

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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AUG 02 2019

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-002277

American Star Development SC, LLC; KKMC Investments, LLC; and 211, LLC,  
..... Plaintiffs,

v.

PulteGroup, Inc.; Pulte Home Corporation, n/k/a Pulte Home Company, LLC; and  
JW Homes, LLC, ..... Defendants,

Of which American Star Development SC, LLC is the ..... Appellant,

And Pulte Home Corporation, n/k/a Pulte Home Company, LLC is the ..... Respondent.

**RESPONDENT'S REPLY TO APPELLANT'S RETURN TO MOTION TO STRIKE  
PORTIONS OF APPELLANT'S INITIAL BRIEF, DESIGNATION OF MATTER,  
INITIAL REPLY BRIEF, AND AMENDED DESIGNATION OF MATTER**

G. Trenholm Walker (SC Bar #5777)  
John P. Linton, Jr. (SC Bar #79130)  
Walker Gressette Freeman & Linton, LLC  
P.O. Box 22167  
Charleston, SC 29413  
843 727-2200

ATTORNEYS FOR RESPONDENT  
Pulte Home Corporation, n/k/a Pulte Home  
Company, LLC

July 31, 2019

Respondent, Pulte Home Corporation, n/k/a Pulte Home Company, LLC, (“Respondent” or “Pulte”) respectfully submits this Reply to American Star Development SC, LLC’s (“American Star” or “Appellant”) Return to Pulte’s Motion to Strike Portions of Appellant’s Initial Brief, Designation of Matter, Initial Reply Brief, and Amended Designation of Matter (“Motion”). For the reasons stated herein and in Pulte’s Motion, the Motion should be granted.

American Star argues that this Court should endorse its efforts to manipulate the issues on appeal by filings it made in the lower court months after it appealed Judge McIntosh’s Order granting Pulte’s motion to cancel the Lis Pendens. In its return to Pulte’s Motion to Strike, American Star makes the implausible argument that Rule 210(c) does not mean what it says. American Star asserts Rule 210(c)’s directive that “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal” does not require that matter in the record be presented to the lower court *prior to* the appeal. The appeal process, according to American Star, is dynamic, and the appellant can make filings in the lower court to influence the outcome of the issues on appeal well after the lower court has ruled and after appellant has taken the appeal. American Star’s interpretation is contrary to plain language of the rule, which provides for inclusion in the record only if the matter “**was**” presented to the lower court. See Rule 210(c).

American Star contends wording in Rule 208(b)(c)(1) governing initial briefs permits it to designate and refer to these after-the-fact filings that were not even before the lower court when it issued the ruling on appeal. American Star relies on this rule’s reference to the content of the statement of the case that explains “[t]he statement [of the case] shall contain a concise *history of the proceedings*, insofar as necessary to an understanding of the appeal.” SCACR 208(b)(1)(C)(double

emphasis added).<sup>1</sup> As is plainly evident, this rule is referring to the proceedings leading up to the appeal and is not referring to proceedings well after an appeal is taken.

The use of the words “was” and “history” in Rule 208(b)(c)(1) clearly indicate that the rule requires that the matters in the record be presented to the lower court prior to the appeal. The opposite interpretation is problematic and would lead to situations, such as this, where the appellant files documents in the lower court after initiating an appeal for the purpose of curing defects in appellant’s positions on appeal. American Star’s novel interpretation of the rules usurps the lower court’s role as the initial decision maker because the appeal would not be limited to those matters presented to it. See generally, Arguments raised for the first time on appeal are not preserved for our review. Knight v. Waggoner, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004).

Finally, American Star cites to Walbeck v. I'On Co., LLC, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2019), *reh'g denied* (May 22, 2019). American Star includes no pinpoint citations when referring to Walbeck, and a reading of the opinion reflects no discussion of the appellate court rules at issue in this motion.

The central question on any appeal is whether the decision of the trial court was correct based on the record before it at the time of the ruling, not based on matters that occurred months later. An appeal is not a competition between the appellant and respondent as to which can better enhance its chances of winning on appeal by making filings long after the trial court has ruled. No appellate maxim

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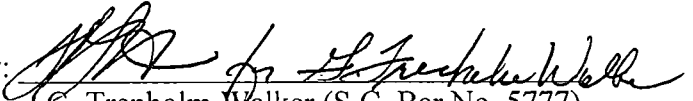
<sup>1</sup> American Star also suggests that because Rule 208(b)(C)(1) refers to changes in the parties due to death, substitution or otherwise, it should be allowed to include Appellant’s Motion to Substitute Parties and Amend Amended Complaint filed March 5, 2019. American Star ignores that the appeal concerns the rights of American Star at the time it filed the Lis Pendens that was ultimately cancelled by the lower court. Nothing in American Star’s Motion to Substitute Parties and Amend Amended Complaint impacts the determination of whether the lis pendens at issue was properly cancelled.

is more foundational than that this Court's review concerns the correctness of the trial court's ruling based on what was before it at the time it ruled, which is exactly what Rule 208 says and means.<sup>2</sup>

For these reasons, the Motion should be granted.

Respectfully submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC

By:   
G. Trenholm Walker (S.C. Bar No. 5777)  
John P. Linton, Jr., (S.C. Bar No. 79130)  
P.O. Drawer 22167  
Charleston, SC 29413  
T: (843) 727-2252  
[WALKER@WGFLAW.COM](mailto:WALKER@WGFLAW.COM)  
[LINTON@WGFLAW.COM](mailto:LINTON@WGFLAW.COM)

ATTORNEYS FOR RESPONDENT,  
PULTE HOME CORPORATION, n/k/a  
PULTE HOME COMPANY, LLC

July 31, 2019  
Charleston, South Carolina

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<sup>2</sup> The one exception is mootness. Mootness deals with the separate question of whether there still remains a ripe, justiciable controversy that allows the appellate court to provide for meaningful relief. Mootness does not concern whether the lower court correctly decided the issues but whether intervening events have rendered the outcome of the issues on appeal without practical effect.

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Of which American Star Development SC, LLC is the .....Appellant,

And Pulte Home Corporation, n/k/a Pulte Home Company, LLC is the .....Respondent.

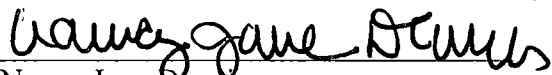
**PROOF OF SERVICE**

I certify that I have served the **Respondent's Reply to Appellant's Return to Motion to Strike Portion of Appellant's Initial Brief, Designation of Matter, Initial Reply Brief and Amended Designation of Matter** by depositing a copy in the United States Mail, postage prepaid, on July 31, 2019, addressed to the attorneys of record:

E. Brandon Gaskins, Esq.  
Charles R. Scarminach, Esq.  
Moore & Van Allen PLLC  
78 Wentworth Street  
Charleston, SC 29401  
*Attorneys for Appellant*

John A. Massalon, Esq.  
Wills Massalon & Allen LLC  
97 Broad Street  
Charleston, SC 29401

Mark V. Hanrahan, Esq.  
Michele Lee Stumpe, Esq.  
Taylor English Duma LLP  
1600 Parkwood Circle, Ste. 200  
Atlanta, GA 30339  
*Attorneys for Defendant JW Homes, LLC*

  
Nancy Jane Dennis  
Paralegal



G. Trenholm Walker  
Thomas P. Gressette, Jr.  
Ian W. Freeman  
John P. Linton, Jr.  
Charles P. Summerall, IV

NANCY JANE DENNIS  
Direct: 843.727.2222  
Email: [njdennis@WGFLAW.com](mailto:njdennis@WGFLAW.com)

July 31, 2019

US MAIL [X] FEDERAL EXPRESS[]

Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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SC Court of Appeals

Re: American Star Development, etc., et al., v. PulteGroup, Inc., et al.  
Appellate Case No. 2018-002277  
WGFL File No.: 7887.002

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent's Reply to Appellant's Return to Motion to Strike Portion of Appellant's Initial Brief, Designation of Matter, Initial Reply Brief and Amended Designation of Matter with Proof of Service.

Your courtesies and consideration of this matter are greatly appreciated.

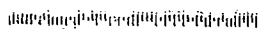
Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LLC

Nancy Jane Dennis  
Paralegal

Enclosures (Reply and Proof)

c: E. Brandon Gaskins, Esq.  
John A. Massalon, Esq.  
Mark V. Hanrahan, Esq.  
Michele Lee Stumpe, Esq.



WALKER  
GRESSETTE  
FREEMAN  
LINTON LLC

66 Maxwell Street, Charleston, SC 29401  
PO Box 22167, Charleston, SC 29413

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