTS (Cont.)

At deposition, Appellant Phillips claimed that the Appellants were induced to enter into the fraudulent Bank Affidavit and Release, by a Bank employee, and not the Respondents, (*Deposition of Appellant Chris Phillips, R. p. 67(f), Line 11 – R. p. 67(g), Line 11*); (*Affidavit and Release, R. pp. 32(k)-32(1)*).

### Statute of Limitations Expired Before Litigation Was Filed.

The Bank Affidavit and Release, showing that no further monies were owed to the Appellants by the Respondents, was executed on February 1, 2006, and the Complaint in this matter was not filed until August 24, 2009, (*Affidavit and Release, R. pp. 32(k)-32(1)*); (*Complaint, R. p. 18*), which was some forty-two months after the closing held on February 1, 2006, the date Appellants knew that Appellants had the alleged claim against Respondents, (*Transcript, R. p. 243, Lines 4-13*).

The Trial Judge, found the following to be dispositive evidence that the Statute of Limitations had run (*Transcript, R. p. 277, Line 2 – R. p. 280, Line 7*). In a colloquy with the Trial Judge, Appellant Phillips admitted executing the Bank Affidavit and Release on February 1, 2006, while Appellants were claiming that the Respondents still owed Appellants monies, and yet Appellant Phillips did not bring a legal action against Respondents, until forty-two months later, on August 24, 2009, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*); (*Affidavit and Release, R. pp. 32(k)-32(1)*); (*Complaint, R. p. 18*). Appellant Phillips admitted at deposition and at Trial that he knew on February 1, 2006, that he was claiming that the Respondents still owed Appellants monies, (*Deposition of Appellant Chris Phillips, R. p. 67(a), Lines 3-9*); (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*).

## STATEMENT OF THE FACTS (Cont.)

Once again, Appellants failed to bring a legal action against Respondents, until forty-two months later, on August 24, 2009, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*); (*Complaint, R. p. 18*).

Respondent Ms. Ferez was informed in a single conversation with Appellant Phillips in August 2008 that Appellant Phillips was claiming that monies were still owed to Appellants<sup>3</sup> (*Transcript, R. p. 158, Lines 10-19*). An Invoice, without proper documentation and without proper “written change orders”, as required by Appellants’ Contract, was presented to Respondent Ms. Ferez, only, in August 2008, who rejected the same, because the Invoice was without proper documentation and support, (*Deposition of Respondent Suzie Ferez, R. p. 72, Lines 14-16*); (*Transcript, R. p. 158, Lines 10-19*).

Almost one year elapsed after the conversation described hereinabove, and on or about, July 30, 2009, Respondent Mr. Ferez only, received correspondence from an attorney representing the Appellants (*Correspondence from counsel for Appellants, dated July 28, 2009, R. pp. 80-81*).

The Appellants’ counsel then waited until August 24, 2009, before actually filing the Complaint (*Complaint R. p. 18*), which, as stated above, was forty-two months after the date of the February 1, 2006, Bank Affidavit and Release and the date Appellant Phillips’ acknowledged that he was claiming that Respondents still owed monies to Appellants, (*Transcript, R. p. 243, Lines 4-13*); (*Affidavit and Release R. pp. 32(k) – 32(1)*).

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<sup>3</sup> Appellants make a reference in Appellants’ Complaint to the date of “March 12, 2007”, which was for *de minimis* re-painting in one room, completed at the Residence by a third party, and not for Contract related work by Appellants, (*Deposition of Respondent Suzie Ferez, R. p. 71, Lines 6-22*); (*Transcript, R. p. 154, Lines 3-15*); (*Complaint, R. pp. 18-20*).

**ARGUMENT**  
*Summary of Argument*

The Parties entered into a Contract, on or about March 10, 2005, for the construction of a Residence by Appellants, located in, Lexington County, South Carolina, (*Contract, R. pp. 21-23*). The construction of the Residence was completed on or about February 1, 2006, (*Transcript, R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*). It is uncontroverted that the Respondents paid the full \$550,000 consideration required by the Contract for the construction of the Residence, (*Deposition of Appellant Chris Phillips, R. p. 61, Line 16 – R. p. 62, Line 3; R. p. 64, Lines 9-17; R. p. 67, Lines 10-12*); (*Plaintiffs' [Appellants'] Supplemental Answer "2.1" to Defendants' [Respondents'] Supplemental Interrogatories, R. p. 58*); (*Appellants' Customer Quickreport, January 1, 2005 through June 1, 2010, R. p. 73*).

The Appellants' Contract required, on its face, that "written change orders" be issued for any claimed overage, (*Deposition of Appellant Chris Phillips, R. p. 65, Lines 6-22; R. p. 66, Lines 2-11; R. p. 67, Lines 6-9*); (*Transcript, R. p. 248, Lines 15-23*); (*Plaintiffs' [Appellants'] Admission number "2" to Defendants' [Respondents'] Requests for Admissions, R. p. 78*); (*Contract, R. p. 56*). It is uncontroverted that Appellants failed to issue and present a single, written change order to Respondents, (*Transcript, R. p. 248, Line 1 – R. p. 249, Line 9*); (*Plaintiffs' [Appellants'] Admission number "3" to Defendants' [Respondents'] Requests for Admissions, R. p. 78*); (*Plaintiffs' [Appellants'] Answer to Defendants' [Respondents'] Interrogatory number "8", R. p. 77*).

*Summary of Argument (Cont.)*

On February 1, 2006, at the closing of the loan for the Residence, the Appellants and Respondents, both executed a sworn Bank Affidavit and Release, which stated:

(i) the construction of the residence agreed to by the Appellants and Respondents, had been fully completed (ii) the building Contract consideration of \$550, 000 was paid in full by the Respondents, after the final check was received by Appellants on February 1, 2006 (iii) that the Respondents were required to pay an additional amount of \$0.00, to pay in full all overages (iv) all total obligations of Respondents, in connection with the construction of the Residence had been paid in full and (v) all sub-contractors, material men and laborers had been paid in full, (*Affidavit and Release, R. pp. 32(k)-32(1)*); (*Deposition of Appellant Chris Phillips, R. 62, Line 13 – R. p. 63, Line 4*); (*Transcript, R. p. 259, Line 9 – R. p. 260, Line 7*).

The Bank Affidavit and Release, showing that no further monies were owed to the Appellants by the Respondents, was executed on February 1, 2006, and the Complaint in this matter was not filed until August 24, 2009, (*Affidavit and Release R. pp. 32(k)-32(1)*); (*Complaint, R. pp. 18-20*), which was some forty-two months after the Residence was completed and Appellants knew, that Appellants had the alleged claim against Respondents, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*).

In a colloquy with the Trial Judge, Appellant Phillips admitted executing the Bank Affidavit and Release on February 1, 2006, while Appellants were claiming that the Respondents still owed Appellants monies, and yet Appellant Phillips did not bring a legal action against Respondents, until forty-two months later, on August 24, 2009, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*); (*Complaint, R. pp. 18-20*).

## ARGUMENT AS TO ALL OF APPELLANTS' ISSUES

Assignments of error, presented in Appellants' Initial Brief and Statement of Issues, are made with short, conclusory statements that do not address the substance of Appellants' position. E.g., Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 & n.3, 439 S.E.2d 283, 285 & n.3 (S.C. Ct. of App. 1993). For example, Appellants make generalized assertions. Short statements, which are not supported by any analysis of the issues, application of case law, or even a cursory explanation of the circuit court's purported error, are insufficient to preserve these issues on Appeal. See, Fields, *supra* at, 285.

The burden of showing error is on Appellants. Duckett by Duckett v. Payne, 279 S.C. 94, 302 S.E.2d 342 (1983). "Broad general statements of issues made by an appellant may be disregarded by this Court." Sldltvan Co., Inc. v. New Swirl, Inc., 313 S.C. 34, 36, 437 S.E.2d 30, 31(1993). See also Armstrong v. Weiland, 267 S.C. 12, 225 S.E.2d 851 (1976) (declining to address allegations of error that are "too vague and fail to point out specific errors of law").

Appellants have made only general references to the Trial Court's decision, but Appellants have not identified particular holdings of the Trial Court which were improper. Appellants' conclusory statements set forth in their Initial Brief, are simply insufficient to, "...include all that is necessary to enable the appellate court to decide whether the ruling complained of was erroneous." Smith v. South Carolina Dep't of Soc. Svcs., 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985). Therefore, Appellants must be deemed to have abandoned these issues on Appeal. See Fields, 312 S.C. at 106 n.3, 439 S.E.2d at 285 n.3 ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority"). The failure to provide argument or supporting authority for an issue renders it abandoned, Bowen v. Lee Process Sys. Co., 342 S.C. 232, 536 S.E.2d 86 (S.C. Ct. of App. 2000).

**ARGUMENT AS TO ALL OF APPELLANTS' ISSUES (Cont.)**  
**(Appellants Made the Following Arguments in Their Initial Brief, on the Pages Indicated)**

- On page “4”, of Appellants’ Initial Brief, “Shortly after construction began, Respondent Suzie Ferez informed Mr. Phillips there would be some changes to the original construction plans. [R. p. 210, Lines 10-19],” Appellants’ statement is misleading. **This statement was not made by Respondent Suzie Ferez, as is suggested by Appellants’ argument to this Court, but instead this self-serving statement was made by Appellant Phillips.**
- On page “4”, of Appellants’ Initial Brief, “Mr. Phillips agreed to build these stairs and the Respondents agreed to reimburse him for the cost of their construction.” [R. p. 137, Lines 4-12]. Appellants’ statement is misleading. **The reference to the Transcript by Appellants does not support Appellants’ statement.**
- On page “4”, of Appellants’ Initial Brief, “The Respondents also asked Mr. Phillips to perform other additional work totaling \$9,883.39. [R. p. 222, Lines 7-8]”. Appellants’ statement is misleading. **This statement was not made Respondents, as is suggested by Appellants’ argument to this Court, but instead this self-serving statement was made by Appellant Phillips.**
- On page “5”, of Appellants’ Initial Brief, “On one instance shortly after they moved in, Respondent Frank Ferez stated he owed Mr. Phillips extra money for the overages and extra work performed. [R. p. 235, Lines 1-9].” Appellants’ statement is misleading. **This statement was not made by Respondent Frank Ferez, as is suggested by Appellants’ argument to this Court, but instead this self-serving statement was made by Appellant Phillips.**
- On page “5”, of Appellants’ Initial Brief, “Mr. Phillips relied on the Respondents’ reaffirmations that they would pay. [R. p. 241, Lines 2-12],” Appellants’ statement is misleading. **This statement was not made by the Respondents, as is suggested by Appellants’ argument to this Court, but instead this self-serving statement was made by Appellant Phillips.**
- On page “6”, of Appellants’ Initial Brief, “The contract itself is silent as to a specific date on which nonpayment becomes a breach.” **Appellants criticized the Contract, but the Contract was drawn by Appellants and construed against Appellants.**
- On page “6”, of Appellants’ Initial Brief, “Further, the contract was orally modified and the debts were acknowledged which would change the time frame for payment from the original contract’s terms.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “6”, of Appellants’ Initial Brief, “In addition, the Respondents made several reaffirmations of the debt after the February 2006 closing.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “6”, of Appellants’ Initial Brief, “In any event, whether the statute of limitations began to run in 2006 or 2007 is a question of fact. Questions of fact are to be determined by the jury.” **Appellants’ statement is made without a reference to a citation of authority in violation of Rule 208(b)(1)(D), SCACR, and is contrary to South Carolina Case Law, see discussion herein on page 16, Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636 (S.C. Ct. of App. 2009); Gibson v. Bank of America, NA, 383 S.C. 399, 406-407, 680 SE 2d 778 (S.C. Ct. of App. 2009).**

**ARGUMENT AS TO ALL OF APPELLANTS' ISSUES (Cont.)**  
**(Appellants Made the Following Arguments in Their Initial Brief, on the Pages Indicated)**

- On page “7”, of Appellants’ Initial Brief, “Pursuant to South Carolina law, the jury is to determine issues of conflicting evidence in matters where the triggering event of the statute of limitation is in question.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR, and is contrary to South Carolina Case Law, see discussion herein on page 16, Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636 (S.C. Ct. of App. 2009); Gibson v. Bank of America, NA, 383 S.C. 399, 406-407, 680 SE 2d 778 (S.C. Ct. of App. 2009).**
- On page “7”, of Appellants’ Initial Brief, “By the Respondents’ own admissions, they made a number of assurances to Mr. Phillips that they would pay for the overages and additional work.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “7”, of Appellants’ Initial Brief, “In sworn testimony, the Respondents acknowledged the outstanding debt on a number of occasions.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “7”, of Appellants’ Initial Brief, “Mrs. Ferez’s only reason for not paying the debt (*sic*) is she was “shocked” by the amount of debt she and Mr. Ferez incurred on building their house.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “8”, of Appellants’ Initial Brief, “Based on the Respondents’ assurances they would pay the debt, Mr. Phillips withheld filing his lawsuit until it became apparent the Respondents intended to renege on their assurances,” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “8”, of Appellants’ Initial Brief, “This is even more true when the clients themselves, who have managed to pay all but the final installment, make assurances that payment will be forthcoming.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “8”, of Appellants’ Initial Brief, “The Respondents made a number of reaffirmations they would pay.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “8”, of Appellants’ Initial Brief, “Mr. Phillips had no indication he would be forced to sue the Respondents to get paid for the extra work they asked him to perform.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “8”, of Appellants’ Initial Brief, “...the reliance on the Respondents’ assurances of payment was the only reasonable position for Mr. Phillips to take.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**

**ARGUMENT AS TO ALL OF APPELLANTS' ISSUES (cont.)**  
**(Appellants Made the Following Arguments in Their Initial Brief, on the Pages Indicated)**

- On page “8”, of Appellants’ Initial Brief, “Unfortunately, because Mr. Phillips relied on the Respondents' assurances, they now argue Mr. Phillips' otherwise legitimate claims for reimbursement must be barred as a technicality under the statute of limitations.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “8”, of Appellants’ Initial Brief, “...because the Respondents induced the Appellant to withhold filing suit and should be estopped from asserting the statute of limitations.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “9”, of Appellants’ Initial Brief, “Mr. Phillips has maintained throughout this lawsuit that the reason he did not file his action sooner was because of the Respondents' representation they would pay him.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “9”, of Appellants’ Initial Brief, “The Respondents admit they were aware of the extra work Mr. Phillips did (*sic*).” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- “On page “9”, of Appellants’ Initial Brief, Respondent Suzie Ferez admitted she was aware of the ongoing debt to Mr. Phillips and that she acknowledged the existence of the debt on numerous occasions following the closing of the house.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “9”, of Appellants’ Initial Brief, “Again, the only reason the Respondents have refused to pay is (*sic*) they claim "shock" at discovering how far they exceeded the budget on the house. **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “10”, of Appellants’ Initial Brief, “Assuming Mr. Phillips filed outside the statute of limitations, this Court should equitably toll the statute because the Respondents' assurances have placed Mr. Phillips in this position.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**
- On page “10”, of Appellants’ Initial Brief, “...because he [Appellant] reasonably relied on the Respondents' assurance (*sic*) would allow a gross wrong.” **Appellants’ statement is made without a reference to the Transcript or Record, in violation of Rule 208(b)(4), SCACR.**

## ARGUMENT

### I. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED PURSUANT TO THE DISCOVERY RULE FOR BREACH OF CONTRACT.

"One purpose a statute of limitations serves...is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights." McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (S.C. Ct. of App. 1989) "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (S.C. Ct. of App. 1996) "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008).

#### The Discovery Rule.

"Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

Appellants' reference to the Discovery Rule is inapposite. The Trial Judge referred to and acknowledged the Discovery Rule in rendering his decision, (*Transcript, R. p. 277, Line 2 – R. p. 280, Line 7*). The Trial Judge, found the following to be dispositive evidence that the Statute of Limitations had run (*Transcript, R. p. 277, Line 2 – R. p. 280, Line. 7*). In a colloquy with the Trial Judge, Appellant Phillips admitted executing the Bank Affidavit and Release on February 1, 2006, while Appellants were claiming that the Respondents still owed Appellants monies, and yet Appellant Phillips did not bring a legal action against Respondents, until forty-two months later, on August 24, 2009, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*); (*Affidavit and Release, R. pp. 32(k)-32(1)*); (*Complaint, R. pp. 18-20*).

## ARGUMENT (Cont.)

### Test for Statute of Limitation Period, is Objective and not Subjective.

The standard as to when the limitations period begins to run is objective rather than subjective. Burgess v. American Cancer Society, 300 S.C. 182, 386 SE 2d 798 (S.C. Ct. of App. 1989). Therefore, the Statute of Limitations period "...begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." Objectively, in a colloquy with the Trial Judge, Appellant Phillips admitted executing the Bank Affidavit and Release on February 1, 2006, while Appellants were claiming that the Respondents still owed Appellants monies, and yet Appellant Phillips did not bring a legal action against Respondents, until forty-two months later, on August 24, 2009, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*); (*Affidavit and Release, R. pp. 32(k)-32(1)*); (*Complaint, R. pp. 18-20*).

### Statute of Limitations Question to be Decided by the Trial Judge.

When, as in the case *sub judice*, there is no conflicting evidence or when only one reasonable inference can be drawn from the evidence, "...**the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.**" (emphasis not in original), Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636 (S.C. Ct. of App. 2009); Gibson v. Bank of America, NA, 383 S.C. 399, 406-407, 680 SE 2d 778 (Ct. of App. 2009), Cf., Johnston v. Bowen, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993), "(Finding grant of summary judgment in medical malpractice case was proper based on statute of limitations for medical malpractice claim because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim)". Also see, Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 68, 488 S.E.2d 332 (1997).

## ARGUMENT (Cont.)

### Only Reasonable Inference Drawn From Appellant Phillips' Admission.

The only reasonable inference to be drawn in this case, from Appellant Phillips' admission at Trial, that Appellants knew when Appellant Phillips executed the Bank Affidavit and Release on February 1, 2006, that Appellants were claiming the Respondents still owed Appellants monies, and yet Appellant Phillips did not bring a legal action against Respondents, until forty-two months later, on August 24, 2009, (*Transcript, R. p. 243, Lines 4-13; R. p. 258, Lines 13-23; R. p. 262, Lines 15-17*); (*Affidavit and Release, R. pp. 32(k)-32(1)*); (*Complaint, R. pp. 18-20*).

## ARGUMENT (Cont.)

### II. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED BY RESPONDENTS' DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE THERE IS NO EVIDENCE THAT RESPONDENTS INDUCED THE APPELLANTS TO DELAY FILING THEIR LEGAL ACTION MORE THAN THREE YEARS AFTER APPELLANTS KNEW THEY HAD A CLAIM AGAINST RESPONDENTS.

Appellants have not provided this Court with any evidence that Respondents induced the Appellants to delay filing their Complaint, until after the Statute of Limitations had run.

Appellants point to one conversation with one of the Respondents, in 2008<sup>4</sup>, (*Deposition of Respondent Suzie Ferez, R. p. 72, Lines 14-16*); (*Transcript, R. p. 158, Lines 10-19*).

There were no real negotiations with Respondents or with Respondents' legal counsel.

#### Respondents Not Estopped From Statute of Limitations Defense.

Even negotiations, absent further action by Respondents, do not give rise to a claim that Respondents induced Appellants to delay filing within the Statute of Limitations period. Black v. Lexington School Dist. No. 2, 327 S.C. 55, 488 SE 2d 327 (1997) citing, Grabert v. Lightfoot, 571 So.2d 293 (Ala.1990) (finding that engaging in settlement negotiations does not estop party from asserting statute of limitations as a defense, absent some affirmative inducement to the claimant to delay bringing action); Black, supra at, 64, citing, Howe v. Groover, 219 Ga. App. 112, 464 S.E.2d 240, 242 (1995). "...settlement negotiations or statements expressing interest in settlement are insufficient to give rise claim that a defendant is equitably estopped from asserting the statute of limitations." (Finding no waiver of right to assert statute of limitations, where there was no evidence that defendant's insurer did anything, "...other than merely negotiate, to lull the plaintiff into believing she would be paid without having to file her suit within the statute of limitation");

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<sup>4</sup> By way of Appellants own testimony, that he spoke to one of the Respondents, on or about August 13, 2008, Appellants "sat on their rights", by waiting another three hundred and seventy seven days to bring this action, on August 24, 2009, (*Transcript, R. p. 239, Lines 15-18*); (*Complaint, R. pp. 18-20*).

## ARGUMENT (Cont.)

Black, supra at, 64, citing, Viirre v. Zayre Stores, Inc., 212 Ill. App. 3d 505, 156 Ill.Dec. 622, 571 N.E.2d 209 (1991). (Mere pendency of negotiations conducted in good faith insufficient to estop defendant from relying on statute of limitations), ("The mere fact that settlement negotiations have been ongoing between parties is insufficient to estop a party from asserting the Statute of Limitations as a defense.") Black, supra at, 64, citing, Sanchez v. City of Sand Springs, 789 P.2d 240 (Okl.1990)(where party did not undertake negotiations with the plaintiff nor admit liability, plaintiff could not argue defendant was equitably estopped from asserting statute of limitations); Black, supra at, 64, citing, Darien Capital Mgmt., Inc. v. Public School Employees' Retirement Sys., 668 A.2d 210 (Pa.Cmwlth. 1995) (absent bad faith or fraud, settlement negotiations between a plaintiff and defendant do not constitute a waiver of the defendant's right to assert the statute of limitations).

In the instant case, the facts do not support any affirmative inducement by Respondents to justify Appellants' forty-two month delay in bringing their Complaint.

## ARGUMENT (Cont.)

### III. THE TRIAL JUDGE PROPERLY DIRECTED A VERDICT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIM WAS BARRED BY RESPONDENTS' DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE THE DOCTRINE OF EQUITABLE TOLLING IS NOT APPLICABLE TO THE FACTS OF THIS APPEAL.

Appellants failed to discuss or distinguish in their Initial Brief, the cases cited by the Trial Judge in his decision, Gaymon v. Richland Memorial Hosp., 327 S.C. 66, 488 SE2d 332 (1997), and Black v. Lexington School Dist. No. 2, 327 S.C. 55, 488 SE 2d 327 (1997), (*Transcript, R. p. 276, Line 15 – R. p. 277, Line 1*). In Gaymon, the South Carolina Supreme Court made it perfectly clear that, “To the contrary, in Knight v. Stroud, 212 S.C. 39, 46 S.E.2d 169 (1948), we specifically held a defense of equitable estoppel interposed in a law case should be tried by the court as an equitable issue.” Gaymon supra at, 64. The Trial Judge also relied on the Black case, as supporting the Gaymon decision, (*Transcript, R. p. 276, Line 15 – R. p. 277, Line 1*). Also see, Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917 (S.C. Ct. of App. 2006).

#### Appellants Fail to Set Forth a Reliance Period.

In Appellants’ Initial Brief on page “9”, Appellants reference the Doctrine of Equitable Tolling, but Appellants fail to set forth and argue a “Reliance Period”, which is a requirement for Equitable Tolling. Hooper v. Ebenezer Sr. Services, 386 S.C. 108, 687 SE 2d 29 (2009).

#### Burden on Appellants, Must Show Extraordinary Event.

The party claiming the Statute of Limitations should be tolled, bears the burden of establishing sufficient facts to justify its use. Hooper, supra at 115, citing, Ocana v. American Furniture Company, 2004 NMSC 18 (2004) see also, 54 C.J.S. Limitations of Actions § 115 (“The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief.”).

## ARGUMENT (Cont.)

It has been observed that **"[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control."** (Emphasis not in original), Hooper, supra at 116, citing, Ocana v. American Furniture Company, 2004 NMSC 18 (2004). Appellants have not provided this Court with any evidence of an extraordinary event beyond Appellants' control, and Appellants have failed to carry their burden.

### Equitable Tolling Should Only be Used Sparingly.

"Equitable Tolling may be applied where it is justified under all the circumstances. We agree, however, that **equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.**" (Emphasis not in original) Hooper, supra at, 117.

In the instant case, **Appellants have not shown** (i) a Reliance Period (ii) an extraordinary event beyond Appellants' control and (iii) Appellants have not shown a compelling basis for Appellants' Equitable Tolling argument.

## ARGUMENT (Cont.)

### **IV. RESPONDENTS RESPECTFULLY REQUEST, PURSUANT TO RULE 220(C) OF THE SOUTH CAROLINA APPELLATE COURT RULES, THAT THIS COURT AFFIRM THE DECISION OF THE TRIAL JUDGE ON ANY GROUND APPEARING IN THE RECORD.**

As additional sustaining grounds, please consider the following.

Appellants' Complaint is governed by S.C. Code Ann. § 15-3-530 (1), (1976, as amended). And, therefore, any liability of the Respondents was subject to a three-year Statute of Limitations.

The Respondent to an Appeal may raise on Appeal, any additional reasons the Appellate Court should affirm the Trial Court's ruling, regardless of whether those reasons have been ruled on by the Trial Court.

In this matter, the record clearly reflects that Respondents appropriately challenged the timeliness of Appellants' delay in bringing Appellants' legal Complaint, on two occasions, and Respondents set forth the basis of its Statute of Limitations defense below.

The Respondents moved for Summary Judgment on November 15, 2010, (*Motion, R. pp. 31-32*) with Affidavit of Francis Michael Ferez (*R. pp. 32(f)-32(j)*) and Affidavit of Suzanne C. Ferez (*R. pp. 32(c) -32(e)*), filed November 15, 2010. That Motion was denied and an Order was filed on January 19, 2011, (*Order, R. pp. 1-5*). On February 4, 2011, the Respondents then filed a Motion to Alter or Amend the Order filed January 19, 2011, denying Summary Judgment, (*Motion, R. pp. 33-36*), which Motion was denied.

The Respondents filed their second Motion for Summary Judgment on July 15, 2011, (*Motion, R. pp. 39-40*) with Affidavit of Francis Michael Ferez (*R. pp. 41-45*) and Affidavit of Suzanne C. Ferez (*R. pp. 46-50*), filed July 15, 2011), which Motion was denied.

Therefore, this additional sustaining ground is appropriate for consideration on Appeal, along with other sustaining grounds, should this Court be so disposed.

## CONCLUSION

Appellants bear the burden of demonstrating that the Trial Judge erred. Duckett by Duckett v. Payne, 279 S.C. 94, 302 S.E.2d 342 (1983); Cook v. Elter, 298 S.C. 395, 380 S.E.2d 853 (Ct. of App. 1989). For a variety of reasons, Appellants have not met that burden. For example, Appellants fail to demonstrate in their Initial Brief any error in the Trial Judge's decision. Similarly, Appellants fail to assign specific error to the decision below and Appellants only make conclusory statements without adequate supporting authority or argument. To the extent that Appellants do make any assignments of error, however, such claims are either unsupported by case law or have not been properly preserved for Appeal. Because Appellants have failed to meet their burden, the Trial Judge's dismissal of the Complaint should be affirmed.

Respectfully Submitted,  
**AUSTIN & ROGERS, P.A.**

By:



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**Attorneys for Respondents**

June 13, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Doyet A. Early, III Circuit Court Judge

Case Tracking No: 2012209587  
Civil Action No. 2009-CP-32-3870

Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez.....Respondents:

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b),  
SCACR.

Respectfully Submitted,  
AUSTIN & ROGERS, P.A.

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June 18, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

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**Case Tracking No: 2012209587**  
Civil Action No. 2009-CP-32-3870

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SC Court of Appeals

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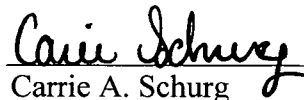
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**PROOF OF SERVICE**

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I, Carrie A. Schurg, an employee of Austin & Rogers, P.A., certify that I have caused a copy of Respondents' Final Brief and this Proof of Service to be served on June 14, 2013, via U.S. Mail, as addressed below.

Stanley L. Myers, Esquire  
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Carrie A. Schurg

June 14, 2013

ORIGINAL