

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

FEB 29 2016

SC Court of Appeals

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-001524

The Callawassie Island Members Club, Inc. Respondent

v.

Ronnie D. Dennis and Jeanette Dennis..... Defendants

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000001

The Callawassie Island Members Club, Inc. Respondent

v.

Gregory L. Martin and Rebecca L. Martin Defendants

Of whom Gregory L. Martin is the Appellant

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000002

The Callawassie Island Members Club, Inc. Respondent

v.

Michael J. Frey and Grace I. Frey..... Defendants

Of whom Michael J. Frey is the.....Appellant

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000003

The Callawassie Island Members Club, Inc. Respondent

v.

Mark K. Quinn and Sherry B. Quinn..... Defendants

Of whom Mark K. Quinn is the Appellant

RETURN TO APPELLANTS' MOTION TO SUPPLEMENT RECORD ON APPEAL

AND NOW COMES Respondent The Callawassie Island Members Club, Inc.
("CIMC") and files the following Return to Appellants' Motion to Supplement Record on
Appeal:

INTRODUCTION

The above captioned cases are before this Court on appeals from the entry of judgments in favor of Plaintiff/Respondent CIMC. Appellants seek to supplement the Record on Appeal with the transcript a deposition that was taken after these appeals were initiated and thus, obviously, was not before the lower court when it made the rulings that are the subject of these appeals. This motion should be denied because it violates the fundamental premise of appellate review by asking this Court to consider evidence that the lower court did not consider.

These lawsuits involve claims filed by CIMC, a member-owned amenities club on Callawassie Island, Beaufort County, South Carolina. In a nutshell, CIMC filed these actions seeking to recover dues and other amounts due from Appellants, who are equity members of CIMC. CIMC avers that, under its governing documents, Appellants are required to remain members in good standing of CIMC until such time as their memberships are reissued in accordance with those governing documents. CIMC has a finite number of members because it is organized around the Callawassie real estate community. Its survival thus depends upon all of the members paying their share of operating costs. Appellants have asserted counterclaims and argued, for various reasons, that they are not obligated to remain members of CIMC and can cancel their financial responsibilities whenever they want.

In the instant motions, the Appellants in the above-captioned matters ("Appellants") seek to supplement the Records on Appeal in these cases, in which all briefing has been completed months ago:

- (a) *The Callawassie Island Members Club, Inc. v. Dennis*, Appeal No. 2014-001524 — (a) Appeal from the entry of summary judgment on January 16, 2014 and Amended on June 10, 2014; (b) Notice of appeal filed on or about July 3, 2014; (c) Record on Appeal filed on January 14, 2015;
- (b) *The Callawassie Island Members Club, Inc. v. Martin*, Appeal No. 2015-000001 — (a) Appeal from the entry of summary judgment on June 27,

2014 (denial of reconsideration on December 16, 2014); (b) Notice of appeal filed on or about January 2, 2015; (c) Record on Appeal filed on August 27, 2015;

- (c) *The Callawassie Island Members Club, Inc. v. Frey*, Appeal No. 2015-000002 — (a) Appeal from the entry of summary judgment on June 27, 2014 (denial of reconsideration on December 16, 2014); (b) Notice of appeal filed on or about January 2, 2015; (c) Record on Appeal filed on August 27, 2015; and
- (d) *The Callawassie Island Members Club, Inc. v. Quinn*, Appeal No. 2015-000003 — (a) Appeal from the entry of summary judgment on June 27, 2014 (denial of reconsideration on December 16, 2014); (b) Notice of appeal filed on or about January 2, 2015; (c) Record on Appeal filed on August 27, 2015.

For the reasons that follow, this Court should deny Appellants' Motion to Supplement Record on Appeal.

ARGUMENTS

In the instant appeal, Appellants in the above-captioned matters seek to supplement the Records on Appeal — long after final briefing has been completed — to add the deposition of Jeff Spencer, which was taken on September 3, 2015 ("Spencer Deposition"). The Spencer Deposition was taken after the Records on Appeal were filed in all of these appeals. Because the Spencer Deposition was taken *after* these appeals were perfected and briefed, it was obviously not before the trial court when it entered the orders that are the subjects of these appeal. Despite the passage of nearly six months since the Spencer Deposition, none of the Appellants have filed Rule 60 Motions with the trial court or otherwise asked the trial court to reconsider its entry of summary judgment against them. As a result, in the orders appealed from, the trial court plainly did not consider or rule upon the impact of the Spencer Deposition.

This Court "will not consider any fact which does not appear in the Record on Appeal." See S.C.A.C.R., Rule 210(h). "The Record shall **not**, however, include matter which was **not presented to the lower court** or tribunal." S.C.A.C.R., Rule 210(c) (emphasis added). The Supreme Court has noted that appellate courts are "bound by the

record established at trial." *See Argabright v. Argabright*, 398 S.C. 176, 179, 727 S.E.2d 748, 750 (2012).

Where a matter is not raised to and ruled upon by the trial judge, it is not preserved for review. *See South Carolina Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (to be preserved for review, issue must have been: (1) raised to and ruled upon by trial court, (2) raised by appellant, (3) raised in timely manner, and (4) raised to trial court with sufficient specificity); *accord I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (imposing preservation requirements on appellant enables lower court to rule properly after considering all relevant facts, law, and arguments and noting that purpose of appeal is to determine whether the trial court erred); *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 74 n. 1, 698 S.E.2d 244, 247 n. 1 (Ct. App. 2010) (finding appellant's argument not preserved where master did not address it and appellant failed to raise in Rule 59(e) motion). "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004).

This Court has held that it cannot consider "newly discovered" evidence that was never presented to and ruled upon by the trial court:

After White served his notice of appeal, co-defendant Anthony Morris issued a written statement retracting his trial testimony against White. Morris claimed he was not at the scene of the crime. In a motion to this court, White urged that we either remand the case for a new trial or remand the case to the trial court for a hearing on the purported new evidence. The State opposed and this court denied the motion. The State argues this court should not consider Morris' statement because it has not been raised to and ruled on by the trial court and is not properly before this court. We agree.
...

The lack of a ruling from the trial court presents nothing for this court's review.

Furthermore, a brief must reference the Record on Appeal to support the facts alleged. . . . **Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal.**

State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 618-19 (Ct. App. 2007) (emphasis added), *aff'd on other grds.*, 382 S.C. 265, 676 S.E.2d 684 (2009); *accord Norris v. Ferre*, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) ("Finally, Norris moved to supplement the record on appeal with deposition testimony from an unrelated action. We deny the motion since the matters were not presented to the trial judge.").

To supplement the Record on Appeal with evidence that the lower court never had the opportunity to consider would violate the fundamental premise of appellate review, and therefore cannot be allowed.

CONCLUSION

For the foregoing reasons, Respondent The Callawassie Island Members Club, Inc. respectfully requests this Honorable Court to deny Appellants' Motion to Supplement Record on Appeal.

February 24, 2016

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THE STATE OF SOUTH CAROLINA
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v.

Gregory L. Martin and Rebecca L. Martin Defendants

Of whom Gregory L. Martin is the Appellant

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The Callawassie Island Members Club, Inc. Respondent

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J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2015-000003

The Callawassie Island Members Club, Inc. Respondent

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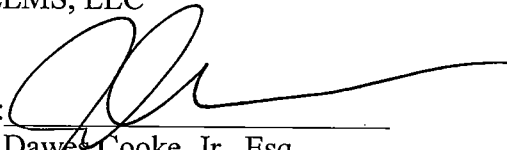
Of whom Mark K. Quinn is the Appellant

PROOF OF SERVICE

I certify that I have served the Omnibus Return to Appellants' Motion to Supplement Record on Appeal on the above-referenced Appellants by depositing a copy of it in the United States Mail, postage prepaid, on February 24, 2016, addressed to their attorneys of record:

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February 25, 2016

RECEIVED
FEB 29 2016
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The Callawassie Island Members Club, Inc. v. Ronnie D. Dennis and Jeanette Dennis
Appellate Case No.: 2014-001524
BWPH File No: 5075.003

Dear Ms. Kitchings,

Enclosed please find the original and seven (7) copies of a Return to Appellants' Motion to Supplement Record on Appeal and Proof of Service. Please file the original Return and Proof of Service and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope provided for your convenience.

By copy of this correspondence to all counsel of record I am serving them with a copy of the Consent Petition and Proof of Service thereof.

Sincerely,



John W. Fletcher

JWF/jgc
Enclosures

cc: Ian S. Ford, Esquire
Neil D. Thomson, Esquire

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5075.003

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