THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

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Marvin H. Dukes III, Master in Equity

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Appellate Case NO 2019-001420

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South Beach Village Bluff Apartments
Horizontal Property Regime No. 56, Inc.,

Respondent,

v.

Zbigniew Marek Drzazgowski and Alicja
Anna Drzazgowski, Defendants,
of whom Zbigniew Marek Drzazgowski
is the

Appellant.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

**I.** Whether Appellant has met his burden of showing reversible error on the part of the lower Court?

## STATEMENT OF THE CASE

The lower court case began on June 6, 2019, with the service and filing of a Lis Pendens Summons and Complaint by Respondent South Beach Villas seeking foreclosure of a lien on Appellant's rental property (Summons, Complaint, and Affidavit of Service). The underlying lien being foreclosed was filed on March 9, 2017, in the Office of the Register of Deeds for Beaufort County. (Order, ¶ 1).

A hearing was held on August 8, 2019. (Order, p. 1). Appellant failed to appear. A default judgment was entered in favor of Respondent on August 8, 2019. (Order). The order stated, "8. Defendants were notified of the time, date and place of hearing in this matter as shown by the Notice of Hearing and Certificate of Service entered on July 17, 2019 and on file herein." (*Id*., page 4).

Appellant first appealed on August 19, 2019.

## APPELLATE COURT PROCEEDINGS

This appeal began on August 19, 2019, with the filing of Appellant's "Notice of Appeal," which was not in fact a Notice of Appeal. Instead, the document attempted to argue the substance of the case.

The Clerk sent Appellant a deficiency letter on August 27, 2019.

Appellant then filed a second Notice of Appeal that was received by the Court on September 9, 2019.

The Clerk wrote to Appellant on November 18, 2019, informing him that his brief was overdue and that he needed to file, within ten days, the brief and a motion to file out of time, or his brief would not be considered.

Appellant then filed what he called an "Initial Brief," dated November 24, which included a request to file out of time. On December 31, 2019, the Clerk wrote to Appellant, informing him that she was construing his "Initial Brief" to instead be a "motion to file out of time." The Clerk instructed Appellant that he must file a brief compliant with the Rules within 10 days or his appeal would be dismissed. The letter further instructed Appellant to file and serve a designation of matter to be included in the record on appeal within the same ten days, or his appeal would be dismissed.

On January 7, 2020, Appellant filed his second attempt at an Initial Brief.

On January 17, 2020, the Clerk again wrote to Appellant. Among other required corrections, the Clerk's letter stated on page 1 that the next initial brief must be

> compliant with Rule 208(b), SCACR. The [next] initial brief shall contain under appropriate headings and in the following order: table of contents and cases, statement of issue on appeal, statement of the case, standard of review, argument, and conclusion.

The letter instructed Appellant that he must file a brief compliant with the Rules within 10 days or his appeal would be dismissed. This second letter further instructed him again to file and serve a designation of matter and a proof of service within the same ten days, or his appeal would be dismissed.

On January 24, 2020, Appellant mailed his third "Initial Brief." It was received by the Clerk on January 28, 2020.

On January 30, 2020, Respondent's counsel served and mailed to the Court a Motion to Dismiss the Appeal. In that Motion, Respondent's counsel argued that this third Initial Brief

failed in numerous ways to comply with the Rules of Appellate Procedure, and that Appellant had had more than enough chances to provide a compliant brief. Respondent's motion was stamped as received by the Clerk on February 6.

In the interim between the mailing of Respondent's motion on January 30 and its receipt by the Clerk on February 6, the Clerk again wrote Appellant. The Clerk's letter of January 31, 2020, listed several technical requirements that had not been met, and it provided Appellant with ten days to fix these problems, or the appeal would be dismissed. The letter did not address Respondent's arguments re the substantive failure of Appellant's Brief to comply with Rule 208(b), as Respondent's motion had not yet been received by the Clerk.

On February 3, 2020, upon learning of the Clerk's January 31 letter, Respondent withdrew its January 30 motion.

On February 4, Appellant mailed his fourth "Initial Brief." It was stamped "Received" by the Clerk on February 10.

On March 3, Respondent mailed to the Court and to Appellant Respondent's (Second) Motion to Dismiss.[1] That motion argued that Appellant's fourth "Initial Brief" fails to comply with the Rules in numerous substantive ways, including serious substantive problems with Appellant's "Statement of the Issues," "Statement of the Case," and "Arguments." *Id*., pp. 3-4.

Respondent's motion also noted that the February filings by the Appellant lacked a designation of matter and a proper proof of service.

On March 18, 2020, the Court dismissed the appeal on grounds that Appellant had failed to file a designation of matter and a proper proof of service showing that the last "Initial Brief" had been served on Respondent.

[1] It was so captioned to avoid confusion with Respondent's earlier, withdrawn, Motion to Dismiss. *See* n.1 of the (Second) Motion to Dismiss.

On March 23, 2020, Appellant then filed a "Designation of Matter" which the Court construed as a "Motion to Reinstate." However, the document (regardless of how it is construed) was not accompanied by a Proof of Service. Accordingly, the Clerk sent a letter to Appellant on April 1, 2020, instructing him to file a Proof of Service. He did so on May 4, 2020.

On July 1, 2020, the Court reinstated the appeal.

On July 8, 2020, the Clerk directed Respondent to file its Initial Brief by August 7, 2020. On July 22, 2020, Appellant mailed to the Court and to Respondent several documents apparently intended for his appeal. These were another "[Initial] Brief of Appellant" (bracketing in original), another "Designation Matter," a "Proof of Service of Notice of Appeal" (not a proof of service of the Initial Brief or Designation) stating that he had served the Notice of Appeal on January 24, 2020, and various and sundry other documents.

On August 4, 2020, the Clerk wrote to Appellant, stating that the Court had already received and filed his initial brief and designation of matter, and that if he wished to amend his previously-filed documents, he must file a motion to do so, pursuant to Rule 240 of the South Carolina Appellate Court Rules.

Accordingly, on August 7, 2020, Respondent filed a motion to extend time to file its Initial Brief of Respondent. As of this writing, Appellant has not moved to amend his previously-filed documents. He has, however, written to the Clerk of this Court, by letter dated August 8, 2020, inadvertently making clear that he misunderstands the Clerk's July 8, 2020, letter to Respondent; that he "think[s] the last one" [i.e., his July 27, 2020, "Initial Brief" and

Designation of Matter] "will be the right one;" and that he misunderstands the emails Respondent's counsel sent to him on July 30 and August 7, 2020.[2]

## PROCEDURAL FACTS

Appellant was notified of the date, time, and place of the hearing on the merits, and the lower court so found. (Certificate of Service of Notice of Hearing, filed July 17, 2019.) The appealed-from order states, "8. Defendants were notified of the time, date and place of hearing in this matter as shown by the Notice of Hearing and Certificate of Service entered on July 17, 2019 and on file herein." (Order, p. 4). Appellant filed no motion to amend or alter that judgment. The time to do so has long since passed.

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To judge by his designation of matter, Appellant intends to rely in his Reply Brief in substantial part on excerpts from a transcript of a hearing that took place on October 8, 2018. (The Initial Brief of Appellant never mentions this transcript; thus, were Appellant to make any arguments based on the transcript, he would need to do so in his Reply Brief.)

Appellant's Designation of Matter lists as its first item,

> 1. Transcript of HEARING Oct. 8, 2019, pp.7-8:18-25;1-16;pp.ll.4-20; pp.15-16;11-25;1-6;pp.17-18;21-25;1-17[.]

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[2] The July 30, 2020, emails concerned whether Appellant's July 22, 2020 mailing, which contained no cover letter, was being sent to the Court, as there was no indication of why the documents were sent to Respondents. The August 7, 2020 emails were (a) a notice that Respondent would seek to extend time to file its Initial Brief, and a request that Appellant consent; (b) a courtesy copy of the motion to extend time (which was also served by United States Mail); and (c) a cc: of the email to Court of Appeals Filings, filing the motion.

Appellant's letter dated August 8, 2020, was accompanied by another "Proof of Service of Notice of Appeal." The Notice stated that he had served "the Notice of Answer" on March 23, 2020.

Appellant's Designation of Matter, p .1. Although it may not be possible to discern which transcript pages Appellant has designated for inclusion in the Record, it certainly appears that he has designated extensive excerpts.

The Court need not and properly should not consider any arguments based on that transcript.

**First**, the October 8, 2020, hearing concerned solely the amount of bond Appellant would be required to post to stay the sale of the subject property pending appeal. It has nothing to do with the validity of the underlying judgment.

**Second**, the resulting order filed October 9, 2020, has not been appealed. It is thus outside the Appellate Court's jurisdiction.

**Third**, the resulting order set an appeal bond of only $1,000. This was approximately ten percent of the underlying judgment. It would make no sense for Appellant to appeal the resulting order, even if he were so inclined.

**Fourth**, by the date this hearing took place, October 8, 2019, Appellant had divested the lower court of jurisdiction to consider anything related to this appeal. Appellant did so by filing his notice of appeal in August 2019 and his Amended Notice of Appeal in September 2019. Service of a notice of appeal transfers jurisdiction over the appealed-upon issues to the appellate court. Rules 205 and 241, SCACR. Once notice of appeal is served, "The lower court may only proceed with matters not affected by the appeal." *Arnal v. Fraser*, 371 S.C. 512, 518-19, 641 S.E.2d 419, 422 (2007). *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (similar); *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) (following *Arnal*). Even had the lower court wanted to hear and rule on the validity of the underlying order, it was precluded from doing so.

**Fifth**, even if Appellant had not divested the lower court of jurisdiction to consider the validity of the underlying order, the passage of time would have done so. The order Appellant complains about issued on August 8, 2019. He received written notice of the order on August 12, 2019, according to both his original and his amended Notices of Appeal. The hearing from which Appellant has designated extensive transcript excerpts occurred almost two months later, on October 8, 2019. One has only ten days from receipt of written notice of the entry of a judgment to serve a motion to bring alleged errors in that order to the attention of the trial court. Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.") "We have previously held that the ten-day limit for serving a Rule 59(e) motion is an absolute deadline." *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018). "[W]e repeat that the ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served . . . ." *Id.,* 815 S.E.2d at 433.

**Sixth**, it is axiomatic that a lower court does not err in failing to consider material not presented to it. *Cf. S.C. DOT v. First Carolina Corp.,* 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The corollary is that the material must be presented to the lower court before it makes its decision. Because the August, 2019, decision challenged in this appeal had already occurred well before the October, 2019 hearing, the lower court could not possibly have erred in failing to consider anything that transpired at the October hearing.

## STANDARD OF REVIEW

The section of Appellant's Brief entitled "Standards of Review" contains no standards of review. His appeal should be denied for that reason alone.

Respondent has nothing to respond to, as Appellant has not set forth the standard of review that he thinks applies. Nor is/are Appellant's claim(s) clear enough for Respondent to identify the proper standard(s) of review.

## ARGUMENT

Appellant has not met his initial burden of alleging any reversible error by the lower court. He obviously has not carried his burden of demonstrating reversible error on the part of the lower court. Therefore, the judgment of the lower court should be AFFIRMED.

"The burden is on the appellant to show not only error, but also prejudice." *Snyder's Auto World v. George Coleman Motor Co*., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (citing *Cartee v. Cartee*, 295 S.C. 103, 366 S.E.2d 269 (Ct. App. 1988)). "The burden is on [the appellant] to demonstrate the trial court committed reversible error." *Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93-94 (Ct. App. 1986).

Moreover, Appellant's serious failures to comply with Rule 208(b) invalidates his appeal. The South Carolina Appellate Court Rules "provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." *Forner v. Butler*, 319 S.C. 275, 276 n.1, 460 S.E.2d 425, 426 (Ct. App. 1995). Yet the material in the Initial Brief of Appellant under the heading entitled "Statement of Issues on Appeal" contains no issues; the material under the heading entitled "Statement of the Case" contains no specific references to the Record; the material under the heading entitled "Standards of Review" contains no standards of review; and

the material under the heading entitled "Arguments" consists of a single sentence devoid of citation to legal authority. (Init. Br. of Appellant, *passim*). His Brief thus violates Rule 208(b)(1) SCACR, ("Brief of Appellant"), paragraphs (B), (C), (D) and E.

> As the Supreme Court advised the bar in *Henning v. Kaye,* 307 S.C. 436, 415 S.E.2d 794 (1992), the 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. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review."

*Forner v. Butler*, 319 S.C. 275, 276 n.1, 460 S.E.2d 425, 426 (Ct. App. 1995) (emphasis added).

Nor is Appellant to be given a pass for being *pro se*. "A *pro se* litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." *State v. Burton*, 356 S.C. 259, 265, n.5, 589 S.E.2d 6, 9 n.5 (2003). Established rules of procedure are not to be discarded on appeal merely because a party appeared *pro se*. *State v. Hollman*, 232 S.C. 489, 498, 102 S.E.2d 873, 877 (1958), overruled on other grounds by *Stevenson v. State*, 335 S.C. 193, 516 S.E.2d 434 (1999).

Appellant's Brief is the reverse of "an orderly mechanism." The Court should declare that it is unable to reverse on the basis of what Appellant has put forth, and should thus affirm.

Moreover, Appellant has abandoned any possible argument. "[A]n argument is deemed abandoned on appeal when conclusory and without supporting authority." *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010) (citing *State v. Jones,* 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001)). *See, e.g., Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (refusing to consider an argument in the appellant's brief that was "conclusory" and "not supported by any authority"); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting a claim is deemed abandoned when the appellant fails to support it with arguments or citations to authority).

The entire "Arguments" section of the Brief of Appellant consists of a single sentence. It is completely devoid of citations to any authority. Therefore, Appellant has abandoned his arguments (if any existed). The lower court should therefore be affirmed.

If the Court wishes to address Appellant's "Arguments," there is absolutely no evidence in the Record or elsewhere that Respondent fabricated any documents, nor is there any evidence that Appellant did so to "gain" the fees charged to it by its collection attorney, nor would it make any sense for Respondent to file an action in order to recover the fees it incurs in filing that action. Thus, were the Court to reach the merits of Appellant's "Arguments," the Court should again affirm.

**Conclusion**

Because Appellant has completely failed to meet his burden of showing that the lower court made a reversible error, the lower court's order should be affirmed.

Respectfully submitted,

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Zbigniew Marek Drzazgowski
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Defendants,

Of whom Zbigniew Marek
Drzazgowski is the Appellant

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PROOF OF SERVICE

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I certify that the Initial Brief of Respondent and of Respondent's Designation of matter were today served upon the Appellant by mailing a copy of each, first class postage attached, to Zbigniew Marek Drzazgowski, 9 West District Rd., Unionville CT 06085.

8/31/2020

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