IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge
Tanya A. Gee, Circuit Court Judge

Civil Action No.: 2013-CP-40-05675

Appellate Case No.: 2015-001627

Willie J. Riley .....Appellant,

vs.

Dennis Wayne Catoe and Does.....Defendants

Of Whom Dennis Wayne Catoe is the.....Respondent.

INITIAL BRIEF OF RESPONDENT

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I. Appellant has abandoned his issues on Appeal.

II. The Statute of Limitations on Appellant's claims had expired prior to his commencing of an action against Defendant Catoe.

III. Appellant's claims are not equitably tolled.

STATEMENT OF THE CASE

The original Summons and Complaint in this matter was filed on September 17, 2013, alleging claims of legal malpractice related to title work done for a piece of property purchased by Appellant. **[Original Complaint.]** In lieu of an Answer, Respondent filed a Motion to Dismiss on October 17, 2013, based on Appellant's failure to comply with the expert affidavit requirements of S.C. Code Ann. § 15-36-100 for bringing a professional negligence claim. **[Motion to Dismiss.]** The Motion to Dismiss was granted, without prejudice, via Order, filed on February 18, 2014. **[February 18, 2014, Granting Motion to Dismiss.]**

An Amended Complaint was filed on March 4, 2014, alleging claims of legal malpractice against Respondent Catoe. **[Amended Complaint.]** The Amended Complaint was supported by the affidavit of an attorney pursuant to S.C. Code Ann. § 15-36-100. **[Id.]** Respondent Answered the allegations in the Amended Complaint on March 19, 2014. **[Verified Answer].**

On October 9, 2014, Respondent served certain Requests for Admission, pursuant to Rule 36, SCRCP, to Appellant. **[Requests to Admit.]** Appellant did not respond to the Requests for Admission within thirty days of their service. **[Affidavit of Leslie A. Cotter, Jr.]**

Respondent filed an Offer of Judgment, pursuant to Rule 68, SCRCP, on December 16, 2014. **[Offer of Judgment]**. Appellant did not respond to Respondent's Offer of Judgment within twenty days of its service.

On December 4, 2014, Respondent filed a Motion for Summary Judgment based on the expiration of the statute of limitations in this matter. **[Motion for Summary Judgment.]** After a hearing on the Motion for Summary Judgment, by Order dated May 18, 2015, the circuit court granted Respondent's Motion for Summary Judgment. **[Order granting Motion for Summary Judgment.]** Appellant moved to reconsider the matter. **[Motion for Reconsideration.]** Appellant's Motion was denied on July 21, 2015.[1] **[Order denying the Motion for Reconsideration.]** This appeal follows.

STATEMENT OF THE FACTS

On July 29, 2008, Respondent Catoe represented Appellant in a real estate transaction involving the purchase of a foreclosure property, located at 2181 Whittaker Parkway, Orangeburg, South Carolina ("the Subject Property") for a total purchase price of $3,800.00 from Aurora Loan Services, L.L.C. **[Order Granting Summary Judgment.]** Appellant alleges that after he began making purported improvements to the Subject Property, he was approached by Ulysses Green ("Green"), who asserted that Appellant was making improvements to the wrong parcel of land. **[Complaint.]**

Specifically, Mr. Green contended he was owner of the Subject Property through the devising of "Lots 11 and 12" through his family. **[Order of Judgment Upon New Trial, C/A No.: 2009-CP-38-1696.]** Mr. Green also contended he was owner of a lot

[1] Regrettably, Judge Kinard passed away during the pendency of the Motion for Reconsideration. Circuit Judge Tanya Gee, to whom the case was assigned, ordered a rough draft of the Motion for Summary Judgment Hearing Transcript and reviewed the relevant documentation and legal issues presented prior to rendering an Order on the Motion for Reconsideration.

across the street from the Subject Property, Lot. 3. **[Id.]** There is no dispute that the Subject Property and "Lots 11 and 12" refer to the same parcel of property.

Appellant contends he immediately contacted Respondent about his interaction with Mr. Green and was rebuffed. **[Complaint; Initial Appellant's Brief.]** Realizing there was a dispute or problem, Appellant contends he immediately began contacting other attorneys to look into the issue, but encountered many attorneys who wanted "upfront money" to investigate his case. **[Id.]** Finally, Appellant spoke with Attorney William Booth about the dispute and the presented issues in June of 2009. **[Id; Letter from William Booth, dated June 3, 2009.]**

On June 3, 2009, Mr. Booth wrote a letter to Respondent regarding the closing related to the Subject Property. **[Letter from William Booth, dated June 3, 2009.]** The letter contains the following statements:

> I am looking at the HUD-1 Settlement Statement dated July 29, 2009, for the purchase by Willie Riley of [the Subject Property] from Aurora Loan Services, LLC.
>
> ...
>
> Based on discussions with Mr. Riley and my review of the deeds, I do not believe Aurora had good title for the [Subject Property] described in the deed.
>
> ...
>
> I believe the examination of the title would show that Aurora Loan Services did not have good title to [the Subject Property].

[Id.]

Thereafter, Appellant, Respondent, and Mr. Booth met in fall of 2009. Appellant, having discovered that Lot 3 was worth more than the Subject Property, *i.e.* Lots 11 and 12, decided to bring an action against Green and several of Green's family members ("Green Family"), seeking to quiet title as to him for Lots 11 and 12 ***and*** **Lot 3**. ("The

Quite Title Action"). **[Requests to Admit]** During the Quiet Title Action, the Green Family, to the extent they had made an appearance in the action, offered to settle the action, giving clear title to Lots 11 and 12 to Appellant while retaining title to Lot 3. **[Id.]** Appellant rejected this offer and proceeded with the litigation in attempt to acquire title to Lots 3, 11, and 12. **[Id.]** Despite neither party seeking this resolution, the Master-in-Equity issued a compromise-type ruling and awarded Lots 3, 11, and 12 to Green and Appellant equally and ordered a sale of the properties and a splitting of the proceeds. **[Master-In-Equity Order, filed November 3, 2010.]**

This ruling was appealed. See Riley v. Green, 400 S.C. 609, 735 S.E.2d 550 (Ct. App. 2012). This Court reversed the Master's order and remanded for a new trial on the grounds that in an action to quiet title, the court has no authority to impose a compromise on parties who do not agree to it. Id. On remand, a Master-In-Equity quieted title in favor of Appellant as to Lots 11 and 12, *i.e.* the Subject Property, and title to Lot 3 in favor of Green. **[Order of Judgment Upon New Trial, filed June 20, 2013, C/A No.: 2009-CP-38-1696.]**

Despite obtaining clear title to the Subject Property that Appellant purchased for $3,800, **which placed Appellant in the exact position he should have been in after his initial purchase of the Subject Property**, Appellant filed a legal malpractice claim against Respondent alleging Respondent failed to ensure clear title concerning Appellant's purchase of the Subject Property. **[Complaint.]** The Complaint was dismissed without prejudice when Appellant failed to simultaneously file and serve an expert affidavit. **[February 18, 2014, Order Dismissing the Complaint.]** An Amended Complaint was filed, alleging that Respondent negligently failed to adequately ensure and

protect Appellant's interests in the real estate closing transaction resulting in defective title to the Subject Property. **[Amended Complaint.]** Summary Judgment was granted based on the expiration of the statute of limitations.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Rule 56, SCRCP. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party below." Willis v. Wu, 362 S.C. 146 , 151, 607 S.E.2d 63, 65 (2004).

An appellate court may rely on any reason appearing in the record to affirm the lower court's judgment. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000); Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995); Rule 220, SCACR.

ARGUMENT AND CITATION TO AUTHORITY

This Court must affirm the grant of summary judgment in favor of Respondent Catoe. Appellant has abandoned his arguments on appeal. In addition, Appellant's legal malpractice claim is barred by the applicable statute of limitations. Accordingly, the trial court properly granted summary judgment in Respondent's favor.

I. APPELLANT HAS ABANDONED HIS ISSUES ON APPEAL.

Appellant's scant argument appears to assign error to two main decisions of the

trial judge – the finding that the statute of limitation had expired and that the start date the trial court selected for the beginning of the statute of limitations is improper. Neither of these positions is supported by, or contains citations to, any legal authority. Accordingly, Appellant has abandoned his claims. State v. Lindsay, 394 S.C. 354, 362, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.") (citing State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009)). See also State v. Jones, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

This Court must affirm the trial court's grant of summary judgment because Appellant has failed to cite to any legal authority and has thus abandoned his claims.

II. THE STATUTE OF LIMITATIONS ON APPELLANT'S CLAIMS HAD EXPIRED PRIOR TO HIS COMMENCING OF AN ACTION AGAINST RESPONDENT CATOE.

Even if Appellant had not abandoned his claims on appeal, the trial court properly dismissed his claims based on the expiration of the statute of limitations. Statutes of limitation are not simply technicalities, but are fundamental to a well-ordered judicial system. See Kelly v. Logan, Jolley, & Smith, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (citing Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996); Hooper v. Ebenezer Senior Serv. & Rehab., Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct. App. 2008)). "Statutes of limitation embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Id. (citing Moates at 172, 470 S.E.2d at 404). Statutes of limitation relieve courts of the burden of trying stale claims when a plaintiff has slept on his or her rights, Id. (citing McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-

50, 378 S.E.2d 69, 70 (Ct. App. 1989)), as well as protecting potential defendants from protracted fear of litigation. Hooper, at 228, 659 S.E.2d at 219.

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530 (Supp. 2013). Pursuant to the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc'y. S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989). Here, the statute of limitations commenced on June 3, 2009. Therefore, Appellant's Complaint filed on September 17, 2013, and the Amended Complaint, filed October 17, 2013, are well-outside the applicable statute of limitations and summary judgment was properly granted in Respondent's favor.

A. UNDER THE DISCOVERY RULE, APPELLANT KNEW OR SHOULD HAVE KNOWN THAT HE HAD A CLAIM AGAINST RESPONDENT IN 2009.

Under the Discovery Rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. Epstein v. Brown[2], 363 S.C. 372, 610 S.E.2d 816, 818 (2005); see also, Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996); Berry v. McLeod, 328 S.C. 435, 445, 492 S.E.2d 794, 800 (Ct. App. 1997); S.C. Code Ann. § 15-3- 535. Courts have interpreted the exercise of reasonable diligence as requiring the injured party to act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. **The**

[2] Respondent is aware of the South Carolina Supreme Court's recent decision in Stokes Craven Holding Corp. v. Robinson, 2015 WL 5247124 (S.C. 2015); but, that opinion remains unpublished at the time of filing the initial brief. In addition, the instant case was decided prior to Stokes Craven and the prevailing law at the time was Epstein.

statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed. Epstein, 610 S.E.2d at 818 (emphasis in original).

The record contains evidence that Appellant became aware that there may have been an issue with the Subject Property and the closing and title work provided by Respondent as soon as Mr. Green approached Appellant about Appellant performing work on the wrong property. Indeed, Appellant concedes he immediately sought legal advice with regard to this dispute and issue—*i.e.* exercising reasonable diligence and acting with some promptness when he believed some right of his had been invaded. Appellant approached multiple attorneys to examine this dispute and issue, but all wanted upfront fees. *See* Br. of App. p., 2. Because the discovery rule focuses upon whether the complaining party acquired knowledge of any facts sufficient to put said party on inquiry, which if developed, would disclose alleged conduct, the application of the discovery rule is in large measure a function of determining what facts and circumstances were known or discoverable by the plaintiff. Consequently, Appellant's actions are sufficient to establish that Appellant was on notice that a claim against someone may exist shortly after he was approached by Green.

A similar result was reached in the Burgess case. There, Burgess sued her former attorney for legal malpractice, contending that although the plaintiff claimed she was aware that a Cancer Society employee, Oulla, was having an affair with her former attorney, McLeod, she was unaware that Oulla was passing information she had learned from McLeod about Burgess' claim to managerial level personnel at the Cancer Society office. See Burgess at 182, 386 S.E.2d 798, 800. This Court affirmed the trial court's

finding that "Burgess's knowledge of the alleged affair between McLeod, her attorney, and Oulla, then Executive Secretary of ACS, constituted such knowledge of existing facts which were sufficient to put Burgess on inquiry and had she pursued such inquiry, it would have disclosed alleged communications between McLeod and Oulla." Id. at 187, 386 S.E.2d at 800-801.

As the trial court here found, it is not necessary that a plaintiff need acquire precise information of a claim against his attorney to start the running of the statute of limitations, rather a plaintiff merely needs to acquire facts as would have led to the knowledge of a claim, if pursued with reasonable diligence. Here, Appellant had acquired sufficient knowledge that he may have a claim if pursued with reasonable diligence. Therefore, summary judgment was properly granted.

B. APPELLANT WAS AWARE HE POTENTIALLY HAD A CLAIM AGAINST RESPONDENT IN JUNE OF 2009.

Even if the "multi-attorney consultation" time period may be too vague of a reference point for this Court, certainly the letter from Mr. Booth, sent on June 3, 2009 (the "Booth Letter"), which states there is a concern that the title at issue had defects, establishes a starting point for the running of the statute of limitations. Mr. Booth is an attorney who undertook to investigate the title issues with the Subject Property for Appellant. The Booth Letter demonstrates that Appellant, and Mr. Booth, knew that legitimate problems, disputes, and issues were present concerning errors in Appellant's deed and title and in the examination of the title and real estate closing concerning the Subject Property by Respondent. These errors were sufficient to apprise Appellant he may have had a claim against Respondent. In addition, the Requests to Admit, which went unanswered and are therefore deemed admitted under Rule 36, SCRCP, establish

Appellant was aware he may have had a claim against Respondent in June 2009.

Because date of discovery is an objective test, the court must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001), (quoting Young v. South Carolina Dept. of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999)). Therefore, on the evidence before it, the trial court was correct in finding the statute of limitations period began to run at least by June 3, 2009, and a claim would have to have been filed by on or about June 2, 2012.

The Original Complaint in this matter was not filed until September 17, 2013, and the Amended Complaint was not filed until March 4, 2014. Each of these dates is well-beyond the June 2012 deadline. Thus, the statute of limitations precludes this legal malpractice claim against Respondent and the trial court's grant of summary judgment in Respondent's favor must be affirmed. See Christenson v. Mikell, 324 S.C. 70, 476 S.E.2d 692 (1996) (finding that an owner's knowledge that he did not have title insurance was sufficient to put the plaintiff on inquiry notice that he may have a potential claim against the attorney); Mitchell v. Holler, 311 S.C. 406, 429 S.E.2d 793 (1993) (affirming the dismissal of a party's legal malpractice claim as barred by the statute of limitations when the record demonstrated the plaintiff contacted two other attorneys complaining of her former attorney's conduct during her criminal trial); Peterson v. Richland County, 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999) (affirming the grant of summary judgment when a party had sufficient knowledge of her injury when she attempted to commence a

foreclosure on a judgment but an error was found with regard to the indexing).

III. APPELLANT'S CLAIMS ARE NOT EQUITABLY TOLLED.

"Tolling refers to the suspending or stopping of the running of a statute of limitations, it is analogous to a clock stopping, then restarting." Hooper, at 115, 687 S.E.2d at 32. South Carolina provides for statutory tolling in certain circumstances such as continuous absence from the state for a period of time and certain disability provisions. See S.C. Code Ann. § 15-3-30 (Supp. 2013); S.C. Code Ann. § 15-3-40 (Supp. 2013). None of the statutory tolling provisions have been pled nor is there any evidence to indicate they should be applicable here.

Instead, Appellant seems to seek an equitable tolling. "Equitable tolling is a non-statutory tolling period which suspends a limitations period." Hooper, at 115, 687 S.E.2d at 32. The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Hooper at 115, 687 S.E.2d 32. The doctrine of equitable tolling should be used sparingly and only when the interests of justice compel its use. Id. at 117, 687 S.E.2d at 33. Here, the trial court correctly found Appellant failed to carry his burden of establishing material facts which would justify tolling the statute of limitations.

Appellant cannot demonstrate equitable estoppel while at the same time claiming he was, in effect, not aware that a claim against Respondent could be brought in 2009. Appellant's Brief contends that he never saw the Booth Letter until 2013 and that it cannot be used to determine the start date for the statute of limitations as commencing in 2009. At the same time, Appellant argues that the interactions between him, Respondent, and Mr. Booth, and the subsequent quiet title litigation, allow for the tolling of the statute

of limitations. These inconsistent positions cannot stand.[3]

"For equitable estoppel to apply, a plaintiff must be *aware* that a claim might exist prior to the expiration of the statute of limitations, but due to some conduct or representation by the defendant, the plaintiff is induced to delay in filing the suit." Kelly at 639, 682 S.E.2d at 8 (citing Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)) (emphasis in Kelly). As the Kelly court explained:

> Kelly emphatically denies that she was aware of a claim against Respondents for legal malpractice at the time she claims Respondents misrepresented her status in the medical malpractice suits. If she was not aware of a claim against Respondents at that time, she cannot also argue that she reasonably relied on their misrepresentations in delaying to file her legal malpractice suit. Because Kelly failed to establish that she meets the requirements for equitable estoppel, the circuit court properly granted summary judgment based on the expiration of the statute of limitations.

Kelly at 639-640; 682 S.E.2d at 8. Similar to Kelly, in this presented record Appellant may not have it both ways. He may not claim he was not aware he might have had a claim against Respondent in 2009 while also claiming that he relied on Respondent's alleged representations to delay in filing his legal malpractice suit. Consequently, Appellant cannot establish equitable tolling is warranted here.

Moreover, on this record, there was nothing stopping Appellant from bringing a claim against Respondent during the pendency of the Quiet Title action and prior to the expiration of the statute of limitations. The South Carolina Supreme Court rejected a similar argument in Epstein, finding that Epstein's argument that requiring him to pursue an appeal while simultaneously pursing a malpractice suit against his attorney would have put him in the awkward position of arguing inconsistent positions in two different

[3] In addition, as referenced above in Part I., Appellant's positions and Brief are not supported by, and do not reference, any legal citations.

courts.[4] See, Epstein, 610 S.E.2d at 821.

In addition, it must be noted, the Quiet Title Action was not just for the quieting of the title to Lots 11 and 12—the Subject Property. Rather, Appellant sought to gain or acquire, through that litigation, title to Lot 3, to which he had no ties until he found out that Lot 3 was more valuable than the Subject Property he purchased for $3,800. Therefore, Respondent's work on that quiet title action, for free, cannot serve to toll the statute of limitations.

Respondent represented Appellant in his quest to attain title to Lot 3 after Appellant found out Lot 3 was worth more than the Subject Property. Thus, Appellant did not utilize Respondent's undertakings in the Quiet Title Action to just correct an alleged error regarding the Appellant's title to Lots 11 and 12. Rather, Respondent, at the behest of Appellant, proceeded with litigation which progressed through the Master-in-Equity, this Court, and the trial court on remand, related to Appellant's quest to seek title to Lot 3. Indeed, during that litigation, the Green Family offered Appellant clear title to Lots 11 and 12 –which would have resolved the matter—but Appellant declined the Green Family's offer, instead pursuing the litigation wherein he sought a claim and title for Lot 3. [**See Requests to Admit**].

The trial court properly found the statute of limitations in this matter was not tolled. Appellant cannot establish a threshold inquiry—that he was not aware of a claim against Respondent—while at the same time trying to claim that the statute of limitations as to his claim must be tolled. Appellant's equitable estoppel claim fails because he claims he was not aware of the claim against Respondent while at the same time trying to

[4] This reasoning, too, is why Appellant's claim in his Brief, that continuances and recesses of the trial court in the Quiet Title Action should also toll the statute of limitations, is without merit.

claim that the statute of limitations as to his claim must be tolled. Thus, summary judgment as to Respondent was properly granted.

CONCLUSION

Based on the foregoing, Respondent Dennis Wayne Catoe respectfully requests this Court affirm the trial court's grant of summary judgment.

Respectfully submitted,

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December 22, 2015
Columbia, South Carolina

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Of Whom Dennis Wayne Catoe is the.....Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson, Plowden & Robinson, P.A., attorneys for Respondents, do hereby certify that I have this date served the foregoing ***Initial Brief of Respondent*** by personally depositing a copy of same in a United States Postal Service mailbox, postage paid, addressed to the following:

Willie J. Riley
84 Wild Indigo Court
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Pro-se Appellant

Sonya Hancock

Dated: December 22, 2015

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November 22, 2015

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Willie J. Riley v. Dennis Wayne Catoe
Appellate Case No.: 2015-001627
C/A No.: 2013-CP-40-05675
RPR File No.: 101-2630

Dear Ms. Kitchings:

As Counsel for Respondent, Dennis Wayne Catoe, I have enclosed for filing an original ***Initial Brief of Respondent*** as well as the ***Designation of Matter To Be Included In The Record On Appeal*** in the above referenced matter, along with our original Certificates of Service for each. I have also enclosed two (2) additional copies of our Initial Respondent's Brief and Designation of Matter and request that these be filed, stamped, and returned to our courier.

We are this day serving a copy of our Initial Respondent's Brief and Designation of Matter on the *Pro-se* Appellant.

Thank you for your assistance.

With regards, I am,

Sincerely,

Sheila M. Bias
SC Bar # 10005

SMB/smh
Enclosures
cc: Leslie A. Cotter, Jr., Esquire (via email only at lcotter@richardsonplowden.com)