THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2014-CP-26-07862

Karon Mitchell and Kyle Mitchell, ... Appellants,

vs.

Rabon & Rabon, Inc. ..... Respondent.

MOTION TO DISMISS APPEAL

The Respondent, Rabon & Rabon, Inc., hereby moves to dismiss the Appeal of the Appellants, Karon Mitchell and Kyle Mitchell, ("Mitchells") dated March 10, 2016.

The grounds for this motion are that this appeal is frivolous and procedurally defective.

PROCEDURAL HISTORY

1. On October 30, 2015, Appellants and Respondent entered into Mediation Settlement Agreement ("Agreement") in Civil Action No. 2014-CP-26-07862.
2. On December 10, 2015, Respondent filed a motion to compel Appellants' performance pursuant to the Agreement.
3. On December 15, 2015, Appellants filed a "motion to dismiss" the Agreement.

4. On January 20, 2016, a hearing was held on the above motions in the Horry County Court of Common Pleas ("Trial Court") before the Honorable Benjamin Culbertson.
5. On February 2, 2016, Appellants filed a document entitled "In Support of Defendants' Motion for Reconsideration of the Purported Mediated Settlement Agreement" ("Rule 59(e) Motion") which the Trial Court construed as a motion pursuant to Rule 59(e), South Carolina Rules of Civil Procedure ("SCRCP").
6. On February 8, 2016, the trial court entered an "Order Deny Defendants' Motion, Granting Plaintiff's Motion, Ordering Defendants to Perform Pursuant to Mediation Settlement Agreement, and Enjoining Defendants From Taking Actions Inconsistent with Mediation Settlement Agreement" ("February 8 Order").
7. On February 10, 2016, the trial court entered a Form 4 Order denying Defendants' Rule 59(e) Motion ("February 10 Order").
8. On March 10, 2016 Appellants filed a Notice of Appeal with this Court with respect to the February 8 Order and the February 10 Order (collectively the "Orders").
9. March 20, 2016 was Appellants deadline for (a) ordering the transcript, (b) filing the Notice of Appeal with the Trial Court, and (c) serving and filing the Orders.
10. On March 20, 2016, Appellants did not (a) order the transcript, (b) file the Notice of Appeal with the Trial Court, or (c) serve or file a copy of the "February 10, 2016 Order." As of the date of this Motion, Appellants have not filed the Notice of Appeal with the Trial Court, or served or filed a copy of the "February 10, 2016 Order.".
11. On March 23, 2016, Appellant Ordered the transcript, three days after the time for doing so.

12. On April 13, 2016, Appellant filed a Motion to Request Transcript out of Time, twenty-four days after the time for ordering the transcript had passed.
13. On May 10, 2016, Appellant requested an extension of the May 11, 2016 deadline for filing Appellants' Initial Brief ("Appellants' Brief").
14. On May 11, 2016, Appellants had not yet received an extension, and did not file Appellants' Brief.
15. On May 12, 2016, the Court granted Appellants an extension to file Appellants' Brief.
16. On June 10, 2016 Appellants filed Appellants' Brief, along with a Designation of Matter to be Included in the Record on Appeal ("Designation"). Appellants did not include the required certification with the Designation, and the Designation improperly included matter which was not presented to the trial court.

DISCUSSION

The Court should dismiss this Appeal because the Appeal is both procedurally defective and frivolous. It is procedurally defective because Appellants' filings are consistently late and incomplete, depriving Respondents and the Court of necessary documents and information including one of the two orders on appeal. It is frivolous because Appellants do not identify where in the record they preserved any of the issues raised on appeal, and rather than citing to the record in support of their Arguments, Appellants cite to documents that were never presented to the trial court. As a result of its frivolity, there is no risk that an "otherwise meritorious appeal [will be dismissed] by the application of a technical rule of procedure." Windham v. Lloyd, 253 S.C. 568, 574 (1970).

I. The Appeal should be dismissed as frivolous because the purported issues it raises are not preserved for appellate review.

Appellants' Brief raises four Issues on Appeal. [Appellants' Brief p. 3]. However, Appellants' Brief does not identify where in the record the four purported issues were raised to the trial court. "The first step in preserving an issue for appellate review is to actually raise it to the lower court." State v. Hughes, 346 S.C. 339, 345 (Ct. App. 2001) (Goolsby, J. dissenting) (quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 66 (1999)). To facilitate appellate review, Rule 208(b)(4), SCACR requires that "The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged." State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. 33, 73 (2015). However, Appellants' Brief does not refer to where the four purported issues were raised to Trial Court before the Court entered the Orders.

Neither did Appellant raise the purported issues in a Rule 59(e) Motion. Indeed, Appellants Brief does not refer even once to Appellants' Rule 59(e) Motion.[1] Appellants fail to cite their Rule 59(e) Motion with good reason; the motion consists merely of eight conclusory section headings, along with quotations from authorities in various jurisdictions throughout the country. Attached to the motion were sixty-eight pages of documents, none of which were offered as evidence at the January 20, 2016 hearing, and only one page of which is referred to in the motion. What the 59(e) Motion does not contain is a specific identification of the issues, much less an argument as to how the issues should have been decided.

Neither mere recitation of facts, nor mere recitation of authority, preserves an issue for appeal without an argument to connect the facts with the authority. See Atl. Coast Builders &

[1] Appellants filed their Rule 59(e) Motion on February 2, 2016 – several days ***before*** the Orders it challenges were filed. It was filed *pro se*, and entitled "In Support of Defendants' Motion for Reconsideration of the Purported Mediated Settlement Agreement." The trial court construed the document as a Rule 59(e) motion.

Contrs., LLC v. Lewis, 398 S.C. 323, 327 (2012) (Finding issue is abandoned where "brief is purely *a* recitation of facts."); In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (stating that a "bald assertion, ***without supporting argument***, does not preserve an issue for appeal.") (emphasis added); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding the ***failure to provide arguments*** or cite to authority in support of argument constitutes abandonment of issue on appeal) (emphasis added). As a result, Appellants Rule 59(e) Motion does not cure Appellants' failure to raise their purported issues to the Trial Court.

Appellants' failure to point to the purported errors leaves Respondent and this Court guessing where such purported errors may be found. For example:

1. Appellants' argument as to the first issue on appeal does not contain any references to facts or the record at all. (Appellants' Brief, Section I, pages 9 – 10);
2. Appellants' argument as to the second issue on appeal contains only the following reference: "Dx, p.1"; "Dx. p.3"; "id." [*sic*]; and "id." [*sic*]. Document "Dx" is not identified. (Appellants' Brief, Section II, pages 10 – 11);
3. Appellants' argument as to the third issue on appeal does not contain any references to facts or the record at all. (Appellants' Brief, Section I, pages 11 – 14); and
4. Appellants' argument as to the fourth issue on appeal refers twice to an unidentified "Exhibit C," as well as to "1/19/16 Email to Judge Culbertson" and "11/30/15 Rachel Dain Email to USDA." (Appellants' Brief, Section I, pages 11 – 14). Neither email, nor the unidentified "Exhibit C", were presented to the Trial Court. As a result, they may not be included in the Record. Rule 210, SCACR.

It is not this Court's "responsibility to ferret out the facts from the record" (Unger v. Leviton, 2006 S.C. App. Unpub. LEXIS 104, *15 (S.C. Ct. App. Mar. 8, 2006)) or to "grope in the

dark in order to identify errors which in actuality may not exist." Smith v. South Carolina Dep't of Social Services, 284 S.C. 469, 471 (1985) (internal quotation omitted). As a result, Appellants' mere allegations of error are not sufficient to maintain this appeal. See State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. 33, 73 (2015). Because Appellants do not offer any evidence that their purported issues were raised to the Trial Court – let alone raised with specificity – none are preserved for review, and this Appeal should be dismissed.

"The first step in preserving an issue for appellate review is to actually raise it to the lower court." State v. Hughes, 346 S.C. 339, 345 (Ct. App. 2001) (Goolsby, J. dissenting) (quoting Jean Hoefer Toal, et al., Appellate Practice in South Carolina 66 (1999)). Appellants' Argument contains mere allegations of error, but no supporting factual references to the record whatsoever, and no indication that the purported issues were ever raised to the trial court.

II. The Appeal should be dismissed because it is procedurally defective in numerous respects.

Independent of its frivolity, this appeal should be dismissed because of its numerous procedural defects. "The South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." Henning v. Kaye, 415 S.E.2d 794, 794 (1992). Therefore, it "is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." Henning, 415 S.E.2d at 794. The material provided by Appellants does neither. For example:

1. Appellants' Initial Brief violates Rule 208(b)(4), SCACR, because it does not contain any references "to where relevant objections and rulings occurred in the transcript," thus forcing Respondent and this Court to "ferret out the facts from the record." Unger v. Leviton, 2006 S.C. App. Unpub. LEXIS 104, *15 (Ct. App. Mar. 8, 2006).

2. Appellants violated Rule 203(d)(1)(B)(ii) by failing to serve or file a copy of "the February 10, 2016 Order" with the Notice of Appeal. The time for filing was March 20, 2016, and as of the date of this motion, Appellants have not served or filed "the February 10, 2016

Order." The "February 10, 2016 Order" is one of the two Orders that are the subject of this appeal.

3. Appellants' Designation of Matter to be Included in the Record on Appeal violates Rule 209(b), SCACR, because it includes matter which was not presented to the lower court, specifically items 6, 7, and 8.

4. Appellants' Initial Brief violates Rule 208(b)(1)(C) because the Statement of the Case does not contain the following required information:

    a. "the date of the commencement of the action,"

    b. "the nature of the action,"

    c. "the nature of the defense,"

    d. "the date of the service of the notice of appeal."

5. Appellants violated Rule 207(a)(1) by failing to timely order the transcript. After the deadline for ordering the transcript had passed, Appellants requested and received a retroactive extension.

6. Appellants violated Rule 203(d)(1)(B), SCACR by failing to file the Notice of Appeal with the Trial Court. The time for filing was March 20, 2016, and as of the date of this motion, Appellants have not filed the Notice of Appeal with the Trial Court.

7. Appellants violated Rule 208(a)(1), SCACR by failing to serve or file their Initial Brief within thirty days of their receipt of the transcript. One day after their Initial Brief was due, Appellants received a retroactive extension.

8. Appellants violated Rule 209(c), SCACR by failing to file a certificate of counsel with their Designation of Matter to be Included in the Record on Appeal.

Appellants violations of the above rules prejudice Respondent by denying Respondent the documents and the information necessary for Respondent to understand Appellants' arguments, and prepare Respondent's counter-arguments. For instance, of the two Orders which are the subject of this Appeal, Appellants have only provided one to this Court. Appellants' violations also disrupt the orderly mechanism of appeals by forcing this court to "grope in the dark in order to identify errors which in actuality may not exist." Smith v. South Carolina Dep't of Social Services, 284 S.C. 469, 471 (1985) (internal quotation omitted).

CONCLUSION

While Appellants' numerous violations of the Rules justify dismissal of this appeal. (Henning v. Kaye, 415 S.E.2d 794, 794 (1992)), their failure to identify any preserved issues requires it. Wilder Corp. v. Wilke, 330 S.C. 71, 76 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Therefore, Respondent prays for an Order of this Court dismissing the Appeal with prejudice, and awarding reasonable attorneys' fees and costs to Respondent.

Respectfully submitted.

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Date: July 11, 2016

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PROOF OF SERVICE

I, Donna M. Brady, an employee of McNair Law Firm, P.A., certify that I have served the Respondent's Motion to Dismiss Appeal, and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 14th day of July, 2016.

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July 11, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Karon Mitchell v. Rabon & Rabon, Inc.*
Appellate Case No.: 2016-000522
Our File No.: 062992.00001

Dear Ms. Kitchings:

With regard to the above matter, enclosed please find a copy of the following:

- Original (unbound) and seven copies of the Respondent's Motion to Dismiss Appeal; and
- Proof of Service.

By copy of this letter to parties of record, and as shown on the Proof of Service, I hereby serve a copy of the aforementioned documents to the parties of record.

Please return to me one clocked copy of the enclosed documents in the enclosed self-addressed envelope.

Best regards,

McNair Law Firm, P.A.

Lane D. Jefferies

LDJ:dmb
Enclosures
cc: Tucker S. Player, Esq. (via email - tucker@playerlawfirm.com)
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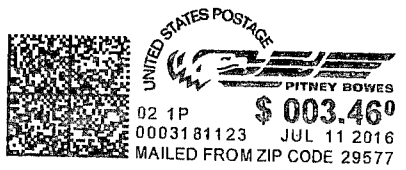

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