

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

Case Tracking No: 2012209587
Civil Action No. 2009-CP-32-3870

Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez.....Respondents.

**MOTION TO STRIKE RECORD,
DISMISS APPEAL AND HOLD FILING DATE IN ABEYANCE**

Jefferson D. Griffith, III
Richard L. Whitt
Austin & Rogers, P.A.
508 Hampton Street, Suite 300
Columbia, South Carolina 29201
(803) 251-7442
Attorneys for Respondents

RECEIVED
JAN 30 2013
SC Court of Appeals

Other Counsel of Record:

Stanley L. Myers, Esquire
M. Brooks Biediger, Esquire
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1700 Sunset Boulevard, Hwy. 378
West Columbia, South Carolina 29171

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FACTUAL BACKGROUND

Counsel for the Respondents received **Appellants' Designation of Matter to be included in the Record on Appeal** on or about October 31, 2012 (*Exhibit "A"*). Appellants' Designation of Matter included, *inter alia*, the entire transcript of the Trial Record below, including all seven of Appellants' Exhibits at Trial (*Exhibit "A"*). On November 13, 2012, counsel for Respondents contacted Appellants' counsel to complain about Appellants' counsel inclusion of the entire Trial Record below and all Trial Exhibits (*Exhibit "B"*). Appellants' counsel responded that he thought, "It is proper to designate the entire transcript into the Record." (*Exhibit "C"*). Appellants' counsel then jointly contacted this Court concerning Appellants' counsel's actions (*Exhibit "D"*). Respondents' counsel then received correspondence from this Court stating that Respondents' counsel should file a Motion (*Exhibit "E"*). Respondents' counsel did not file a Motion at that time.

Counsel for the Respondents received the **Initial Brief of Appellants** on or about October 31, 2012. A review of Appellants' Initial Brief reveals that Appellants did not file their Initial Brief in compliance with the South Carolina Appellate Court Rules.

Counsel for the Respondents received **Appellants' Record on Appeal** on or about January 11, 2013. Respondents' counsel then contacted Appellants' counsel on three occasions, beginning January 15, 2013, concerning Appellants' counsel's errors and omissions (*Exhibit "F"*). Respondents' counsel's email to Appellants' counsel, was received and read by Appellants' counsel on January 15, 2013, at 3:57 p.m., (copy was also sent on January 15, 2013, via, U.S. Mail), (*Exhibit "G"*). Respondents' counsel again contacted Appellants' counsel by electronic mail on January 22, 2013, at 2:54 p.m., (*Exhibit "H"*) and January 22, 2013, at 3:17 p.m., (*Exhibit "I"*).

FACTUAL BACKGROUND (Cont.)

Respondents' counsel never received a response from their contacts on (i) January 15, 2013 (ii) January 22, 2013, at 2:54 p.m. or (iii) January 22, 2013, at 3:17 p.m., from either of Appellants' legal counsel. Respondents' Motion follows:

Appellants' counsel violated Rule 208(b)(1)(D), Rule 208(b)(4), Rule 209, subsections (a), (b) and (c), Rule 210(c) and Rule 267(c), of the South Carolina Appellate Court Rules, (hereinafter, "SCACR"), in Appellants' filing of Appellants' Initial Brief, Appellants' Designation of Matter to be Included in the Record on Appeal, with attorney Certification (*Exhibit "A"*) and Appellants' filing of its Record on Appeal, with attorney Certification.

Examples of Appellants' counsel's violations follow:

Respondents' counsel communicated with Appellants' counsel on several occasions to call these errors to Appellants' counsel's attention, (copy of communications with Appellants' counsel are included herein as, *Exhibits "B", "C", "D", "F", "H" and "I"*). The Appellants' counsel had the opportunity to address these errors, but no response was forthcoming from Appellants' counsel. Therefore Respondents were compelled to file this Motion.

Initial Brief - Violation of Rule 208(b)(1)(D), and Rule 208(b)(4), SCACR.

- Appellants' counsel made an improper argument in Appellants' Initial Brief, without a reference to a citation of authority, on page "6", of the Initial Brief of Appellants. **Appellants' conclusory argument is in violation of Rule 208(b)(1)(D), SCACR,** (copy of an example of this violation in the Initial Brief of Appellants, *Exhibit "P"*).
- Appellants' counsel made numerous statements in Appellants' Initial Brief, without a reference to the Record, on nineteen occasions on pages "6", "7", "8", "9" and "10", of the Initial Brief of Appellants. **Appellants' statements without references to the Record, are in violation of Rule 208(b)(4), SCACR,** (copy of an example of this violation in the Initial Brief of Appellants, *Exhibit "Q"*).
- Appellants' counsel **made numerous misleading statements in the Initial Brief of Appellants, on six occasions** on pages "4", "5" and "6", of the Initial Brief of Appellants, (copy of an example of these misleading statements in the Initial Brief of Appellants, *Exhibit "R"*; Trial Transcript page 154, *Exhibit "S"*).

Designation of Matter - Violation of Rule 209(a), (b) and (c), SCACR.

- Appellants' counsel designated the entire transcript of the Trial Record below, into the Record on Appeal, (*Exhibit "A"*). **Appellants' Initial Brief did not reference all two hundred and four pages of the transcript of the Trial below** and the inclusion of all of the two hundred and four pages of the Trial below is a violation of Rule 209(a), (b) and (c), SCACR.
- Appellants' counsel designated all seven of Appellants' Trial Exhibits below, into the Record on Appeal, (*Exhibit "A"*). **Appellants' Initial Brief did not reference all seven Trial Exhibits below,** and the inclusion of all of the seven Trial Exhibits from the Trial below is a violation of Rule 209(a), (b) and (c), SCACR.

Record on Appeal – Violation of Rule 210(c), SCACR.

- The Index to Appellants’ Record on Appeal indicates that “Plaintiff’s Supplemental Answers to Defendant’s Supplemental Interrogatories, dated July 15, 2011, appears on page “48”, **which is incorrect**, (copy of Appellants’ Index in the Record on Appeal, *Exhibit “J”*).
- Respondents designated, “Motion for Summary Judgment, with Affidavits of Respondents Francis Michael Ferez and Suzanne C. Ferez, filed November 15, 2010”, (*Exhibit “K”*). Appellants’ Record on Appeal, **fails to include the Affidavits of Respondents Francis Michael Ferez and Suzanne C. Ferez,** in violation of Rule 210(c), SCACR (copy of Appellants’ Index in the Record on Appeal, *Exhibit “J”*).
- Respondents designated the, “Bank ‘Affidavit and Release’, dated February 1, 2006, with copy of First Citizens’ Cashier Check No.: 0025433”, into the Record on Appeal (*Exhibit “K”*) and **Appellants’ Record on Appeal failed to include this document and check as an Index item**, (*Exhibit “J”*), in violation of Rule 210(c), SCACR.
- Respondents designated the following pages of Appellant’s deposition into the Record on Appeal, pp. 12, 20, and 28. **The way these pages were placed into the Record on Appeal, there are nineteen holes punched into each page, which renders part of the text “missing”**, in violation of Rule 210(c), SCACR, (copy of an example of this violation is Appellants’ Record on Appeal page, “62”, *Exhibit “M”*).
- Counsel for the Appellants designated the entire transcript of the Trial Record below, into the Record on Appeal and also designated all seven Trial Exhibits, into the Record on Appeal, (*Exhibit “A”*). **Counsel for the Appellants failed to place any of the seven Trial Exhibits into the Record on Appeal served upon Respondents**, in violation of Rule 210(c), SCACR, (copy of Appellants’ Index to Appellants’ Record on Appeal, *Exhibit “J”*).

Record on Appeal – Violation of Rule 267(c), SCACR.

- The Bank Check included by Appellants' counsel in Appellants' Record on Appeal, on page "45" and page "50" is **unreadable**, in violation of Rule 267(c), SCACR, (copy of Check as it appears in Appellants' Record on Appeal as, *Exhibit "L"*).
- Respondents designated the following pages of Appellant's deposition, into the Record on Appeal, pp. 8, 12, 15, 16, 20, 23, 24 and 28. **The deposition pages have been reduced in size, so that one page contains four separate deposition pages, which is a photographic reduction of the pages in the Record on Appeal**, in violation of Rule 267(c), SCACR, (copy of an example of this violation is Appellants' Record on Appeal page, "61", *Exhibit "N"*).
- Respondents designated the following pages of Appellant's deposition into the Record on Appeal, pp. 8, 15, 16, 23 and 24. **The deposition pages are copied into the Record on Appeal in such a manner that the text is missing down the length of the page and therefore makes those pages in the Record on Appeal unreadable**, in violation of Rule 267(c), SCACR, (copy of an example of this violation is Appellants' Record on Appeal page, "63", *Exhibit "O"*).

MOTION TO STRIKE RECORD,
DISMISS APPEAL AND HOLD FILING DATE IN ABEYANCE

The grounds for Respondents' Motion are set forth hereinabove. Based on the foregoing, and in light of Appellants numerous, egregious and material violations of the South Carolina Appellate Court Rules, Respondents move that this Court strike Appellants' Record on Appeal as being incomplete and improper and also dismiss this Appeal and hold Respondents' filing date for Respondents' Final Brief in abeyance. Respondents have been prejudiced by Appellants' actions in that, *inter alia*, Respondents have been forced to bear the significant expense of preparing and prosecuting this Motion, and this Appeal has been unnecessarily delayed.

REQUEST TO HOLD RESPONDENTS' FILING OF THEIR FINAL BRIEF
IN ABEYANCE

1. Based on the foregoing, Respondents' counsel does not have access to an accurate and complete Record on Appeal to complete their Final Brief.

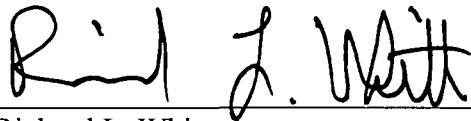
2. Accordingly, Respondents' counsel requests that Respondents' present filing deadline of January 31, 2013, be held in abeyance, pending this Court's decision on Respondents' Motion to Strike.

All counsel of record will be served with this Motion.

CONCLUSION

Based on the grounds set forth hereinabove, counsel respectfully motions this Court to hold Respondents' filing date for Respondents' Final Brief in abeyance, pending this Court's decision on Respondents' Motion and after this Court's inquiry into this matter, to strike Appellants' Record on Appeal and to dismiss Appellants' Appeal, because of Appellants' numerous, willful and material failures to comply with this Court's Rules.

Respectfully Submitted,
AUSTIN & ROGERS, P.A.

By: 

Richard L. Whitt
Jefferson D. Griffith, III
508 Hampton Street, Suite 300
P.O. Box 15907
Columbia, South Carolina 29211
Phone: (803) 256-4000
Fax: (803) 252-3679
Attorneys for Respondents

January 30, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-209587

Chris Phillips and Chris
Phillips Builders, Inc.,

Appellants,

v.

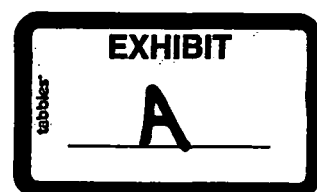
Frank Ferez and Suzie Ferez,

Respondents.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

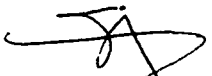
Appellants propose the following be included in the Record on Appeal:

1. Transcript of Record, including Appellants/Plaintiffs' exhibits 1-7;
2. Complaint;
3. Defendants' Motion for Summary Judgment November 11, 2010;
4. Order Denying Summary Judgment January 19, 2011;
5. Defendants' Motion to Reconsider, Rehear, Alter or Amend Judgment February 4, 2011;
6. Order Denying Motion Under Rule 59 February 23, 2011;
7. Defendants' Motion to Strike May 16, 2011;
8. Order Denying Defendants' Motion to Strike June 24, 2011; and,
9. Defendants' Motion for Summary Judgment July 15, 2011.



I certify that this designation contains no matter which is irrelevant to this appeal.

October 30, 2012



Stanley L. Myers
M. Brooks Biediger
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

Attorneys for Appellants

RLW Assist

From: Jeff Griffith [jeff@jdg8750.com]
Sent: Tuesday, November 13, 2012 4:37 PM
To: Richard L. Whitt; RLW Assist
Subject: Fwd: Designation of Matter in Phillips Appeal

Begin forwarded message:

From: Jeff Griffith <jeff@jdg8750.com>
Subject: Designation of Matter in Phillips Appeal
Date: November 13, 2012 4:35:56 PM EST
To: Stanley Myers <stanley@mttlaw.com>
Cc: Jeff Griffith <jdg8750@gmail.com>

Stanley:

I have looked at your Designation of Matter in the Phillips' appeal. It appears that someone in your shop designated in error the entire transcript into the Record on Appeal. I thought that you might want to look at it and make any corrections you deem appropriate .

Thanks for your attention

Regards,
Jeff



RLW Assist

From: Jeff Griffith [jeff@jdg8750.com]
Sent: Tuesday, November 13, 2012 5:31 PM
To: RLW Assist; Richard L. Whitt
Subject: Fwd: RE: Designation of Matter in Phillips Appeal

Sent from my Verizon Wireless 4G LTE DROID

----- Original Message -----

Subject: RE: Designation of Matter in Phillips Appeal
From: Stanley Myers <stanley@mttlaw.com>
To: Jeff Griffith <jeff@jdg8750.com>
CC: Jeff Griffith <jdg8750@gmail.com>

Jeff:

Thanks for the email, but I am a little confused. It is proper to designate the entire transcript into the Record.

Take care.

Stanley

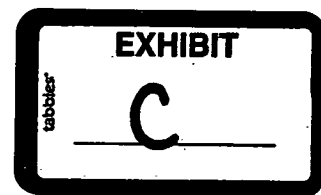
From: Jeff Griffith [mailto:jeff@jdg8750.com]
Sent: Tuesday, November 13, 2012 4:36 PM
To: Stanley Myers
Cc: Jeff Griffith
Subject: Designation of Matter in Phillips Appeal

Stanley:

I have looked at your Designation of Matter in the Phillips' appeal. It appears that someone in your shop designated in error the entire transcript into the Record on Appeal. I thought that you might want to look at it and make any corrections you deem appropriate .

Thanks for your attention

Regards,
Jeff



Austin & Rogers, P.A.

ATTORNEYS AND COUNSELORS AT LAW

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(1949-2010)

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RAYMON E. LARK, JR.
RICHARD L. WHITT
JEFFERSON D. GRIFFITH, III*
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* ALSO ADMITTED IN N.C.

November 19, 2012

The Honorable V. Claire Allen
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: • Phillips, Chris v. Ferez, Frank, *et al.*, Case Tracking # 2012-209587
• **Appellants' Designation of Matter to be Included in the Record on Appeal**

Dear Ms. Allen:

The Appellants' Designation of Matter to be included in the Record on Appeal was filed with your Court, on or about October 31, 2012. Appellant designated the entire transcript of record below (204 pages), and also designated all seven of Appellants' Exhibits below, to be included in the Record on Appeal. We contacted attorney Stanly L. Myers and informed him that it appeared that a substantial portion of his Designation was made in error and asked him to review the same. Mr. Myers indicated that his Designation of Matter was correct and he declined to make changes to include only those pages of the transcript of record and exhibits actually referred to in Appellants' Initial Brief, consistent with the South Carolina Appellate Court Rule 209 (a), (b) and (c), (see attachment herein, highlighting pertinent parts).

We contacted counsel opposite because he has already filed his Initial Brief and he did not cite to 204 pages of the transcript below, nor did he make reference to all seven exhibits from below. We have never encountered this situation during our practice of the Law and we are seeking your guidance in this matter.

RLW/cas
cc. Attorney, Stanley L. Myers

Respectfully Submitted,

AUSTIN & ROGERS, P.A.


Richard L. Whitt


Jefferson D. Griffith, III

EXHIBIT

D

RULE 209
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

(a) Time to Serve and File. At the same time a party serves his initial brief(s) under Rule 208, to include a reply brief, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal. One copy of this Designation with proof of service shall immediately be filed with the clerk of the appellate court.

(b) Content. The Designation must clearly identify what the party desires to have included in the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. A party shall not include any matter in his Designation which is not relevant to the appeal.

(c) Certification. The Designation shall be accompanied by a certificate signed by the party's counsel of record that the Designation contains no matter which is irrelevant to the appeal.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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December 10, 2012

—Mr. Richard-Lee Whitt
PO Box 11716
Columbia SC 29211

Mr. Jeff D. Griffith, III
PO Box 11716
Columbia SC 29211

Re: Phillips, Chris v. Ferez, Frank
Appellate Case No. 2012-209587

Dear Counsel:

The Court received your letter dated November 19, 2012, regarding the above case. If you wish to seek relief with the Court, you will need to file a motion as required by Rule 240 in the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Stanley Lamont Myers, Sr.
Michael Brooks Biediger



Austin & Rogers, P.A.

ATTORNEYS AND COUNSELORS AT LAW

C.C. HARNESS, III
(1949-2010)

WILLIAM FREDERICK AUSTIN
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JEFFERSON D. GRIFFITH, III*
EDWARD L. EUBANKS
W. MICHAEL DUNCAN

* ALSO ADMITTED IN N.C.

January 15, 2013

Stanley L. Myers, Esquire
Moore, Taylor & Thomas, P.A.
1700 Sunset Boulevard (Hwy. 378)
West Columbia, South Carolina 29171

RE: • Phillips, Chris v. Ferez, Frank, *et al.*, Case Tracking # 2012-209587
• **Record on Appeal**

Mr. Myers:

We are in receipt of the Record on Appeal, and note the following discrepancies, errors and omissions. Please correct these problems as soon as possible and provide us with a copy of the revised Record on Appeal, and an Appendix to your Record on Appeal. These matters must be corrected promptly, as we need the revised Record on Appeal and Appendix to complete our final Briefs.

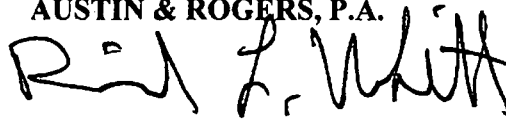
Please note:

1. Your Index indicates that "Plaintiff's Supplemental Answers to Defendant's Supplemental Interrogatories, dated July 15, 2011, appears on page "48", **which is incorrect;**
2. We designated, "Motion for Summary Judgment, with Affidavits of Respondents Francis Michael Ferez and Suzanne C. Ferez, filed November 15, 2010", and **you failed to include the Affidavits of Respondents Francis Michael Ferez and Suzanne C. Ferez, in the Record on Appeal;**
3. We designated the, "Bank 'Affidavit and Release', dated February 1, 2006, with copy of First Citizens' Cashier Check No.: 0025433", and **you failed to include this document and check as an Index item;** and
4. We designated the following pages of Appellant's deposition, pp. 8, 12, 15, 16, 20, 23, 24, and 28, into the Record. **The way these pages were placed into the Record on Appeal, there are holes punched into these pages, which renders part of the text "missing" and therefore unreadable.**



Correspondence
January 15, 2013
Page 2 of 2

AUSTIN & ROGERS, P.A.

A handwritten signature in black ink, appearing to read "Richard L. Whitt". The signature is written in a cursive, somewhat stylized font.

Richard L. Whitt
Jefferson D. Griffith, III

RLW/cas
cc. via, electronic mail

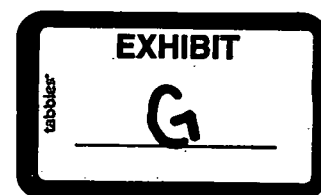
RLW Assist

From: Stanley Myers [stanley@mttlaw.com]
To: RLW Assist
Sent: Tuesday, January 15, 2013 3:57 PM
Subject: Read: Phillips v. Ferez- Record on Appeal

Your message

To: stanley@mttlaw.com
Subject:

was read on 1/15/2013 3:57 PM.



RLW Assist

From: Richard L. Whitt
Sent: Tuesday, January 22, 2013 2:54 PM
To: stanley@mttlaw.com
Cc: brooks@mttlaw.com; Karen@mttlaw.com; RLW Assist; Jeff Griffith
Subject: Phillips v. Ferez- Record on Appeal
Attachments: 1.15.2013.pdf

Importance: High

Mr. Myers:

1. We sent you the email below on January 15, 2013, at 3:56 p.m. We also mailed you a copy of our correspondence attached.
2. A week has passed and we have received no response from you or anyone in your office.
3. If you do not contact us by the close of business today, we will assume that you do not intend to correct or amend your Record on Appeal.

Sincerely,
Richard Whitt

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the foregoing communication, the information contained herein is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

From: RLW Assist
Sent: Tuesday, January 15, 2013 3:56 PM
To: Stanley Myers
Cc: 'Brooks Biediger'; Karen Kaminer; Richard L. Whitt; Jeff Griffith
Subject: Phillips v. Ferez- Record on Appeal
Importance: High

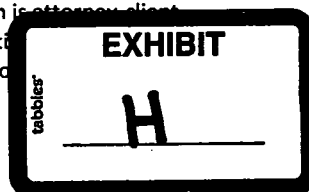
Mr. Myers:

Please see the attached, which is time sensitive. Please let us know if you have any questions or concerns. My direct telephone number is: (803) 251-7442.

Sincerely,
Carrie Schurg
Legal Assistant

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the foregoing communication, the information contained herein is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.



RLW Assist

From: Richard L. Whitt
Sent: Tuesday, January 22, 2013 3:17 PM
To: stanley@mttlaw.com
Cc: brooks@mttlaw.com; Karen@mttlaw.com; RLW Assist; Jeff Griffith
Subject: Additionally - Phillips v. Ferez- Record on Appeal

Importance: High

Mr. Myers:

In addition to the items mentioned in our previous correspondence:

1. Although you placed the full, normal deposition pages into the Record for Suzie Ferez, you placed the deposition pages which have been reduced in size, so that one page contains four separate deposition pages, for both Phillips and Frank Ferez.
2. Placing the deposition pages which are reduced in size to 1/4th of their normal size, in the Record, means that 19 holes were punched in the deposition pages, removing that text and therefore making it unreadable.

Sincerely,
Richard Whitt

From: Richard L. Whitt
Sent: Tuesday, January 22, 2013 2:54 PM
To: 'stanley@mttlaw.com'
Cc: 'brooks@mttlaw.com'; 'Karen@mttlaw.com'; RLW Assist; Jeff Griffith
Subject: Phillips v. Ferez- Record on Appeal
Importance: High

Mr. Myers:

1. We sent you the email below on January 15, 2013, at 3:56 p.m. We also mailed you a copy of our correspondence attached.
2. A week has passed and we have received no response from you or anyone in your office.
3. If you do not contact us by the close of business today, we will assume that you do not intend to correct or amend your Record on Appeal.

Sincerely,
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CONFIDENTIAL & PRIVILEGED

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case Tracking No. 2012209587
Civil Action No. 2009-CP-32-3870

RECEIVED
JAN 11 2013
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Appellants,

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Frank Ferez and Suzie Ferez,

Respondents.

RECORD ON APPEAL

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Attorneys for Respondents



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

Case Tracking No: 2012209587
Civil Action No. 2009-CP-32-3870

Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez.....Respondents.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondents propose the following be included in the Record on Appeal:

RECORDED & INDEXED
NOV 30 2012
MICHAEL FERREZ APPEALS

1. Complaint filed August 24, 2009;
2. Amended Answer and Counterclaims, filed April 28, 2011;
3. Motion for Summary Judgment, with Affidavits of Respondents Francis Michael Ferez and Suzanne C. Ferez, filed November 15, 2010;
4. Order filed January 19, 2011, Re: Motion for Summary Judgment;
5. Motion to Reconsider, Rehear, Alter or Amend Judgment, filed February 4, 2011;
6. Order filed February 25, 2011, Re: Motion to Reconsider;
7. Motion to Strike, filed May 19, 2011;
8. Order filed June 15, 2011, Re: Motion to Strike;
9. Motion for Summary Judgment, with Affidavits of Respondents Francis Michael Ferez and Suzanne C. Wilson (formally known as Suzanne C. Ferez), filed July 15, 2011;
10. Notice of Appeal, filed March 15, 2012;
11. Electronic Mail from Trial Judge, dated March 22, 2012, Re: Order;

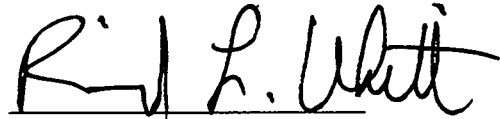
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12. Second Notice of Appeal, dated April 10, 2012;
13. Contract, dated March 10, 2005;
14. Plaintiffs' [Appellants'] Supplemental Answer "2.1" to Defendants' [Respondents'] Supplemental Interrogatories, dated July 15, 2011;
15. Deposition of Appellant Chris Phillips, p. 8; p. 9; p. 10; p. 12; p. 14; p. 15; p. 16; p. 20; p. 22; p. 23; p. 24; p. 28; p. 29; p. 30;
16. Deposition of Respondent Frank Ferez, p. 55;
17. Deposition of Respondent Suzie Ferez, p. 51; p. 64;
18. Appellants' "Customer QuickReport";
19. Plaintiffs' [Appellants'] Admission number "2" to Defendants' [Respondents'] Requests for Admissions, dated October 19, 2009;
20. Plaintiffs' [Appellants'] Admission number "3" to Defendants' [Respondents'] Requests for Admissions, dated October 19, 2009;
21. Plaintiffs' [Appellants'] Answer to Defendants' [Respondents'] Interrogatory number "8" dated October 20, 2009;
22. Plaintiffs' [Appellants'] Admission number "1" to Defendants' [Respondents'] Requests for Admissions, dated October 19, 2009;
23. Correspondence to Respondent Frank Ferez, from Counsel for Appellants, dated July 28, 2009;
24. Bank "Affidavit and Release", dated February 1, 2006, with copy of First Citizens' Cashier Check No.: 0025433;
25. Transcript of Proceedings, p. 4; p. 73; p. 77; p. 78; p. 107; p. 108; p. 113; p. 158; p. 162; p. 167; p. 168; p. 177; p. 178; p. 179; p. 180; p. 181; p. 190; p. 191; p. 192; p. 195; p. 196; p. 197; p. 198; p. 199; p. 200; p. 201; p. 202.

[Signature Page Follows]

I certify that this Designation of Matter to be Included in the Record on Appeal, contains
no matter which is irrelevant to this appeal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "R. L. Whitt". The signature is written in a cursive style with a horizontal line underneath the name.

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Jefferson D. Griffith, III
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November 30, 2012

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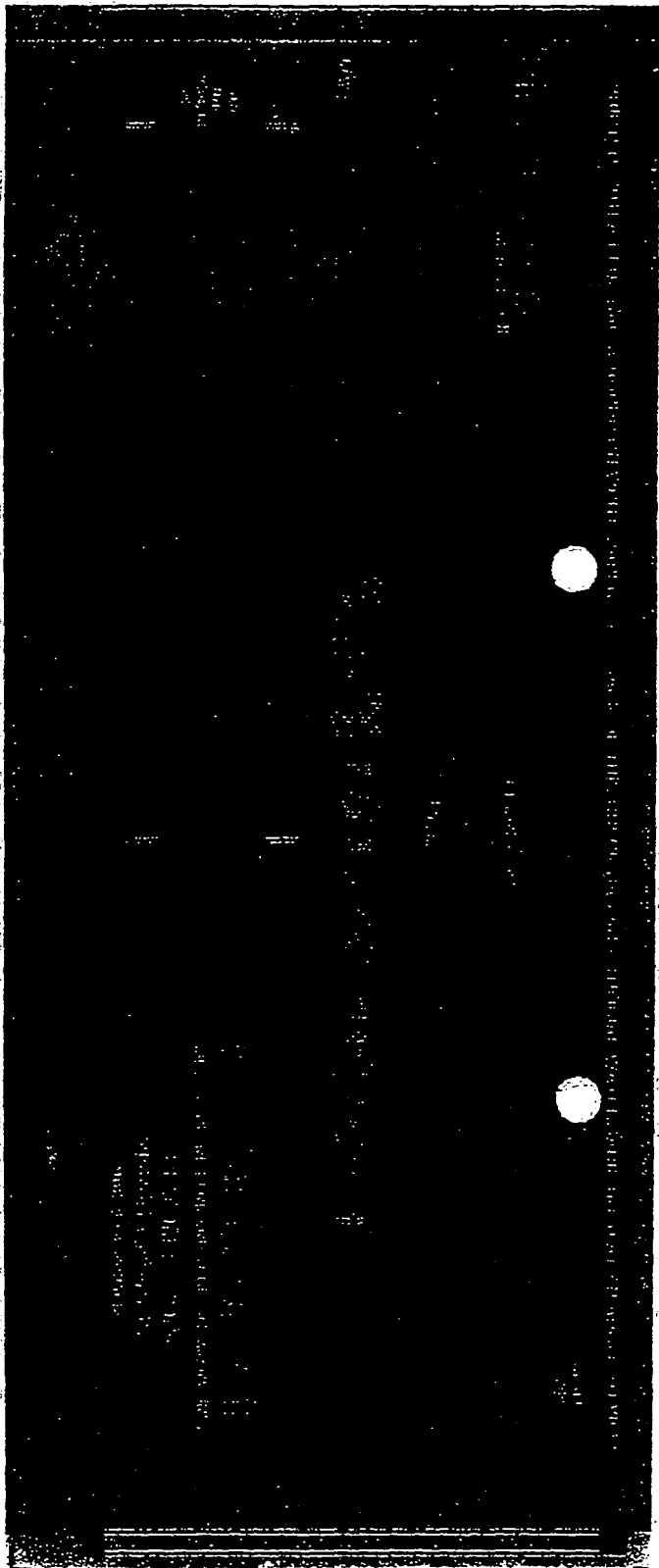
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EXHIBIT

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EXHIBIT

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1 received a little over \$550,000, correct?
2 A That's correct.
3 Q \$553,375. Okay. And you've got that marked. Okay.
4 Next document marked ---
5
(MARKED FOR IDENTIFICATION, DEFENDANT'S
6 EXHIBIT NUMBER 3, AFFIDAVIT AND RELEASE, ATTACHED.)
7 BY MR. WHITT:
8 Q Okay. I'll show you that to make sure you recognize
9 it.
10 A Yes, sir.
11 Q All right. And can you read the part that's
12 highlighted in yellow for me, please?
13 A That said construction improvements have been fully
14 completed. Upon receipt of a final advance of \$104,500
15 from First Citizens, the building contract amount of
16 \$550,000 will be paid in full. Also, if applicable,
17 receipt of payment from Francis M. Ferez and Suzanne C.
18 Ferez in the amount of zero has been paid in full all
19 overages. All total obligations in connection with
20 said construction improvements have been paid in full.
21 Q Okay. And you recognize this document and you
22 recognize your signature?
23 A Yes, sir.
24 Q And it's for Chris Phillips Builders, Inc., by you?
25 A Yes, sir.

10

1 Q And it's dated when?
2 A 2-1 of '06.
3 Q Okay. And you remember signing this document?
4 A Yes, sir.
5 Q And you didn't have this document in your file, a copy
6 of this document in your file at your office? The
7 reason I ask you that is we ---
8 A I did not.
9 Q --- asked for copies of all documents related to this,
10 and we didn't get that document. So, do you know if it
11 was in your file or not?
12 A Honestly, I do not know.
13 Q But the day you - do you remember going to the bank?
14 A Yes, sir.
15 Q You remember signing?
16 A Yes, sir.
17 Q Do you remember the Ferezes being there? Did the
18 banker give you a copy of it that day?
19 A I would have to assume so, but I don't know for sure.
20 Q Okay. All right. I'm going to go through some more of
21 these documents and get them marked, and then we're
22 going to come back to them.
23 A Okay.
24 Q So, we've got one more.
25

(MARKED FOR IDENTIFICATION, DEFENDANT'S

1 EXHIBIT NUMBER 4, PLAINTIFF'S RESPONSES TO DEFENDANT'S
2 REQUESTS FOR ADMISSIONS, ATTACHED.)
3 BY MR. WHITT:
4 Q Let me show you that. That's a document that you
5 should have seen as part of the discovery process.
6 you flip to the second page, you can see it's signed
7 your legal counsel on October the 19th.
8 A Yes, sir.
9 Q Okay. What does question number five say on that
10 document?
11 A Admit that the consideration for the contract was
12 \$550,000 and the Defendants paid the Plaintiff
13 \$550,000.
14 Q And what was your response below?
15 A Response: Denied.
16 Q Why would that response be denied? If we've already
17 determined that, based on your internal records that
18 you gave to me, they paid you \$550,000, plus \$3,300
19 more?
20 A Why was it denied?
21 Q Yes.
22 A Honestly, I - I would have to defer that one to
23 Stanley, because I don't ---
24 Q Well, do you remember discussing this question with
25 him, question number five on Exhibit 4?

1 A Well, I'm sure we did, yes, sir.
2 Q But do you recall discussing it with him?
3 A I - no, sir, I don't recall, but I mean, it's a
4 Q Well, based on your, what you know now and what
5 covered by looking at your Exhibit Number 2, or the
6 Exhibit Number 2 to this deposition, which was your
7 QuickBooks report ---
8 A Uh-huh.
9 Q --- is there any reason why you would deny now that
10 at least received \$550,000?
11 A No, sir. I mean, they paid me the 550.
12 Q Okay. Okay. And so, that answer should be changed
13 your opinion?
14 MR. MYERS: Object to form. You can answer.
15 BY MR. WHITT:
16 Q Yeah. That answer should be changed to admitted -
17 A Yes, sir. I received 550.
18 Q Okay. All right. One more.

(MARKED FOR IDENTIFICATION, DEFENDANT'S
20 EXHIBIT NUMBER 5, PLAINTIFFS ANSWERS TO DEFENDANT'S
21 SUPPLEMENTAL INTERROGATORIES, ATTACHED.)

22 BY MR. WHITT:
23 Q All right. Look at that, please. The title at
24 is that - you're the plaintiff in this case, and
25 is answers to interrogatories. This document is a

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5

1 Q So, just direct all questions to me. I will ask you
2 these questions and I'll repeat them if I need to. I'm
3 going to assume if you answer them that you understood
4 them, but if you have any questions you can ask me.
5 A Okay.
6 Q All right. For the record, just state your name, your
7 full name.
8 A Christopher David Phillips.
9 Q And your address?
10 A Is 200 Possum College Road, Swansea, South Carolina, 29
11 ---
12 Q And your date - I'm sorry.
13 A 29160. That's all right.
14 Q Date of birth?
15 A 10-14-70.
16 Q And Social Security number?
17 A 251-15-2687.
18 Q And you're married?
19 A Yes, sir.
20 Q Your wife's name?
21 A Jolynne, J-o-l-y-n-n-e, R. Phillips.
22 Q Okay. And the contract that's at dispute herein is
23 between Chris Phillips Builders and the Ferezes. It's
24 not you individually.
25 A Right.

6

1 Q And you don't mingle your money back and forth between
2 the company and your private business dealings, I
3 assume?
4 A No, sir.
5 Q You keep a separate account.
6 A Yes, sir.
7 Q In fact, I noticed the checks were payable to Chris
8 Phillips Builders, Inc.?
9 A Yes, sir.
10 Q So, the money from this would have gone to them and
11 that was the title to the contract, so you built the
12 house as Chris Phillips Builders.
13 A Yes, sir.
14 Q All right. All right. Well, we'll switch to talking
15 about Chris Phillips Builders, then. And I've got a
16 document here that we can mark for identification, and
17 I can just give you a copy, also. It's the contract.
18
19 (MARKED FOR IDENTIFICATION, DEFENDANT'S
20 EXHIBIT NUMBER 1, CONTRACT, ATTACHED.)
21 BY MR. WHITT:
22 Q I want you to look at it, see if you recognize it, and
23 if that's the document you signed.
24 A Yes, sir.
25 Q All right. I'll call your attention to the contract,
down at the bottom, and see if yours has a highlighted

1 section in it.
2 A Yes, sir.
3 Q Can you read that for me?
4 A Any alteration or deviation from above specificati
5 involving extra costs will be executed only upon
6 written orders and will become an extra charge ove
7 above the estimate.
8 Q Okay. And I think that we've done some discovery o
9 this case, and you've admitted in your discovery th
10 you didn't execute these formal written change orde
11 Is that correct?
12 A That's correct.
13 Q Okay. So, we don't have any of those. All right.
14 and I guess for the record, the amount of the contr
15 was \$550,000. Is that your understanding?
16 A Yes, sir.
17 Q All right. And it was signed by you as authorized
18 signature for Chris Phillips Builders?
19 A Yes, sir.
20 Q Okay. All right. I've got another document that w
21 want to mark, and I can just hand you a copy.
22
23 (MARKED FOR IDENTIFICATION, DEFENDANT'S
24 EXHIBIT NUMBER 2, QUICKBOOKS REPORT, ATTACHED.)
25 BY MR. WHITT:
Q And this is your document. This came from your

1 company.
2 A Yes, sir.
3 Q Can you look at it and see if you recognize it?
4 A Yes, sir.
5 Q It came from QuickBooks Pro, or ---
6 A Yes, sir.
7 Q And this is called a QuickReport?
8 A Yes, sir.
9 Q Okay. If you look at that, and I've highlighted
10 mine, but you can see it on yours, too, that you'
11 the payments listed on there.
12 A Uh-huh.
13 Q And they are listed one right after another, and
14 start on March 10, 2005?
15 A Yes, sir.
16 Q And look and tell me the date of the last payment
17 there.
18 A 2-2-2006.
19 Q Right. And subject to checking my math later, th
20 total \$553,375?
21 A Yes, sir.
22 Q So, accepting that, subject to check, what was th
23 amount of the contract?
24 A \$550,000.
25 Q \$550,000. And your internal records show that yo

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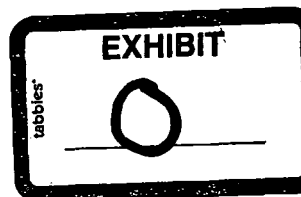
Frank Ferez and Suzie Ferez,

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Attorneys for Respondents



13

1 as Plaintiffs Answers to Defendants Supplemental
2 Interrogatories, and it's question 2-1. I'll give you
3 a chance to look at that.
4 A Okay.
5 Q Okay. If you would, read 2-1 to me, please.
6 A Because you contend that the Ferezes did not pay you
7 \$50 for the construction of the residence, set forth
8 the dollar amounts you contend the Ferezes paid you for
9 construction of the residence.
10 Q And read me your answer.
11 A Answer: Defendants paid \$31,000 to Plaintiff.
12 Q Can you explain that answer to me?
13 A No, sir.
14 Q Okay. Well, in light of looking back at your report,
15 Number 2, where your records tell us, subject to you
16 doing the math, checking the math, that you received
17 \$553,375 and you've got each date you did it?
18 A Right.
19 Q Then that answer is incorrect?
20 A Yes, sir, that would - because they paid me the 550.
21 Q Okay. Do you remember discussing that with your
22 counsel, your legal counsel?
23 A I - honestly, no, sir.
24 Q Okay. And once again, just like the previous document,
25 do you think that that answer should be amended to

1 A Uh-huh.
2 Q Now, we've already read this, you've already publish
3 the sentence at the bottom of the page that indicate
4 that any alteration or deviation from above
5 specifications involving extra costs will be executed
6 only upon written orders and will become an extra
7 charge over and above the estimate. So, we've already
8 read that that's in this contract.
9 A Right.
10 Q And that none exist, that you didn't do them.
11 A Right.
12 Q Oh, and the other thing is who drafted this contract
13 Did you draft it, or someone on your behalf?
14 A Yes, sir.
15 Q This isn't the Ferezes' contract they presented to
16 Chris Phillips Builders. This is your contract.
17 A Right.
18 Q Okay. So, you drafted this contract up, and you said
19 it's going to be 550, and by your own terms of your
20 contract, if it exceeds 550, you said we're going
21 to give you some change orders. Is that correct?
22 A That's - yes, sir.
23 Q And then, that wasn't done.
24 A Right.
25 Q Okay. And then, the other things, I think we can

14

1 reflect the amount that they did pay you, whether it's
2 553,075, or somewhere in that area?
3 A Right.
4 Q That answer should be changed?
5 A Yes, sir.
6
7 (MARKED FOR IDENTIFICATION, DEFENDANT'S
8 EXHIBIT NUMBER 6, PLAINTIFFS' RESPONSES TO DEFENDANTS
9 REQUESTS FOR ADMISSIONS, ATTACHED.)
10 BY MR. WHITT:
11 Q Okay. All right. If you will, please read that. And
12 you can see at the top, it's addressed to Richard L.
13 Whitt, as Attorney for the Defendants. And this is
14 another discovery response and this is a request to
15 admit, also. So, if you look at number three and read
16 that for me, please.
17 A Admit that there are no written change orders to the
18 contract, extant, which were executed by the Plaintiffs
19 and acknowledged in writing by the Defendants.
20 Q And then, your response to that is?
21 A Admit.
22 Q You admit it, okay, good. Thank you. All right.
23 Let's go back to the contract, which is Exhibit Number
24 1. Do you still have your copy there?
25 A Yes, sir.
26 Q It says Chris Phillips at the top?

1 establish by looking at the, your report, which you
2 have a copy of there, which is your Exhibit Number
3 It's your QuickBooks report.
4 A Yes, sir.
5 Q We've established that they paid you over \$550,00
6 And we've established that the only way you could
7 gotten more than that was with a written change o
8 and we don't have any. Is that correct?
9 A Well, yeah.
10 Q Well, it says \$550,000 they were supposed to pay
11 and they paid you that, correct?
12 A Correct.
13 Q And then, your contract that you drafted said if
14 will go anything above this specifications, or the
15 numbers or what's set forth, there will be a writ
16 order and then you've admitted in discovery and
17 you didn't have one.
18 A Right.
19 Q So, those two things are what I'm establishing.
20 A Yes, sir.
21 Q Okay. So, there's no written orders and that wa
22 amount. All right. We'll come back to these
23 documents, but let's just talk in generalities n
24 How many people besides the Ferezes has Chris Ph
25 brought litigation against in the last three yea

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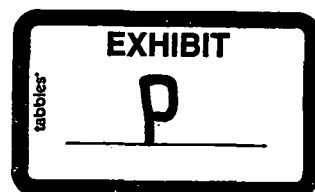
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ARGUMENT

I. JUDGE EARLY ERRED IN HOLDING THE ACTION WAS BARRED UNDER THE STATUTE OF LIMITATIONS BECAUSE THE APPELLANT TIMELY FILED THE ACTION PURSUANT TO THE DISCOVERY RULE FOR BREACH OF CONTRACT

Under South Carolina law, applicable statute of limitations for contract actions is three years. S.C. Code Ann. § 15-3-530. South Carolina follows the discovery rule when determining the triggering event for the statute of limitations to being running. *Garner v. Houck*, 312 S.C. 481, 485, 435 S.E.2d 847, 850 (1993).

“If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury.” *Id.* (citing *Santee Portland Cement Co. v. Daniel Int’l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989)).

There has been a great deal of conflicting evidence presented thus far as to which event properly triggered the statute of limitations. The contract itself is silent as to a specific date on which nonpayment becomes a breach. Further, the contract was orally modified and the debts were acknowledged which would change the time frame for payment from the original contract’s terms.

The Respondents claim the closing date in February of 2006 triggers the statute of limitations. Because work was still being performed on the house under the original contract in March of 2007, the statute of limitations was not triggered until this time. In addition, the Respondents made several reaffirmations of the debt after the February 2006 closing. Therefore, the statute of limitations began to run on March of 2007 and the action was timely filed in August of 2009.

In any event, whether the statute of limitations began to run in 2006 or 2007 is a question of fact. Questions of fact are to be determined by the jury and are not appropriate at the directed

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Based on the Respondents' assurances they would pay the debt, Mr. Phillips withheld filing his lawsuit until it became apparent the Respondents intended to renege on their assurances. Mr. Phillips testified that his business is attached to his reputation. The Respondents both testified they heard of his business through word of mouth. It is certainly not good for business to go around suing every client that has fallen behind in payment. This is even more true when the clients themselves, who have managed to pay all but the final installment, make assurances that payment will be forthcoming..

Mr. Phillips's reliance on the Respondents' promises was reasonable under these circumstances. The Respondents made a number of reaffirmations they would pay. Until the final payment, the Respondents had never missed a payment. Mr. Phillips had no indication he would have to bring a claim to assert his rights. Mr. Phillips had no indication he would be forced to sue the Respondents to get paid for the extra work they asked him to perform. To the contrary, based on the history between the parties and his business's reputation, the reliance on the Respondents' assurances of payment was the only reasonable position for Mr. Phillips to take.

Unfortunately, because Mr. Phillips relied on the Respondents' assurances, they now argue Mr. Phillips' otherwise legitimate claims for reimbursement must be barred as a technicality under the statute of limitations. Based on the applicable law regarding equitable estoppel, Appellants respectfully request this Court reverse the lower court's decision to dismiss this matter because the Respondents induced the Appellant to withhold filing suit and should be estopped from asserting the statute of limitations.

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Attorneys for Appellants



(Transcript 148:15-18; R.__). To assist in closing the loan and helping the Respondents move into their new home, Mr. Phillips signed an affidavit saying no more money was owed to him. (Transcript 152:3-6; R.__). Mr. Phillips understood the affidavit to mean the note from the bank was paid in full. (Transcript 152:20-24; R.__). Following the closing, Mr. Phillips returned to the home a number of times to wrap up the construction. (Transcript 69:2-18; R.__). On one instance shortly after they moved in, Respondent Frank Ferez stated he owed Mr. Phillips extra money for the overages and extra work performed. (Transcript 154:1-9; R.__).

On March 2, 2007, Mr. Phillips returned to the house to repair a dark spot on the side of the house. (Transcript 145:12-16; R.__). The Respondents were not charged as a result of this repair work because it was performed pursuant to the original contract. (Transcript 147:8-14; R.__).

On or around August 13, 2008, Mr. Phillips gave Respondent Suzie Ferez and invoice for the overages and additional work. (Transcript 156:12-21; R.__). The thought that the Respondents would refuse to pay for the overages and additional work never crossed Mr. Phillips's mind. (Transcript 158:3-14; R.__). Mr. Phillips relied on the Respondents' reaffirmations that they would pay. (Transcript 160:2-12; R.__). Mr. Phillips testified at trial that had the Respondents not made the later promises to pay, he would have filed his lawsuit sooner. (Transcript 16:11-13; R.__).

After giving Mrs. Ferez the final invoice in August of 2008, Mr. Phillips made numerous attempted to contact the Respondents for payment. (Transcript 160:17-161:7; R.__). By August of 2009, Mr. Phillips realized the Respondents were simply not going to pay for the additional work they asked him to perform on their home. Mr. Phillips then contacted Appellants' counsel and the present action was filed on August 24, 2009. (Complaint; R.__).

1 State of South Carolina) In the Court
2 County of Lexington) Of Common Pleas

3 Docket No: 2009-CP-32-03870

4
5
6 Chris Phillips and)
7 Chris Phillips Builders, Inc.,)
8 Plaintiff,)

9 vs.)

10 Frank Ferez and Suzanne Ferez,)
11 Defendants.)

 COPY

TRANSCRIPT OF
RECORD

12
13 March 12-13, 2012
14 Lexington, South Carolina

15 B E F O R E:

16 The Honorable Doyet A. Early III, Judge and a jury.

17 A P P E A R A N C E S:

18 Stanley L Myers, Esquire
19 M. Brooks Biediger, Esquire
20 Attorneys for the Plaintiff

21 Mr. Richard L. Whitt, Esquire
22 Mr. Jeff D. Griffith, Esquire
23 Attorneys for the Defendant

24 Brenda J. Sigwald, Circuit Court
25 P.O. Box 206, Jackson, South Carolina 29831

EXHIBIT

 S

Christopher D. Phillips, Sr. - Direct Examination by Mr. Myers

1 A It was after they had moved in. The sauna -- Frank
2 had called me one evening, the sauna wasn't working. And
3 once we talked about or thought about what was probably
4 going on, we felt it was an electrician issue and it was a
5 breaker situation; and he got it fixed and the sauna
6 worked. While we were there, he made the statement, he
7 said, I know we owe you some extra money. He said, Get it
8 figured up so I can get you paid because I don't like owing
9 anybody any money.

10 Q Now, Chris, was this after the loan closing on
11 February 1st, 2006?

12 A Yes, sir.

13 Q Now, the sauna, was it something that was wrong
14 with the sauna?

15 A It was a breaker that -- I forget the details, the
16 electrician fixed it. It was a breaker that wasn't put in
17 for one of the wirings in the sauna. I'm not sure exactly
18 what the detail was, but --

19 Q That's conversation number one. You said that
20 there was another conversation --

21 THE COURT: When was that conversation, number one?

22 THE WITNESS: That was -- I'm sorry.

23 That would have been -- of course, I don't know an
24 exact date.

25 THE COURT: Just approximate.

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

Case Tracking No: 2012209587
Civil Action No. 2009-CP-32-3870

67074

Chris Phillips and Chris Phillips Builders, Inc.....Appellants,

v.

Frank Ferez and Suzie Ferez.....Respondents.

PROOF OF SERVICE

I, Carrie A. Schurg, an employee of Austin & Rogers, P.A., certify that I have caused a copy of Respondents' Motion to Strike Record, Dismiss Appeal and Hold Filing Date in Abeyance, and this Proof of Service to be served on January 30, 2013, via hand-delivery as addressed below.

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JAN 30 2013

SC Court of Appeals

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Carrie Schurg
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January 30, 2013
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January 30, 2013

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED

JAN 30 2013

SC Court of Appeals

RE: • Phillips, Chris v. Ferez, Frank, *et al.*
• Case Tracking # 2012209587
• **Respondents' Motion to Strike Record, Dismiss Appeal and Hold Filing Date in Abeyance.**

Dear Ms. Kitchings:

Enclosed for filing, please find Respondents' Motion to Strike Record, Dismiss Appeal and Hold Filing Date in Abeyance, the required six copies of the Motion and Proof of Service, in the above-referenced matter. Also enclosed is a check in the amount of \$25.00, representing the appropriate filing fee.

Please accept these documents for filing and acknowledge receipt of the same by file-stamping the copies enclosed and returning them to me, via our courier. If you have any questions or need additional information, please feel free to contact me.

Respectfully Submitted,
AUSTIN & ROGERS, P.A.



Richard L. Whitt
Jefferson D. Griffith, III

RLW/cas
cc. Stanley L. Myers, Esquire