

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-21-1334 and Case No. 2013-ES-21-190
Appellate Case No.: 2013-002810

In the Matter of the Estate of Eris Singletary Smith

In re:

Eris Gail Smith,.....Appellant,

v.

Judy Smith Jones, Jacqueline Brown, James Ervin Smith
Timothy David Smith, Jamie Smith and Mikie Smith, Defendants

Of whom Judy Smith Jones is the.....Respondent.

**REPLY IN SUPPORT OF AMENDED MOTION TO STRIKE
APPELLANT'S DESIGNATION
OF MATTER NOT IN THE RECORD**

J. René Josey, Esquire
Jeffrey L. Payne, Esquire
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ATTORNEYS FOR THE RESPONDENT

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AUG 25 2014

SC Court of Appeals

REPLY ARGUMENT

Respondent hereby makes Reply, pursuant to SCACR 240 (f), in support of the pending Amended Motion to Strike Appellant's Designation of Matter Not In The Record. In her Return to the Motion, Appellant focuses on one phrase of SCACR 210 (c) ("presented to the lower court") which appears as part of a prohibition not to include matter in the Record on Appeal that was not "presented to the lower court or tribunal." Appellant wishes for the Court to conclude that the converse must be allowable – that is, anything "presented to the lower court" is fair for inclusion in the Record on Appeal *regardless of when it was submitted or what creative form it may take*. Clearly that is not what the rule provides and with good reason.

Appellant's argument further suggests that the objectionable designations are "relevant" as required by SCACR 209(b). Respondent argues that the material is relevant to the question presented of "Did the trial court err by granting ... summary judgment ... because it was premature to grant the motion before an opportunity for full and fair discovery had been had?" Appellant's argument asks this Court to second guess the fairness or ripeness of the summary judgment motion – not based upon the procedural protections and framework provided by Rule 56 and the SCRCF but rather based upon unchallenged unilateral witness statements taken outside of the framework of the discovery rules and "presented" to the Court after the Court had rendered its decision. Respondent suggest that SCACR 209 and 210 must be read in conjunction with (*in pari materia*) the more specific procedural context and framework provided by the SCRCF.

Appellant's interpretation would render the procedural protections and framework of the SCRCP meaningless and invite litigants to sandbag evidence until after a Court's ruling knowing that a second bite at the apple was always available. It would also encourage disappointed litigants to rush out following every announced ruling and seek information outside of the discovery process to cast after-the-fact suspicions on a trial court's ruling. The trial judges of this State would never be able to achieve the finality needed in legal process and promised in Rule 1 of the SCRCP ("just, speedy, and inexpensive determination"), but instead would be subjected to never-ending submissions and counter-submissions without invitation and interrupting the reflective time needed to prepare and review written orders. In theory, such submissions could continue even after a trial court's ruling – perhaps even up until a notice of appeal deprived the Court of jurisdiction – thus rendering the SCRCP provisions for post-judgment motions equally meaningless.

In support of her interpretation of the appellate court rules, Appellant cites Ford v. State Ethics Comm'n, 344 S.C.642, 545 S.E.2d 821 (2001) and Doe v. Doe, 324 S.C. 492, 478 S.E.2d 584(Ct. App. 1996). Both cases stand for the sound proposition that a trial court can change its mind between the issuance of an oral ruling and the preparation of a final written order. Respondent does not dispute or challenge such inherent authority of a trial judge. That does not mean, however, that the record remains open outside the parameters of the SCRCP. Nothing suggested by the Respondent's Motion To Strike would prohibit a trial judge from having second thoughts and either denying summary judgment in writing – based upon a record presented in conformity with the SCRCP – and nothing would prohibit a trial judge from having second thoughts and requesting additional evidentiary submissions within a fair procedural framework. Of course, that is *not* what happened here. Here, the trial judge made up his mind, announced his

ruling, and then issued a written order based upon the record made through the summary judgment hearing.

Notably, the trial court's order denying the Motion to Reconsider did not even consider the Appellant's belated submissions which were not submitted pursuant to Rule 60(b)(2) as newly discovered evidence and are not allowed under the extensive case law prohibiting a party from raising new matter in the context of a Rule 59(e) motion.¹ Appellant's motion Return offers no argument in response to the prohibitions of Rules 59 and 60.

¹ Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 344 (Ct. App. 2008) (citation and internal quotation marks omitted). "An issue may not be raised for the first time in a motion to reconsider." Johnson v. Sonoco Products Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2008). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hospital, Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994); see also C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2D 268, 270 (1993) ("party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not."); MailSource, LLC v. Bailey & Assoc., Inc., 356 S.C. 370 374, 588 S.E.2d 639, 641 (Ct. App. 2003). Moreover, in West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000), this Court specifically affirmed a trial court's non-consideration of a late affidavit filed outside of the "time required by Rule 56" and without "any good excuse for that failure." See also Black v. Lexington School District No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997) (our Supreme Court also affirming trial court's rejection of a late affidavit). Again, Respondent notes that an unpublished opinion of this Court arising from this same county has affirmed the non-consideration of new exhibits submitted for the first time with a Rule 59(e) motion. (Respondent is aware that SCACR 268(d)(2) provides that unpublished opinions should not be cited as precedent and only mentions it, without citation, because of its unique facts similar to those at bar).

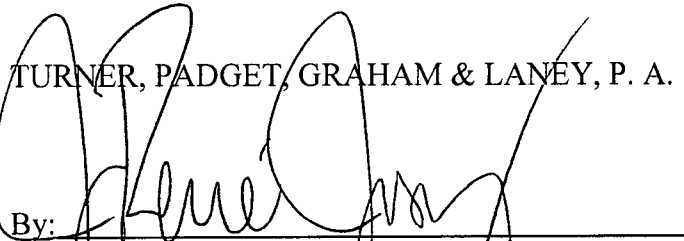
CONCLUSION

Respondent asks this Court to strike the items 13, 14, 24, 25, 26, 27 (an Exhibit to Item 26), 28, and 29 from the Appellant's *amended* designation of the Record on Appeal. In addition, Respondent asks the Court to order Appellant to amend her brief to remove any reference to such materials and any argument based upon such materials.

Florence, South Carolina

TURNER, PADGET, GRAHAM & LANEY, P. A.

August 21, 2014

By: 

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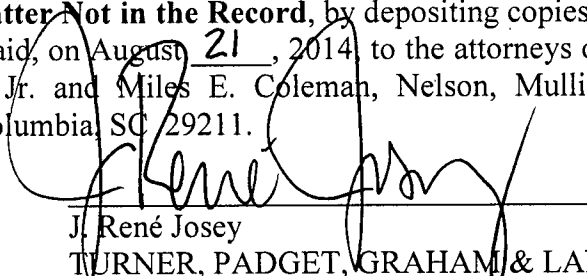
v.

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Timothy David Smith, Jamie Smith and Mikie Smith, Defendants

Of whom Judy Smith Jones is the.....Respondent.

PROOF OF SERVICE

I certify that I have served the **Reply in Support of Respondent's Amended Motion to Strike Appellant's Designation of Matter Not in the Record**, by depositing copies of the same in the United States mail, postage prepaid, on August 21, 2014, to the attorneys of record, C. Mitchell Brown, William C. Wood, Jr. and Miles E. Coleman, Nelson, Mullins Riley & Scarborough, LLP, P.O. Box 11070, Columbia, SC 29211.



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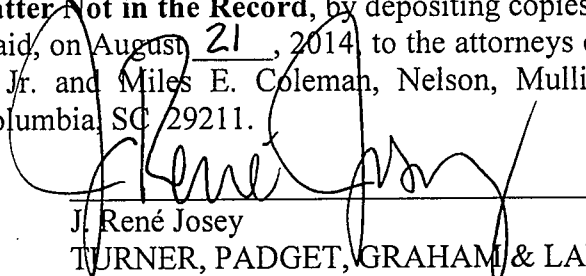
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August 21, 2014

Hon. Jenny Abbott Kitchings
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Re: Estate of Eris Singletary Smith; In Re: Eris Gail smith v. Judy Jones Smith
Civil Action No.: 2013-CP-21-1334 and Case No.: 2013-ES-21-190
Tracking Number: 2013-002810
TPGL File No.: 12331:101

Dear Ms. Kitchings.:

Enclosed please find the original and seven copies of a Reply in Support of Respondent's *Amended* Motion to Strike Appellant's Designation of Matter Not in the Record. Also enclosed are the original and one copy of the Proof of Service. Please file the original documents and return one clocked copy of each to me in the enclosed self-addressed stamped envelope.

By copy of this letter with enclosures to all counsel of record, I am herewith serving them with copies of the same. Thank you for your assistance with this matter, and please contact me if you have any questions.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:vlb
Enclosures

Cc: Judy Smith Jones (w/enclosures)
C. Mitchell Brown, Esquire (w/enclosures)
William C. Wood, Jr., Esquire (w/enclosures)
Miles E. Coleman, Esquire (w/enclosures)

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