

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-07-06054
Appellate Case No. 2013-001407

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.

**REPLY TO APPELLANTS' RETURN TO
RESPONDENT'S MOTION TO STRIKE
CERTAIN MATTERS DESIGNATED BY APPELLANTS
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent, Anthony E. Griffis, hereby replies to Appellant's Return to Respondent's "Motion to Strike Certain Matters Designated by Appellants to Be Included in the Record on Appeal":

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

dated February 20, 2013, entered on March 5, 2013 (copy attached), 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 (copy attached) which held that an expert affidavit was required to support Appellant's legal malpractice claims¹. 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 not a vehicle through which a party can inject new issues for the court to pass on, and they

¹ 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.

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 Court².

Appellants have designated matters #15, 16, 17, 19, 20, 21, 22, 29, and 30 - but have not cited to this matter in their initial brief³. 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 of the transcript prepared by the court reporter or by the page of the material to be

² 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.
³ 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)).

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 rules⁴.

3. Appellants should not be allowed to amend their Initial Brief and Designation of Matter, in violation of Rule 211, SCACR. Please see "Return to Appellants' Motion to Amend Initial Brief and Initial Designation of Matter to Be Included

⁴ 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.

in Record on Appeal", incorporated herein by reference.

CONCLUSION

Respondent urges this Court to order that matters 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 29, and 30 be deleted from "Appellants' Designation of Matter to be Included in Record on Appeal" of this case, because the above matters are irrelevant to the issue on appeal (S.C. Code Ann. §15-36-100), and in violation of our appellate court rules.

September 11, 2013



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PROOF OF SERVICE

I certify that I have served the **REPLY TO APPELLANTS' RETURN TO MOTION TO STRIKE CERTAIN MATTERS DESIGNATED 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



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