

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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MAY 12 2015

SC Court of Appeals

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

vs.

ARTHUR APPLGATE.....Appellant.

RETURN TO PETITION FOR REHEARING

Respondent, The Callawassie Island Members Club, Inc., files this Return to Appellant's Petition for Rehearing respectfully requesting the Court deny Appellant's Petition. "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The points allegedly overlooked or misapprehended must be stated with particularity. Rule 221(a), SCACR. The purpose of the petition for rehearing is not to have the case tried in the appellate court a second time." Kennedy, *Supra*.

"The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal." Kennedy, at 533, 564 S.E.2d at 323.

Since Appellant failed to raise the same arguments on appeal that he raised to the circuit court, his arguments, far from being misapprehended or overlooked, were unpreserved and not considered by this Court. See Kennedy, 349 S.C. at 533, 564 S.E.2d at 323 ("South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.").

Appellant also claims multiple errors with the circuit court's final order dated July 17, 2013, alleging that the circuit court made rulings that had not been previously argued or contemplated. However, Appellant failed to raise this objection to the circuit court by way of a Rule 59, SCRCP, motion challenging the final order. Thus, like Appellant's challenge to the initial order, the arguments relating to the circuit court's new rulings were unpreserved. See Timmerman, 331 S.C. at 460, 502 S.E.2d at 922 ("When a party received an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."). "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." Id.; see

also Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993) (finding an appellant must challenge a theory of relief with a Rule 59 motion when the theory of relief was first raised in the trial court's order).

Additionally, Appellant asserts in his Petition for Rehearing that certain documents were "a matter of record" with the courts, and based on the information within those documents, there is "clear error by the [circuit] court," which would allow for appellate review. (Pet. Re. p. 5). Our Supreme Court "has consistently refused to apply the plain error rule. Instead, it is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Further, "South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review." Johnson v. S.C. Dep't of Prob., Parole & Pardon Servs., 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007).

Accordingly, since Appellant fails to identify any arguments this Court either overlooked or misapprehended, this Court should summarily deny Appellant's Petition for Rehearing.

*(SIGNATURE ON THE FOLLOWING PAGE)*

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CERTIFICATE OF SERVICE

I certify that I served the foregoing 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 17 day of May, 2015.

By:   
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May 6, 2015

Hon. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
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SC Court of Appeals

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 Respondent's Return to Petition for Rehearing with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

  
Stephen P. Hughes

SPH/kah  
Enclosure

cc: Brian D. McDaniel, Esquire  
Ehrick K. Haight, Jr., Esquire