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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001790

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, ...Plaintiffs,

v.

Island Pointe, LLC; Leonard T. Brown; Complete Building Corporation; Tri-County Roofing, Inc.; Creekside, Inc.; American Residential Services, LLC d/b/a Rescue Rooter Charleston; Andersen Windows, Inc.; Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc.; Christopher N. Union; Builder Services Group, Inc. d/b/a Gale Contractor Services; Novus Architects, Inc. f/k/a SGM Architects, Inc.; Tallent and Sons, Inc.; W C Services, Inc., CRG Engineering, Inc.; CertainTeed Corporation; Kelly Flooring Products, Inc. d/b/a Carpet Baggers and John Doe 1-60, ... Defendants,

Of which Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated are the Respondents.

and

Tri-County Roofing, Inc., ... Appellant.

RESPONDENTS' RETURN IN OPPOSITION TO APPELLANT'S SECOND MOTION TO AMEND ITS INITIAL BRIEF/FINAL BRIEF

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October 12, 2020, Mount Pleasant, South Carolina

SUMMARY OF ARGUMENT

The instant Appeal concerns a single issue: dollar amounts of setoff. Now, a mere few weeks before Appellant's Final Brief is due, Appellant seeks to significantly alter twelve (12) of these dollar amounts cited throughout its *first* Initial Brief and again throughout its *Amended* Initial Brief. This is not a permissible correction of "typographical errors" or "misspellings" discovered in an Initial Brief; rather, Appellant seeks to modify by hundreds of thousands of dollars the *ultimate* setoff it seeks in this case. An alteration of this sort is prohibited under the South Carolina Appellate Court Rules, and an alteration of this sort is *especially* prohibited and contrary to equitable considerations when the Appellant has already had a chance, with the consent of the Respondents, to review the Initial Brief for error. Respondents have not once, but twice had to brief the issues presented in Appellant's Initial Brief; it would be inequitable to require Respondents to do so a *third* time.

FACTUAL/PROCEDURAL BACKGROUND

Respondents incorporate herein the recitation of facts contained in their Initial Brief filed on September 15, 2020. (*See* Resp. Initial Brief at 1-14). However, a short recapitulation of the *briefing* chronology may prove helpful to the Court in deciding this Motion.

Appellant filed its Notice of Appeal on October 14, 2019. (*See* Notice of Appeal). The transcript of the underlying trial was not received until over five (5) months later, on March 25, 2020, making Appellant's Initial Brief due on May 13, 2020. (*See* App. Ltr. to Court, submitted 3/25/2020). Appellant then moved for and was granted two (2) extensions of time to file its Initial Brief, which was filed on June 25, 2020. (*See* App. Initial Brief). While Respondents were writing their Initial Brief, Respondents pointed out to Appellant that a great many citations to the transcript were missing, which made it difficult for Respondents to ascertain Appellant's source material and

address Appellant's points. (See Lucey Em. to Cole, 8/11/2020, attached hereto as Exhibit "A"). Respondents invited Appellant to correct its Initial Brief in lieu of Respondents seeking to compel it to do so. (*See id.*).

As a result of Respondents' invitation, Appellant sought leave of the Court to file an Amended Initial Brief. (*See* App. Mot. to Amd. Initial Brief, filed 8/13/2020). In its Motion to Amend, Appellant referenced the need to add source material in order to comply with 208(b)(4), SCACR; Appellant *also* stated as follows: "[W]hile counsel for Appellant was reviewing the Initial Appellate Brief, *he found some non-substantive scrivener and grammar errors*, which are corrected in the Amended Initial Brief of Appellant *in compliance with Rule 211(b)(2), SCACR*." (*Id*. at 1) (emphasis added). Notably, and for the purposes of this Motion, the mathematical figures Appellant *now* seeks to change now remained the same in *both* Appellant's Initial Brief *and* its Amended Initial Brief. (*Compare* App. Initial Brief, filed 6/25/2020, *with* App. Amd. Initial Brief, filed with App. Mot. to Amd. on 8/13/2020 and accepted by Order Granting App. Mot. to Amd. on 8/31/2020).

Prior to the Court granting Appellant's Motion to Amend, Respondents' Initial Brief became due; so, Respondents filed a "Provisional Initial Brief" on August 26, 2020, to account for the possibility that the Court may (or may not) grant Respondents additional time to file an Initial Brief, considering the changes Appellant made to its Initial Brief. (*See* Resp. Provisional Initial Brief, noting App. Mot. to Amd. was still pending, filed on 8/26/2020). The delay in the Court's consideration of Appellant's Motion to Amend was caused by Appellant's failure to tender the requisite filing fee, which Appellant did not correct until August 31, 2020. (*See* Ltr. from Clerk to Appellant, 8/27/2020; Reply Ltr. from Appellant to Clerk tendering fee, dated 8/31/2020). Appellant's Motion to Amend was granted on the same day it tendered the fee, August 31, 2020,

and the Court gave Respondents an additional fifteen (15) days to file its Initial Brief, which was filed on September 15, 2020. (*See* Order Granting App. Mot. to Amd., filed 8/31/2020; Resp. Initial Brief, filed 9/15/2020).

Appellant's Reply Brief (titled "Initial Response Brief of Appellant") was filed on September 25, 2020. It is evident that Appellant had decided to amend its arguments before September 25, 2020, as the Reply Brief seeks the same lower net judgment that the Motion to Amend seeks. On that basis, the *Reply Brief should be struck* as its effort to seek a lower net judgment is a new argument that cannot be raised in a Reply Brief. Inexplicably, even though it is obvious that Appellant decided sometime between September 15, 2020 (Resp. Initial Brief) and September 24, 2020 (the day before the Reply Brief was filed) that it would seek a lower net judgment, the Motion to Amend was not filed until October 2, 2020, a week after all briefing had closed and seventeen (17) months after the jury rendered its verdict in this matter.

LEGAL STANDARD

The South Carolina Appellate Court Rules make clear that the final brief of the parties must be identical to their initial briefs, with two exceptions:

> (1) References to the Record. The references in the initial brief shall be revised to indicate where the material appears in the Record on Appeal. These revised references may be in place of or in addition to the initial references, and shall be in the form indicated by the following examples: (R. p. 15, line 4) (R. p. 75, lines 8-20) (R. p. 90, line 1-p. 101, line 14) (R. pp. 29-31).
>
> (2) Correction of Typographical Errors and Misspellings. The party may correct **obvious typographical errors** and misspellings which were contained in the initial brief. **No other changes may be made.**

Rule 211(b), SCACR (emphasis added). The term "typographical errors" is not defined, so it should be given its ordinary meaning. *See Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C.

54, 62, 504 S.E.2d 117, 122 (1998) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.").

The American Heritage Dictionary (5th ed. 2020) defines a typographical error as "a mistake in printing, typesetting, or typing, especially one caused by striking an incorrect key on a keyboard." (*See https://ahdictionary.com/word/search.html?q=typographical+error*, last visited October 8, 2020). Courts around the country have similarly defined "typographical error", albeit in the context of other statutes which are not at issue here. *See, e.g. Japanese Found. for Cancer Research v. Lee*, 773 F.3d 1300, 1306 (Fed. Cir. 2014) ("[C]lerical or typographical mistakes are generally understood to include simple mistakes such as obvious misspellings that are immediately apparent."); *see also Superior Fireplace Co. v. Majestic Products Co.*, 270 F.3d 1358, 1370, 60 U.S.P.Q.2d 1668 (Fed. Cir. 2001) (Explaining clerical or typographical errors "include simple mistakes such as obvious misspellings that are immediately apparent."); *Spain v. EMC Mortg. Co.*, No. CIV 07-0308-PHX-RCB, 2009 WL 2590100, at *5 (D. Ariz. Aug. 20, 2009) ("A typographical error would be, for example, the difference between the word 'data' and the word 'date.' It is easy to see how in transcription those two words inadvertently could be interposed one for the other.").

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." *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). One premise underlying this and similar rules regarding preservation of arguments is equity: it is unfair to the Respondent to argue against a moving target, and it is unfair to the Court to ask it to rule on that moving target. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The [argument preservation] requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the

hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.").

I. The Mathematical Figures Appellant Seeks to Change Are Not Mere "Typographical Errors"

Appellant erroneously states that "Respondent contends that mathematical errors exist in TCR's brief." (App. Initial Reply Brief at 8). That is false. What Respondents' Provisional Initial Brief (filed 8/26/2020) and Initial Brief (filed on 9/15/2020) actually stated, in identical footnotes, is:

> Separate and apart from its unsupported and illogical arguments, TCR's math, then and now, has been repeatedly indecipherable. Further, the math and supporting analysis presented in the post-trial motion do not match that which was presented in the motion to reconsider, and neither match what is set forth in Appellant's Initial Brief, making this entire appeal improper as the math and arguments on appeal were never presented to the trial court for consideration. *Compare* (June 7, 2019, TCR Post-Trial Motions at 17-18) *with* (August 5, 2019, TCR MTR at 7) *and* (TCR Initial Brief at 45).

(*See* Resp. Provisional Initial Brief, at 4, fn. 2; *see also* Resp. Initial Brief at 4, fn. 3). As evidenced above, Respondents have never taken the position that Appellant's Initial Brief(s) contained mathematical errors; rather, Respondents argued (beginning with the filing of its Provisional Initial Brief on August 26, 2020) that Appellant's math was illogical, unsupported, and unexplainable. The instant Second Motion to Amend does nothing to clear up what Respondents called Appellant's "indecipherable" math, as Appellant fails to explain either (1) the genesis of the "errors" or (2) why the correction of the "errors," (including the final dollar amount Appellant concedes is owed), are non-substantive revisions, as opposed to very significant ones.

a. This Entire Appeal is About Dollar Amounts - Which Amounts Appellant Seeks Now to Alter

The figures Appellant seeks to change are not minute or tangential references: this entire appeal is over the dollar amount of setoff the Appellant believes it is entitled to versus the dollar amount of setoff the trial court ordered. Indeed, Appellant made clear in its Initial Brief that

"[a]lthough the notice of appeal addressed several issues, the only question TCR is prosecuting in this appeal is the trial court's inadequate setoff." (App. Initial Brief at 3). Appellant's "final ask" in its Initial Brief of its own appeal is as follows: "[w]ith the information currently available, the general verdict amount should be reduced to reflect a final judgment against TCR of **$2,107,500**." (App. Initial Brief at 37; App. Amd. Initial Brief at 45).[1] Appellant now seeks to change the *dollar amount* contained in the final sentence of its Initial Brief and Amended Initial Brief to **$1,607,500**. (*See* App. Second Mot. to Amd. at 8, filed 10/2/2020). Any reliance by Appellant on its stated qualifier regarding what "information [was] currently available" is gaslighting: the exact same information was available to TCR on June 7, 2019 as was on June 25, 2020.

As Respondents briefed in great detail, the burden is on the Appellant to (1) show that the lower court abused its discretion in conducting its setoff analysis; and (2) show that it is entitled to a different *dollar amount* of setoff. (*See generally* Resp. Initial Brief). **Both** of these burdens largely turn on one thing: **dollar amounts**. It was these dollar amounts, and the accompanying language explaining Appellant's arguments regarding its perceived "right" to offset the jury's verdict with them, that Respondents spent many hours briefing. Stated differently, Appellant now wants to submit a revised brief to this Court asking for an additional $500,000 setoff. The reduction from at $2,100,000 net judgment to a $1,600,000 net judgment is a twenty-five percent (25%) change! These are substantive changes, and any argument to the contrary is meritless.

b. The Alterations Appellant Seeks Are Not "Obvious," "Immediately Apparent," or "Simple"; In Fact, Appellant Fails Entirely to Explain the Basis of its Self-Labeled "Apparent Arithmetic Errors"

[1] Appellant's inclusion of the phrase "information currently available" in its Initial Brief(s) makes no sense. As Appellant points out in the instant Second Motion to Amend, the dollar amounts of *all* settlements in this case were fixed and known to all parties and the trial court by June 10, 2019, over a year before Appellant's Initial Brief was filed. (*See* App. Second Mot. to Amd. at 3-4).

The mathematical figures Appellant seeks to change because they label them as "typographical errors," are not obvious mistakes or misspellings; rather, Appellant seeks to significantly alter twelve (12) separate dollar amounts which span the entirety of Appellants' forty-five (45) page Amended Initial Brief. (*See* App. Second Mot. to Amend at 6-8). The "errors" Appellant wishes to correct are not akin to the transposing of numbers, or to using a decimal point (".") instead of a comma (",") when writing a dollar figure, for example.[2]

Appellant asks this Court, and Respondents, to blindly accept its revision of twelve (12) "apparent arithmetic errors" without even explaining to Respondents or to the Court why the numbers are "errors" or why the "errors" were made in the first instance. For example, Appellant's Motion seeks to increase one figure by $39,000, increase another figure by $996,000, decrease one figure by $500,000, decrease another figure by $1,000,000, increase another by $600,000, increase another by $295,000, and increase a range of two figures by $1,612,500 and $1,662,500, respectively. (*See* App. Second Mot. to Amend at 7-8). Respondent can find no pattern or simple answer to account for the proposed revisions, **nor should it have to spend its time searching for such an explanation**.

Not only does Appellant fail to explain the basis for asserting that these numbers are "arithmetic errors" in its Second Motion to Amend, it refuses to even call them errors. Instead, it calls them "*apparent* arithmetic errors" (*see* App. Second Mot. to Amend at 6, emphasis added), that it would petition the Court to revise "[t]o the extent some arithmetic is incorrect." (App. Reply

[2] In fact, Appellant did make such a typographical error in its Initial Brief: "These non-issue release settlements total $2,609.000." (App. Initial Brief at 24). It is clear from reading the context of the preceding paragraph, which references totaling up eight (8) dollar amounts ranging from $35,000 to $1 million, that the "total" could not actually be two thousand, six hundred and nine dollars, and was in fact meant to be two million, six hundred and nine thousand dollars. (*See id*.). The "typographical error" there was the use of a decimal point instead of a comma, and was immediately apparent to the reader (i.e., Respondents and the Court).

to Resp. Initial Brief at 8).[3] So, not only are Respondents (and the Court) left to guess as to whether Appellant considers the figures in its Initial Briefs to be "arithmetic errors," "apparent arithmetic errors," or something else, there is a complete absence of explanation regarding the cause of the "arithmetic errors," "apparent arithmetic errors," or whatever Appellant choses to call them. There is no explanation, and the "errors" are not clear on the face of the document, nor are they immediately apparent to the reader. *Indeed, the "obvious typographical errors" were not "obvious" enough to Appellant, who has had at least two prior chances to read, review, and edit its initial brief to correct any aspect it found to be erroneous.* In fairness to the Respondents, Appellant should be held to the figures contained in its Initial Brief (which are identical to those contained in its Amended Initial Brief), because those were the figures Respondents spent months attempting to decipher, address, and counter.

II. Appellant's Failure to Recognize What it Deems "Typographical Errors" Until this Point in the Appeals Process is Inexcusable

The chronology of briefing in this Appeal is recited in the Background section above. Appellant had the chance to check, double-check, and triple-check the most important aspect of its Appeal during the three (3) months it had to file its Initial Brief, and it had a second opportunity to "get it right" when reviewing the Initial Brief almost two (2) months later for "scrivener" and "grammar" errors.

[3] Appellant has clearly attempted to use its Reply to Respondents' Initial Brief, filed on September 25, 2020, to "explain away" any "apparent arithmetic errors" contained in Appellant's Initial Brief, and in fact seeks the same revised setoff amount as it does in its Second Motion to Amend. (*See* App. Reply, Section 3). This is improper, as "[a]n appellant may not use either oral argument **or the reply brief** as a vehicle to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (emphasis added).

Not only did Respondents bring to Appellant's attention the need to amend Appellant's Initial Brief and give its consent to do so, Respondents brought Appellant's illogical mathematical analysis to Appellant's attention as early as August 26, 2020, when Respondents filed their Provisional Initial Brief. (*See* Resp. Prov. Initial Brief. at 4, fn. 2). All told, it took approximately seven (7) months from the time Appellant received the transcripts and began briefing for it to realize that "apparent arithmetic errors" existed. This is inexcusable. *And Respondent should not have to brief this appeal a third time!*

CONCLUSION

Given the arguments annunciated above, Respondents respectfully request that this Court deny Appellant's Second Motion to Amend its Initial Brief/Final Brief.[4]

Respectfully submitted,

By: */s/Justin O'Toole Lucey*
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Attorneys for Respondents

October 12, 2020

[4] Should the Court permit this re-briefing by the Appellant, Respondents respectfully requests thirty days to again amend their brief.

Exhibit A

From: Jennifer Zambriczki
To: Jennifer Zambriczki
Subject: FW: Palmetto Pointe, et al. vs. Tri-County Roofing, et. al. - 2nd Motion for Extension (2019-001790)
Date: Monday, October 12, 2020 1:58:36 PM

From: Justin Lucey <jlucey@lucey-law.com>
Sent: Tuesday, August 11, 2020 11:19 AM
To: Andrew Cole <acole@collinsandlacy.com>
Cc: Jennifer Zambriczki <jzambriczki@lucey-law.com>; Richelle Campbell <rcampbell@collinsandlacy.com>; Tarsha M. Jefferson <tjefferson@collinsandlacy.com>; Anna McCann <amccann@lucey-law.com>; Sohayla Townes <stownes@lucey-law.com>; Josh Evans <jevans@lucey-law.com>; ebuckley@ycrlaw.com; ademato@ycrlaw.com; kmixson@ycrlaw.com
Subject: Re: Palmetto Pointe, et al. vs. Tri-County Roofing, et. al. - 2nd Motion for Extension (2019-001790)

Andrew,

good morning. thank you for your consent. i hope all is well.

in attempting to assist my staff with the briefing, i have recently learned that your brief is chocked full of vacant cites/meaningless placeholders. This is improper. I am not concerned about the obvious future cites to, e.g., the complaint in the ROA. but many of these vacant cites are alleging facts that i disagree with - and with out you indicating the source or location in the transcript, it becomes difficult to respond to or to contradict.

i am therefore writing to ask that you file a proper initial brief, without the necessity of a motion by the Respondent. We will consent to your motion to file an amended brief. it should provide that we have 15 days to file the Respondents brief from the filing of the revised initial appellants brief.

thank you

Justin Lucey

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001790

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, Individually, and on behalf of all others similarly situated, ...Plaintiffs,

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Of which Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated are the Respondents.

and

Tri-County Roofing, Inc., ... Appellant.

PROOF OF SERVICE

I, Justin O'Toole Lucey, counsel for Respondents, certify that ***Respondents' Return in Opposition to Appellant's Second Motion to Amend Its Initial Brief/Final Brief*** was served on counsel for Appellant via email to Andrew N. Cole, Esq. at ***acole@collinsandlacy.com.***

Respectfully submitted,

By: */s/Justin O'Toole Lucey*

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October 12, 2020

VIA EMAIL
The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: *Palmetto Pointe, et al. vs. Island Pointe, et al.*
Appeal from the Charleston County, Court of Common Pleas
Case Action No.: 2015-CP-10-00955
Appellate Case No.: 2019-001790

Dear Ms. Kitchings:

Please find attached ***Respondents' Opposition to Appellant's Second Motion to Amend its Initial/Final Brief***.

With its Second Motion to Amend its Initial/Final Brief, Appellant also filed two other motions: 1) Motion to Strike Part of Respondents' Designation of Record on Appeal and 2) Motion to Recuse the Honorable Stephanie P. McDonald. Regarding these motions, rather than delay this matter further, Respondents withdraw Exhibits 542 and 613 from its Designation of Matter to be Included on the Record on Appeal, thereby mooting the Motion to Strike. Further, Respondents will not oppose the Motion to Recuse.

Please let us know if you desire a formal filing on either of these matters.

Best regards,

/s/ Justin Lucey

Justin Lucey

JOL/jcz
Attachments (stated)