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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Court of Common Pleas

Daniel Coble, Circuit Court Judge

Case No.: 2025-000757

George Gallow,.....Appellant,

v.

Autumnwood Crossing LP and Intermark Management Corporation,....Respondents,

RESPONDENTS' REPLY

Pursuant to Rule 240(f), SCACR, counsel for the Respondents submit a Reply to Appellant's Return in Opposition to the Motion to Strike.

ARGUMENTS IN REPLY

Appellant's Return focuses on the arguments made by counsel at the hearing on Respondent's Motion for Summary Judgment. *See* Return, p. 2 (stating "Appellant did not raise on appeal any argument that was raised for the first time in this Rule 59(e) motion"); Return p. 4 (stating "The arguments made in Appellant's Initial Brief are the same arguments made at the summary judgment stage").

Appellant concedes the documents at issue were not presented to the trial judge in opposition to the Motion for Summary Judgment and were first submitted in the Rule

59(e) motion. *See* Return, p. 4 (stating “And while the exhibits attached to the Rule 59(e) motion had not been previously filed with the Court . . .”).

Appellant presents no case law showing a document available at the time of a motion hearing may be submitted for the first time in a Rule 59(e) motion and considered by the trial judge or appellate court. *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (finding this Court could not consider on appeal a document that was submitted to hearing judge only as an attachment to a Rule 59(e) motion) citing *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”); *see also Viviano v. Jeffers*, No. 6120, 2025 S.C. App. LEXIS 53, at *9 (Ct. App. Aug. 20, 2025) (concluding the circuit court properly declined to address materials first provided in the Rule 59(e) motion]; *Green v. Johnson*, No. 2024-UP-024, 2024 S.C. App. Unpub. LEXIS 21, at *12 (Ct. App. Jan. 17, 2024) (holding the trial judge “erred in considering evidence that Johnson presented for the first time during the hearing on his Rule 59(e) motion”); *Mozingo v. Ford Motor Co.*, No. 2009-UP-282, 2009 S.C. App. Unpub. LEXIS 285, at *2 (Ct. App. June 4, 2009) (stating “. . . a party cannot use Rule 59(e) to present new evidence to the court” . . . citing *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend), also citing *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

Accordingly, the documents cannot be considered by the trial judge in ruling on the Rule 59(e) motion, and cannot be considered in this appeal. Therefore, the motion should be granted.

Appellant also contends the documents submitted in the Rule 59(e) motion were “not disputed documents.” Return, p. 4.

To resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. *NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). *Id.*

“[T]he non-moving party may not circumvent the grant of summary judgment through the argument of counsel alone. *See Ex Parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006) (“It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.”); *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held “that statements of fact appearing only in arguments of counsel will not be considered”); *South Carolina Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“[a]rguments made by counsel are not evidence”); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) (“Arguments of counsel are also not evidence.”); *Gilmore v. Ijev*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (the trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence).

Appellant failed to present *any* evidence to the trial judge for consideration in opposition to the motion for summary judgment *except* arguments of counsel. [Motion,

Exhibits 1, 3]. Respondents do not contend the Rule 59(e) documents *could not have* been considered by the trial judge if presented prior to the Rule 59(e) motion. However, because the documents were not presented prior to the Rule 59(e) motion, Respondents were unable to properly present documents obtained during discovery to contradict the inferences from the documents now sought to be relied upon by Appellant. Instead, Respondent properly argued to the trial judge in its response that the documents submitted could not be considered to support the motion, and argued the law and evidence properly submitted trial judge.

As allowing the documents to be part of the Record on Appeal and improperly referenced in the Initial Brief contrary to established precedent, Respondents would be significantly prejudiced, and the motion should be granted.

CONCLUSION

For the reasons set forth, Respondents respectfully request an Order granting them the following relief:

- (1) An Order striking Appellant's Designations of Matter filed with the Rule 59(e) motion;
- (2) An Order instructing Appellant to file an Amended Initial Brief removing reference and/or citation to any document struck from Appellant's Designation of Matter; and
- (3) An Order staying the current deadlines until such time as the motion is ruled upon.
- (4) For such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's **REPLY** has been served on counsel via electronic mail to the AIS e-mail address of the following attorneys:

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