

THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas

The Honorable Marvin H. Dukes, III

Trial Court Case No. 2009-CP-07-0605
Appellate Case No. 2013-001407

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SEP 13 2013

SC COURT of Appeals

Cynthia Griffis, Plaintiff,

v.

Cherry Hill Estates, LLC, Eugene O'Neil, and Ronald Faulkner,
Defendants,

Of Whom Cherry Hill Estates, LLC. and Ronald Faulkner areAppellants.

Cherry Hill Estates, LLC and Ronald Faulkner, Third Party Plaintiffs,

v.

Anthony E. Griffis,Respondent.

**RESPONDENT'S RETURN TO
APPELLANTS' MOTION TO AMEND
INITIAL BRIEF AND INITIAL DESIGNATION OF MATTER BY APPELLANTS
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent, Anthony E. Griffis, hereby responds to Appellant's "Motion to Amend Initial Brief and Designation of Matters to Be Included in the Record on Appeal"¹:

1. Relevancy Issues. Appellants are only appealing the lower court's Order

¹ Respondent is restating his arguments (#1 and #2 herein) contained in his Reply to Appellants' Return to subject Motion to Strike Certain Matters Designated by Appellants to be Included in the Record on Appeal.

dated February 20, 2013, entered on March 5, 2013 (attached Exhibits p E1-3), in which the only issue is whether the court should apply "equitable tolling", of its own motion, to allow Appellants additional time, outside the applicable statute of limitations, to obtain the expert affidavit required by S.C. Code Section 15-36-100(F) in support of its legal malpractice claims. Appellants did not appeal the lower court's Order dated October 26, 2010 (attached Exhibit, p E4-5) which held that an expert affidavit was required to support Appellant's legal malpractice claims². Therefore, the only "relevant" issue before this Court is whether the lower court should have allowed Appellants the right to file the supporting expert affidavit, obtained after the expiration of the statute of limitations, contrary to §15-36-100(F), by applying "equitable tolling" (of the lower court's own Motion).

Further, Appellants never filed any Motion in the lower court or properly raised any of the issues contained in their Initial Brief, and there is no Order by the lower court addressing said issues, prior to date of the Order which is the subject of this appeal. Issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It was not until after the Order entered on March 5, 2013 (which is the subject of this appeal) that Appellants ever mentioned some of the arguments which are contained in their Initial Brief, in their Motion to Reconsider (Rule 59) said Order filed on March 18, 2013. Rule 59(e) motions are important to preserve issues raised to but *not* ruled upon by the trial judge. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). However, they are

² The Order did, however, give Appellants the option to "re-plead these matters so as not to require an expert affidavit", but Appellants elected not to re-plead their complaint, and did not preserve this issue for appeal.

not a vehicle through which a party can inject new issues for the court to pass on, and they similarly are not a way to get new arguments in through the back door. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

Appellants are attempting to "throw in the kitchen sink" in their Designation of Matters to Be Included in the Record on Appeal, and said matters are irrelevant and have absolutely nothing to do with the issue before this court. Likewise, Appellants are setting forth irrelevant arguments in their Initial Brief regarding their alleged claims and "damages", which have nothing to do with the appealed issue of whether Appellants timely obtained and filed the expert affidavit required by S.C. Code Ann. §15-36-100. For example, Appellants are now requesting this Court to take "judicial notice" of a matter (#30) which Appellants admit (in Appellants' Return) was never presented to the lower court, in violation of Rule 210(c), SCACR. Further, this matter was never cited in Appellants' Initial Brief, and also has absolutely no relevance to the issue before this Court³.

Appellants have designated matters #15, 16, 17, 19, 20, 21, 22, 29, and 30 - but have not cited to this matter in their initial brief⁴. This "designated matter" cannot be "relevant" if not properly cited by Appellants in their Initial Brief. Rule 208(b)(4), SCACR, states that the Initial Brief *shall* contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal. Further, the rule states that these references shall be to the page and line number

³ Matter #30 is a Masters' Report and Sale, for the foreclosure sale of the subject property, which has no probative value, and is not relevant to the issue of whether Appellants' timely obtained the expert affidavit.
⁴ Respondent also maintains that each of these "designated matters" has no relevancy to the issue before this Court (whether the Appellants should be allowed to file an expert affidavit obtained after expiration of the statute of limitations in violation of §15-36-100(F)).

of the transcript prepared by the court reporter or by the page of the material to be referenced. Rule 211(b)(1), SCACR, states that the final briefs shall be *identical* to the initial briefs except for correction of typographical errors and proper citations to the Record. *No other changes may be made.* Appellants cannot add additional citations, in their final brief, which were not in the initial brief. In *State v. Crocker*, 366 S.C. 394 at 399, 621 S.E.2d 890 (Ct. App. 2005) this Court held that conclusory statements unaccompanied by argument *and citation* to authority are insufficient to preserve an issue for appeal, and failure to provide such argument and citation renders an issue abandoned. See also *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005); *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011).

2. Appellants' Designation of Matter to Be Included in Record on Appeal contains ambiguous and vague matters. Rule 209 (b), SCACR, states that the Designation *must clearly identify* what the party desires to have included in the Record. Appellants' proposed matters 10, 11, 12, 13, 14 and 15 do not clearly identify what Appellant desires to have in the record. Overly broad designations, such as "excerpts from deposition", which do not clearly identify the matter (by page, line number, etc) violate Rule 209. Appellants should not have the discretion, after filing the initial brief and designation of record, to arbitrarily decide what to put in their final brief and record, in violation of our appellate rules⁵.

⁵ Further, Appellants should not be allowed to come in the "back-door" now by incorporating such matters in their Reply Brief, with a revised "Designation of Matter" accompanying said Reply Brief.

3. Appellants should not be allowed to amend their Initial Brief and Designation of Matter, in violation of our appellate rules.

a. Appellants' Motion to Amend Initial Brief and Designation of Matter does not contain any citations to authority in support of the motion as required by Rule 240(c)(2), SCACR.

Specifically, Appellants do not cite any authority to provide any exceptions to Rule 208(b)(4) which provides that the Initial Brief "shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal". Further, Appellants' Motion does not cite any authority to provide any exception to Rule 211(b), SCACR, which provides that "The final brief(s) shall be identical to the brief(s) previously served under Rule 208", and further provides that, except for adding references to the Record and correction of typographical errors, "No other changes may be made". As our Court has held, conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review, *State v. Crocker*, 366 S.C.394, 399 n.1, 621 S.E.2d 890, 893 n.1 (Ct. App. 2005).

b. Ignorance of the law and our appellate court rules is no excuse for Appellants to amend their Initial Brief and Designation of Matter.

Appellants set the standard, for which they should be held to, when they sued Respondent for legal malpractice, based upon a "technical" violation of our ethics rules. The gravamen of Appellants' malpractice claims is that Respondent failed to obtain a *written* disclosure of potential conflicts of interest and the necessity for Appellants to obtain independent counsel - *even though Appellants were actually represented by*

independent counsel (Jack Qualey, Esq.), both as legal counsel (attached Exhibit, p. E6) and as attorney-in-fact (attached Exhibit, p. E7-8), in the subject transaction from which Appellants' alleged damages arose. This alleged "technical"⁶ violation of our ethics rules provides the basis for Appellants' "breach of duty" malpractice claims. (See paragraphs 17, 18, 25, 30 of the attached Complaint, p. E9-11). Although Appellants continue to assert that a mere ethics violation constitutes a "per se negligence" case (at p. 15, Conclusion, of their Reply Brief filed in this appeal), our Court has ruled that our Rules of Professional Conduct do not, in themselves, create a cause of action or establish evidence of negligence per se. The rules are intended for guidance and disciplinary purposes, not to form a basis for civil litigation. *Spence v. Wingate*, 716 SE2d 920 (SC 2011), citing *Smith v. Haynsworth et al*, 472 S.E.2d (1996).

Although Appellants are asserting a "technical" violation of our ethics rules as a basis for their malpractice claims which are the subject of this appeal, they do not want to be held to the same standard when it comes to their ignorance of our law and appellate rules. The only "excuse" for not timely filing the expert affidavit required by S.C. Code Ann. §15-36-100, and for failure to adhere to our appellate court rules, is "ignorance" of said law and rules. "Relief will not be granted where the complaining party took measure to secure knowledge as to the state of the law and, being misinformed, placed himself in the prejudicial situation of which he later complains. Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests." 27A Am.Jur.2d *Equity* § 7 (1996); *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 470 S.E.2d 858

⁶ In the "Conclusion" to Appellants' Reply Brief (p. 15), Appellants assert that Respondent's assertion of the statutory requirements (§15-36-100) of providing an expert affidavit are merely "technical".

(Ct.App.1996) *Id.*, 322 S.C. at 210-211, 470 S.E.2d at 860. *Estate of Holden*, 539 S.E.2d 703, 343 S.C. 267 (S.C. 2000).⁷

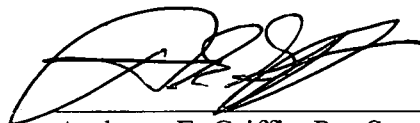
c. Judicial efficiency and fairness mandate that Appellants' Motion to Amend be denied.

This Court should not allow Appellants to amend their Initial Brief and Initial Designation of Matter, in clear violation of Rule 211(b) which provides that "No other changes may be made" (other than substituted references to the record and typos). Our Rules provide efficiency and certainty to our appellate process; if this court decides to treat the Initial Briefs as "drafts" and allow wholesale amendments to them in the final Briefs, then the Rules should be changed. It is not fair to allow Appellants the right to amend, in violation of our appellate rules, without allowing the Respondent and all other litigants the same right.

CONCLUSION

Appellants should not be allowed to "amend" their Initial Brief and Initial Designation of Matter to be Included in Record on Appeal, in violation of our appellate court rules.

September 11, 2013



Anthony E. Griffis, Pro Se
355 Park Ave SW
Aiken, SC 29801
(843) 368-5013

⁷ Distinguishing Chief Justice Toal's dissent in *Atlantic Coast Builders v. Lewis*, 396 S.C. 479 at p 491, (S.C. 2011), in which she states that she does not believe it is the Court's place to play a "gotcha" game with attorneys by showcasing their alleged mistakes --- the instant case involves a "gotcha" game instigated by Appellants; but even more than a technical "gotcha" game, involves blatant ignorance and violation of the law and court rules by Appellants.

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Court of Appeals

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Appellate Case No. 2013-001407

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v.

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Defendants,

Of Whom Cherry Hill Estates, LLC. and Ronald Faulkner areAppellants.

Cherry Hill Estates, LLC and Ronald Faulkner, Third Party Plaintiffs,

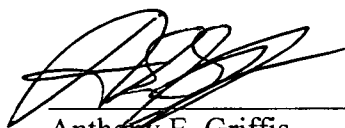
v.

Anthony E. Griffis,Respondent.

PROOF OF SERVICE

I certify that I have served the **RETURN TO APPELLANTS' MOTION TO AMEND INITIAL BRIEF AND DESIGNATION OF MATTERS BY APPELLANTS TO BE INCLUDED IN THE RECORD ON APPEAL** on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on September 11, 2013, addressed to Appellants' attorney of record, Michael W. Mogil, 2 Corpus Christie Place, Suite 303, Hilton Head Island, SC 29928.

September 11, 2013



Anthony E. Griffis
355 Park Ave SW
Aiken, SC 29801
(843) 368-5013
Pro Se Respondent

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