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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY  
Court Of Common Pleas

JAN 06 2015

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No: 2015-01328

Donna Douglass,.....Appellant,

v.

Berkshire on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC,  
and The Berkshire Group,.....Respondents.

RESPONDENTS' MOTION TO STRIKE  
APPELLANT'S FINAL BRIEF FOR NON-  
COMPLIANCE AND DISMISS APPEAL AND  
MOTION TO COMPEL A COMPLETE AND  
CORRECT RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENTS

Pursuant to Rules 240, 208, 209, 210, and 211 of the South Carolina Appellate Court Rules, the undersigned, as attorneys for Respondents Berkshire on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC, and The Berkshire Group (hereinafter “Respondents”), hereby moves this Court for an order striking Appellant’s Final Brief for deficiencies and dismissing the appeal, or in the alternative, compelling Appellant to file a complete and corrected Record on Appeal. In support of this Motion and in accordance with Rule 240(c), SCACR, Respondents have incorporated a memorandum of authority and exhibits hereto.

### ARGUMENT

Appellant inexplicably failed to include several items enumerated in Respondents’ Designation of Matters to be Included in the Record on Appeal. Furthermore, the Record on Appeal includes matters that were not enumerated in Appellant’s Designation of Matters to be Included in the Record on Appeal. Moreover, Appellant’s Final Brief contains numerous deficiencies. These failures and deficiencies are violations of South Carolina’s Appellate Court Rules and have hindered Respondents ability to defend this appeal and comply with the Rules.

Regarding the Record on Appeal, Rule 210(c) states, in pertinent part:

**(c) Content.** The Record on Appeal *shall* include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents, and a certificate by appellant. Each page of the Record on Appeal shall be numbered consecutively beginning with the index. Where a portion of a page of the trial transcript, or a page of an exhibit or document, is to be included in the Record on Appeal, the entire page shall be included. When a portion of an order, judgment, decision or pleading is to be included in the Record on

Appeal, the entire order, judgment, decision or pleading shall be included in the Record, to include the caption and signature(s); provided, however, that the portion of a pleading showing verification or service shall not be included unless relevant to the appeal. If the original court reporter's numbering has been deleted, the Record on Appeal shall contain ellipses or other notation indicating when pages of the court reporter's transcript have been omitted.

(emphasis added). Furthermore, subsection (d) states "Appellant or his counsel *shall certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.*" (emphasis added). The Rule is not discretionary. Rather, it provides that Appellant, as the appealing party, shall include *all* matter designated to be included by any party and shall not include any other material.

**i. Appellant's Failure to Include All of Respondents' Designated Matters to be Included in the Record on Appeal is Error and a Violation of the Appellate Court Rules.**

Here, Appellant failed to include the following matters enumerated in Respondents' Designation of Matters:

- Respondents' Motion for Summary Judgment
- Respondents' Memorandum in Support of Summary Judgment
- Respondents' Memorandum in Opposition to Rule 59(e) Motion for Reconsideration
- Appellant's Memorandum in Opposition of Summary Judgment
- Appellant's Rule 59(e) Motion for Reconsideration

(See **Exhibit A**, Respondents' Designation of Matters). Furthermore, Appellant failed to include certain cited pages of the following transcripts, which were also enumerated in Respondents' Designation of Matters:

- Transcript of Donna Douglass' deposition

- Transcript of Greg Moran's deposition

This is especially troubling in light of Appellant's inclusion of only the portions of Moran's testimony that were cited in her Final Brief. Equally troubling is Appellant counsel's certification that the Record on Appeal includes all materials proposed—it clearly does not. Attached as **Exhibit C**, please find the items which were properly designated by Respondents but inexplicably left out of the Record on Appeal.<sup>1</sup>

ii. **Appellant's Inclusion of Items Not Enumerated in Appellant's Designation of Matters to be Included in the Record on Appeal is Error and a Violation of the Appellate Court Rules.**

In addition to these items, Appellant included an entire copy of a deposition transcript from a workers' compensation matter in the Record on Appeal. This is inappropriate for two reasons: first, the transcript was not enumerated in Appellant's Designation of Matters; (See **Exhibit B**, Appellant's Designation of Matters to Be Included in the Record on Appeal) secondly, at best, Appellant submitted only two (2) pages of this transcript to the lower court in her motion for reconsideration, not the entire transcript which Appellant seeks to do now. Moreover, Appellant has failed to include the motion for reconsideration in the Record on Appeal. See *Johnson v. S.C. Dep't of Prob.*, 372 S.C. 279, 641 S.E.2d 895 (2007) ("Because court rules require the appealing party to prepare the record on appeal, see Rule 210(a), SCACR, South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review.").

Finally, Appellant has included cases and rules which were neither presented to the lower court nor included in her Designation of Matters. Moreover, these cases do not

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<sup>1</sup> Respondents have added page numbers to **Exhibit D** in an effort to create a continuation from Appellant's incomplete Record on Appeal for the Court's ease.

appear to be cited in Appellant's Final Brief.<sup>2</sup> Not only are these matters not properly included in a Record on Appeal in general, their inclusion is in violation of Rule 210's clear mandate.

The purpose of the Designation of Matters is to permit both sides to see the proposed items the other side desires to be made part of the Record on Appeal. The Record on Appeal is merely a clerical gathering of those items designated by the parties and not otherwise objected to. Appellants have no discretion to deviate from the designated matters when creating the Record on Appeal. Appellant's distortion of the Record on Appeal, in both failing to include Respondents' properly designated material and including matters not designated or presented to the lower court, is an inexplicable violation of the appellate court rules and has hindered Respondents' ability to defend this appeal.

**iii. Appellant's Final Brief is Deficient and in Violation of the Appellate Court Rules.**

In addition to these failures regarding the Record on Appeal, Appellant's Final Brief is wholly deficient for other reasons. As previously discussed, Appellant relies on and cites to matters not included in her Designation of Matters and not presented to the trial court. Furthermore, Appellant has failed to provide a Table of Contents or Table of Authorities in the Final Brief, despite the clear requirement to do so found in Rule 208.<sup>3</sup> Additionally, Appellant has failed to properly reference the Record on Appeal. *See* Rule

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<sup>2</sup> It is difficult to discern the cases cited in Appellant's Final Brief because Appellant has failed to include a Table of Authorities as required by Rules 208 and 211 of Appellate Court Rules. However, it appears Appellant has included cases in the Record on Appeal which do not appear in her Final Brief or her Designation of Matters.

<sup>3</sup> Rule 208 provides(b) provides:

The initial briefs under this Rule and the final briefs under Rule 211 shall contain . . . (A) Table of Contents and Cases. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

208(b)(4) (stating “[a]fter the Record on Appeal is prepared, these references shall be revised as provided by Rule 211(b)(1)”). These deficiencies have necessarily created confusion and hindered the ability of Respondents to accurately defend the appeal.

### CONCLUSION

In light of the foregoing, Respondents respectfully move for an Order of this Court striking Appellant’s Final Brief for the above-cited deficiencies and dismissing the appeal. In the alternative, Respondents respectfully move for an Order of this Court compelling Appellant to file a complete and accurate Record on Appeal, which includes *all* matters designated by Respondents, including those attached in **Exhibit D**, and which removes matters not previously designated by Appellant.<sup>4</sup>

In an effort to fully comply with the appellate court rules, Appellant respectfully requests a stay of this appeal. However, in an abundance of caution, Respondents will file their Final Brief tomorrow, January 6, 2016. Where a reference was made to matters included in Respondents’ Designation of Matters but left out of the Record on Appeal, Respondents have cited to the proposed continuation of page numbers found in **Exhibit D**. Furthermore, should the Court grant Respondents’ Motion to Compel and require Appellant to file a complete and accurate Record on Appeal, thus requiring the parties to file revised Final Briefs, Respondents respectfully request an Order requiring Appellant to pay for the costs of the duplicative Final Brief binding.

Finally, prior to the filing of this motion, the undersigned have attempted to meet and confer with Appellant’s counsel to resolve this matter. (*See Exhibit C, Communications*). The undersigned received a return telephone call from Appellant’s counsel late afternoon of January 5, 2016, at which time Appellant indicated any errors in

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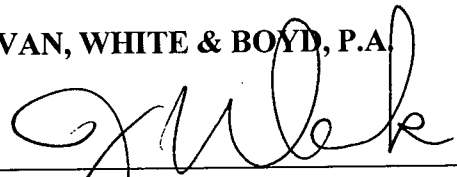
<sup>4</sup>Exhibit D is not consecutively numbered with the other supporting exhibits in light of its length.

the Record on Appeal were inadvertent and will be remedied if needed. However, in light of the other arguments in this Motion and the due date of Respondents' Final Brief, the undersigned is compelled to seek the relief requested in an effort to comply with the rules.

For the foregoing reasons, Respondents respectfully request that Appellant's Final Brief be struck and the appeal dismissed, or in the alternative, Appellant be compelled to file a complete and correct Record on Appeal in compliance with the South Carolina Appellate Court Rules.

Respectfully Submitted,

**GALLIVAN, WHITE & BOYD, P.A.**



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January 6, 2016

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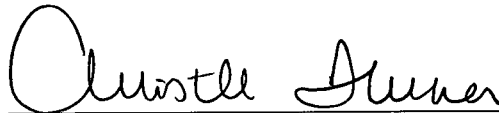
Berkshire on St. Ives, Berkshire Property Advisors, LLC, BVF North Cove LLC,  
and The Berkshire Group, .....Respondents.

**PROOF OF SERVICE**

I, Christle Turner, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for Respondents, hereby certify that on January 6, 2016, I served a copy of Respondents' MOTION TO STRIKE APPELLANT'S FINAL BRIEF FOR NON-COMPLIANCE AND MOTION TO COMPEL A COMPLETE AND CORRECT RECORD ON APPEAL by United States Mail, postage prepaid to the following:

Jarrel L. Wigger, Esq.  
WIGGER LAW FIRM, INC.  
8086 Rivers Ave, Suite A  
North Charleston, SC 29406

January 6, 2016



Christle Turner