

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

CASE NO: 2009-CP-07-05410

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JAN 22 2014

Court of Appeals

THE CALLAWASSIE ISLAND MEMBERS CLUB, INC..... Respondent,

vs.

ARTHUR APPELATE.....Appellant.

REPLY TO APPELLANT'S RETURN TO RESPONDENT'S MOTION TO
EXCLUDE MATTER DESIGNATED TO BE INCLUDED IN THE RECORD ON
APPEAL

In his Return to the Motion to Exclude Matter Designated to be Included in the Record on Appeal filed by The Callawassie Island Member's Club, Inc. (CIMC), the Appellant, Applegate, contends that documents filed with the Court following the hearing on the motion that is the subject of the instant appeal are properly included within the Record because they were filed prior to the Court issuing its Order denying Applegate's Motion to Alter or Amend. Applegate further contends that an affidavit, on file with the Beaufort County Clerk of Court but neither presented nor referred to by the trial court is also properly part of the record because it is part of the file maintained by the Clerk and it was available

for review by the trial court. These assertions are not supported by South Carolina law.

A motion to alter or amend, pursuant to Rule 59(e), SCRCP, is intended to allow a party to request that the court reconsider matters properly encompassed in a decision on the merits. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). However, a party cannot for the first time raise an issue by way of a Rule 59(e) motion. Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). Moreover, it is axiomatic that an issue must have been raised to and ruled upon by the trial court in order for it to be raised on appeal. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Applegate's attempts to include in the Record on Appeal documents filed following the initial hearing are not properly before this Court, because a party cannot raise new issues in bringing a Rule 59(e) motion. Therefore, because these filings could not have been part of the Court's consideration in its decision to transfer the instant matter to the nonjury roster, they could not be included, and were not included, as part of Applegate's Rule 59(e) motion. Therefore, they are not properly before this Court.

Additionally, the affidavit (item 13) cannot be included because it was not presented to the lower court for consideration. Applegate argues that it was on file with the Court, and therefore *might* have been considered by the trial court, but there is no indication the court did so. It is not raised in Applegate's memorandum, nor is it referenced within the Court's Order. Therefore, because there is no indication the trial court was presented with the affidavit or considered

it, it is not properly part of the record. See Rule 210, SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”)

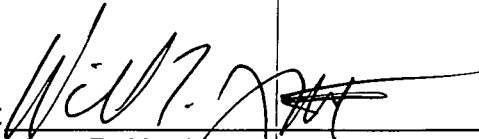
Applegate asserts that *any* document on file with the Clerk of Court is properly part of the record on appeal, citing S.C. Dept. of Social Services v. Janice C., 383 S.C. 221, 678 S.E.2d 463 (Ct. App. 2009) for this contention. However, that opinion involved the Court of Appeals, reviewing a termination of parental rights, finding that the family court did not err in taking judicial notice of acceptances and affidavits of service that were on file with the Clerk of Court but not entered into evidence at the TPR hearing. Those circumstances are exceptionally distinct from the instant appeal, in that the affidavit to be included in the instant Record is not referenced in the lower court’s Orders. Likewise, those documents filed after the hearing on CIMC’s motion to transfer are not referred to or discussed by the trial court in its Orders, and are not properly part of the Record in the instant appeal.

Finally, these documents are irrelevant to determining whether a trial court properly transferred a matter to the nonjury roster after determining the documents at issue were unambiguous. Specifically, the affidavit Applegate seeks to include is not referenced in either brief filed by Applegate with this Court and, as discussed within CIMC’s brief, the denial of summary judgment does not establish the law of the case. Therefore, the inclusion of those documents, which could not have been presented to the trial court, are not properly before this Court.

Accordingly, for the reasons discussed herein, CIMC's motion should be granted.

Respectfully submitted,

HOWELL, GIBSON & HUGHES, P.A.

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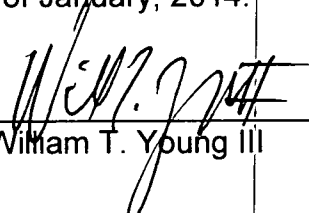
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January 17, 2014

CERTIFICATE OF SERVICE

I certify that I served the foregoing Reply to Appellant's Return to Respondent's Motion to Exclude Matter upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 17th day of January, 2014.

By: 
William T. Young III

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SC Court of Appeals

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January 17, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: The Callawassie Island Members Club, Inc. v. Arthur H. Applegate
Appellate Case No. 2013-001812
Civil Action No.: 2009-CP-07-05410
Our File No.: 10809 4 SPH

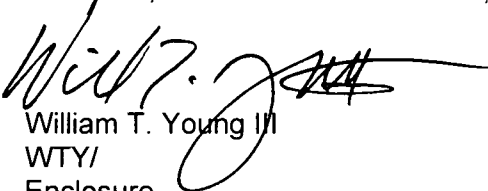
Dear Ms. Kitchings:

Please find enclosed herewith for filing the original and seven (7) copies of the Reply to Appellant's Return to Respondent's Motion to Exclude Matter Designated to be included in the Record on Appeal filed on behalf of the Respondent. I would appreciate it if you would please return a clocked copy of the same to me in the self-addressed, stamped envelope provided for your convenience.

I am by copy of this correspondence serving all counsel with a copy of the Reply. In the event you have questions regarding this filing, please feel free to contact me.

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


William T. Young III

WTY/

Enclosure

cc: Ehrick K. Haight, Jr., Esquire - w/ enclosure
Brian D. McDaniel, Esquire - w/ enclosure
Jennifer I. Campbell, Esquire - w/ enclosure

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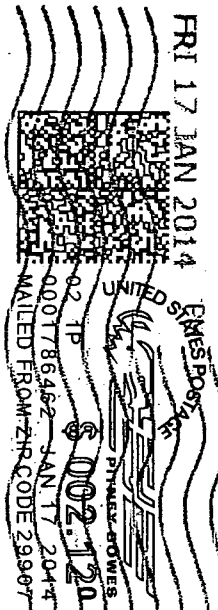
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SC Court of Appeals

CHARLESTON SC 294

FRI 17 JAN 2014



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TO:

Hon. Jenny Abbott Kitchings
Clerk of Court
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