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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master-In-Equity

Circuit Court Case No. 2021-CP-07-01507
Appellate Case No. 2022-000681

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITITES

Page(s)

CASES

STATUTES AND REGULATIONS

COURT RULES

ORDINANCES

[1] The CDC provisions cited in Respondents' brief are those which were in effect on April 12, 2021.

PRELIMINARY STATEMENT

The challenged order of the Circuit Court reached a correct decision based upon the plain and ordinary meaning of ordinances enacted by Appellant Beaufort County ("County"). Faced with the uncomfortable task of undermining its own code of laws, the County has taken a different tack by creating "straw man" arguments to tear apart. Indeed, the bulk of its argument addresses due process and the rule of lenity, neither of which supplied the basis for the Circuit Court's decision. Thus, the County asks this Court to reverse a Circuit Court order that does not exist.

Underneath its façade of due process and actual notice arguments, the County's position is clear: it has no accountability or duty to adhere to the ordinances that mandate its own conduct, while punishing perceived offenders accused of violating the same code. Seemingly unaware of the irony in its own stance, the County argues that it is not bound by the same code that it seeks to enforce against its citizens.

The Circuit Court reversed the Magistrate Court's verdict based upon the literal application of the County's criminal ordinance provisions at issue, Community Development Code ("CDC") §§ 9.4.40 and 9.4.50. The County argues that the lower court failed to apply the clear language of the CDC. Yet, its brief deprives the reader of an opportunity to test this argument because it omits the actual text and analysis of §§ 9.4.40 and 9.4.50, which form the heart of the penal ordinance at issue. The reason for the County's avoidance of these code provisions could not be more transparent: the County failed to comply with them.

Setting aside the County's diversionary tactics, this is a straightforward case. The lower court's decision relied on the plain and ordinary meaning of CDC §§ 9.4.40 and 9.4.50. The text of those ordinances clearly requires that a warning Notice of Violation be delivered to an alleged violator before the County can issue a Uniform Summons Ticket, which in turn must contain

certain information. The County did not issue the required notice and improperly issued the criminal citations at issue. Accordingly, the Circuit Court was correct in reversing the Magistrate's verdict and finding Appellants not guilty of the charged violations.

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court correctly find that the penal ordinances contained in Beaufort County Community Development Code Sections 9.4.40 and 9.4.50 require Beaufort County to issue a Warning Notice of Violation before a Uniform Summons Ticket can be served?
2. Did the Circuit Court correctly find that the Uniform Summons Tickets served by Beaufort County for criminal charges in this case did not comply with the requirements of Beaufort County Community Development Code Sections 9.4.40 and 9.4.50 and were thus improperly issued?
3. As an additional sustaining ground, whether SCDOT's approvals for the subject sign repair work are authoritative because Section 63-350 of the South Carolina Code of Regulations controls over and/or abrogates Beaufort County Community Development Code Section 5.6.50.E.?

STATEMENT OF THE CASE

On April 12, 2021, the County executed two Uniform Ordinance Summonses, bringing criminal charges against Respondents Adams Outdoor Advertising Limited Partnership ("Adams") and Bo Hodges ("Hodges") for alleged violations of CDC § 5.6.50.E. (Maintenance Standards for Off-Premises Signs). A non-jury trial of these charges was conducted on July 14, 2021, in Beaufort County Magistrate's Court before Magistrate Nancy Sadler. The Magistrate issued her Verdict on July 23, 2021 ("Verdict"), finding Adams and Hodges guilty of the two (2) violations alleged. At the sentencing hearing on August 11, 2021, the Magistrate issued a sentence

of a $1,087 fine for each ticket, and the Notice of Sentence was entered August 13, 2021, against "Defendant Bo Hodges/Adam's Outdoor Advertising."

On August 20, 2021, Adams timely filed and served its Notice of Appeal of the Magistrate's rulings to the Beaufort County Court of Common Pleas. The lower court conducted hearings on the appeal via remote videoconference on October 27, 2021 and via teleconference on November 24, 2021. On April 22, 2022, the Circuit Court separately entered its Order on Appeal (the "Order") and Judgment, reversing the Magistrate's verdict and vacating the sentence previously imposed on the grounds that the County did not issue the required prerequisite warning notice, and that the citations were improperly issued and facially deficient. The County served and filed its Notice of Appeal of the Order to this Court on May 20, 2022 and issued its filing fee on May 24, 2022. On June 20, 2022, the County filed its Initial Brief ("Cty. Br.") and Designation of Matter to be Included in the Record on Appeal.

STATEMENT OF THE FACTS

I. COMMUNITY DEVELOPMENT CODE PROVISIONS AT ISSUE.

Respondents were charged with two criminal violations of CDC § 5.6.50.E., governing maintenance of off-premises signs. (R. p. 362 (PX-6 at p. 4) (copies of the citations issued)).[2] However, this case turns on whether the County, not Respondents, complied with its ordinance provisions, namely CDC §§ 9.4.40 and 9.4.50.

Beaufort County's zoning and development code of ordinances, the CDC, is divided into different articles, which in turn are separated into divisions. Article 9 of the CDC (Enforcement) regulates CDC compliance and corrections, enforcement procedures, remedies, and penalties for

[2] The transcript of this case's trial on July 14, 2021 ("Trial Tr.") identified the County's exhibits with the prefix "PX-" and Respondents' exhibits with the prefix "DX-". Trial Tr. pp. 4-5 (R. pp. 94-95).

CDC violations. (R. p. 396 (CDC § 9.1.10)). Division 9.4 (Enforcement Generally) contains the procedures to be followed in enforcing the CDC's provisions. (R. pp. 398-400). The Order's sole focus was §§ 9.4.40 and 9.4.50, the text of which is set forth below, verbatim.

9.4.40 - Notice of Violation

When the Code Enforcement Department finds and determines a violation of this Development Code exists, the Code Enforcement Department shall notify, in writing, the person violating the Code. Such notification shall serve as a warning notice of a violation. It shall be delivered via U.S. Mail or hand delivered to the last known address of to the owner and or any person occupying the land or structure where the violation occurs. The notice shall state the following:

A. The address and legal description of the land, structure, or sign that is in violation of this Development Code;

B. The nature of the violation, the provisions of this Development Code being violated, and the necessary action to remove or abate the violation;

C. The date by which the violation should be removed or abated; and

D. The penalty for failing to remove or abate the violation, stating that if the nuisance recurs, a notice to appear in the appropriate court in Beaufort County will be issued without further notice.

9.4.50 - Failure to Correct Violation

A. If the person(s) to whom a warning notice has been given in accordance with Section 9.4.40 (Notice of Violation), fails to remove or abate the violation in the time specified in the notice and severe conditions exist that affect health, welfare, or safety, or cause severe environmental degradation, the County through the Code Enforcement Department may lawfully enter upon the land where the violation remains unabated to remove or abate the violation, at the expense of the person(s) responsible for creating or maintaining the violation(s).

B. Under all other circumstances, if the person(s) to whom a warning notice has been given in accordance with Section 9.4.40 (Notice of Violation), fails to remove or abate the violation in the time specified in the notice, the Code Enforcement Department shall fill out and sign, as the complainant, a Uniform Summons Ticket in the appropriate court of Beaufort County. The Uniform Summons Ticket shall include the following:

1. Name of the owner of the land subject to the violation, any occupants, and any other person(s) responsible for the violation(s);

2. The address or legal description of the land on which the violation is occurring;

3. The nature of the violation;

4. The provision(s) of this Development Code being violated;

5. The date on which the case will be on the court docket for hearing; and

6. Any other information deemed pertinent by the Code Enforcement Department.

C. The original copy of the Uniform Summons Ticket shall be forwarded to the appropriate court of Beaufort County for inclusion on the court's docket for the date indicated on the notice.

D. The Uniform Summons Ticket shall be provided to the owner or any person occupying the land or structure in violation of this Development Code. The notice shall be delivered by certified mail to the owner or any person occupying the land where the violation is occurring. In addition, the Code Enforcement Department shall fill out and sign the Uniform Summons Ticket as the complainant and deliver the original plus one copy to the Clerk of the Court. The Clerk shall verify or insert the date the case is set for hearing before the court. The Clerk shall mail a copy of the Uniform Summons Ticket, by certified mail, to all person(s) named in the Uniform Summons Ticket, at their last known address.

(R. pp. 398-99).

II. COUNTY ISSUES CRIMINAL CHARGES AFTER ADAMS PERFORMS SIGN REPAIR WORK AUTHORIZED BY SCDOT.

As its name suggests, Adams is engaged in the outdoor advertising business, including, but not limited to, the sale and lease of billboard space for use as locations for outdoor advertising, both within and outside the County and the State of South Carolina. During the relevant time period, Hodges was the Real Estate Manager for Adams' Beaufort, South Carolina market.

Over time, due to strong winds from multiple storms, as well as other natural forces, two of Adams' nonconforming billboards located within the County became damaged to such an extent that they had to be repaired. These billboards each contain two faces, or sides, and are located on

separate parcels of real property adjacent to US-21/Trask Parkway, approximately 0.5 and 0.6 miles north of Parris Island Gateway, respectively (the "Billboards").

A. With SCDOT's Approval, Adams Repairs Its Signs Located Along SCDOT-Maintained Road.

US-21/Trask Parkway, the road adjacent to the Billboards, is maintained by the South Carolina Department of Transportation ("SCDOT") as an interstate or federal-aid primary system, as those terms are defined in the Highway Advertising Control Act, S.C. Code Ann. §§ 57-25-110 – 57-25-220 ("HACA"). Thus, the Billboards are controlled by HACA. SCDOT, pursuant to the HACA, promulgated regulations contained in Chapter 63 of the South Carolina Code of Regulations. S.C. Code Ann. Regs. 63-350 (the "State Regulation") prescribes maintenance standards for outdoor advertising signs controlled by the HACA. (R. pp. 384-85).

On or about February 3 and March 3, 2021, Adams obtained permission from SCDOT to repair the Billboards, pursuant to S.C. Code Ann. Regs. 63-350.C.(4). (R. pp. 503, 505). SCDOT approved the requested repairs after determining, under the objective criteria of S.C. Code Ann. Regs. 63-350.C.(4), that the damage to the Billboards was less than fifty percent (50%) of the replacement cost of the sign structure. (R. pp. 502-06, 516-26, 527-46, 384). Hodges testified that SCDOT's review process in this regard is "very stringent[,]" whereby it inspects the signs both before and after the repair work and thoroughly considers the materials and data submitted to make sure it is "comfortable with [the applicant] meeting that 50 percent[]" mark. (R. p. 248, lines 2-23; *see also id.*).

On its face, it is clear that the County's off-premises sign maintenance ordinance, CDC § 5.6.50.E., was modeled after, and is substantially similar to, the State Regulation. *Compare* CDC § 5.6.50.E. (R. pp. 364-65); *with* S.C. Code Ann. Regs. 63.350 (R. pp. 384-85); (*see also* R. p.

124, line 24-p.125, line 3 (County's opening argument: "SCDOT has adopted regulations pursuant to the [HACA] where they say pretty much the same thing that the Beaufort County regulations sign say.")). A comparison shows that CDC § 5.6.50.E. is not more restrictive than the State Regulation. Indeed, the County's ordinance may be less restrictive due to the complete absence of criteria to be used in determining the percentage of a sign's damage under the CDC's version of the "50% Rule." *Compare* S.C. Code Ann. Regs. 63.350.C.(4) (R. p. 384), *with* CDC § 5.6.50.E.4.c. (R. p. 365); *see also* discussion *infra* pp. 21-25 (Argument Section II.A.).

In early April of 2021, Adams notified the County of the repair work it would be performing on the Billboards pursuant to SCDOT's approvals for the same. (R. p. 500; R. pp. 501-06; R. p. 154, lines 1-22; R. p. 218, line 17-p. 219, line 17). Adams proceeded with the work because the approvals from SCDOT, the state agency in charge of the roadway in question, constituted proper authorizations. Hodges testified that in his years of experience, most types of permit applications to SCDOT require submission of local approval for the requested work. (R. p. 215, line 7-p. 216, line 7). Additionally, SCDOT will request proof of local permission if that is deemed necessary based on the type of permit applied for. (R. p. 216, lines 8-23). In the instant matter, though, SCDOT determined that County approval for Adams' work was not necessary. (R. p. 248, line 24-p. 249, line 2). And, as Hodges testified, if SCDOT had asked for local approval of the work, Adams would have obtained it. (*Id.*).

B. County Administrator Takes Issue with Sign Repairs.

After work began, the County's then interim Administrator, Eric Greenway ("Greenway" or "Administrator"), emailed Hodges on April 10, 2021, stating that during a return trip from Charleston he noticed the work being performed on the Billboards by Adams' contractor. (R. p. 356). Therein, the Administrator characterized the repairs as a "complete rebuild of the[] signs[,]"

claimed that SCDOT's approvals did not constitute proper authorization, and stated, "[t]o my knowledge Beaufort County has issued no approvals for Adams to conduct this work[.]" (*Id.*).

However, the Administrator did not know what type of repair work SCDOT had approved or what information Adams had submitted to the County, and did not review the paperwork for the repairs that Adams' contractor showed to him on site. (R. p. 196, lines 10-14; R. p. 205, line 24-p. 206, line 5; *see also* R. p. 230, lines 13-16 (Hodges' testimony: "I've been doing this a long time . . . if it was a rebuild, the State would never have allowed the approval for the repair work to be done")).

In deciding whether a partially destroyed sign may be repaired, CDC § 5.6.50.E.4.c. requires the Director of the Community Development Department ("Director") to determine if that sign is less than fifty percent damaged due to wind or other natural forces. (R. p. 365; R. p. 402 (CDC § 10.1.40, definition of "Director"); R. p. 199, lines 1-9). However, the Community Development Department was no longer in existence in April 2021, so under the actual text of the CDC such permission could not be obtained if necessary. (R. p. 193, lines 1-5).

At trial, the County contended that the elimination of the Community Development Department made no difference. (R. p. 192, line 16-p. 193, line 5). Greenway testified that in addition to his role as interim Administrator, he also carried the responsibilities of the Planning and Zoning Department Director and said department was performing the tasks of the defunct Community Development Department. (R. p. 191, line 20-p. 192, line 25; R. p. 197, lines 11-19).

Greenway testified that the County made its determinations of fifty percent sign damage, and that Appellants violated the CDC, simply by driving past the site while the sign work was in progress. (R. p. 205, line 24-p. 206, line 3 ("I know what a complete rebuild of a sign is when I ride by it.")). However, it would be completely arbitrary, if not impossible, for the Director to

determine "that the damage to the sign was greater than 50 percent of its replacement cost as of the time of the damage[]" simply by driving by the sign. (R. p. 365 (CDC § 5.6.50.E.4.c.)).

In response to the Administrator's April 10 email, Adams' General Counsel, Richard Zecchino, advised the next day that SCDOT's determinations to approve the work were controlling and proper authorization. (R. pp. 354-55). Mr. Zecchino pointed out that Adams had received no official notice or stop work order and advised that Adams would be completing its work on the Billboards that day. (R p. 355).

C. County Improperly Issues Criminal Citations.

After Adams completed the SCDOT-approved work on the Billboards, the County's Code Enforcement Director issued a Stop Work Order directed to "Adams Outdoor Advertising, Inc.," dated April 12, 2021 (the "Stop Work Order"). (R. p. 359). On even date, the Code Enforcement Director also issued two (2) Uniform Ordinance Summons to "Bo Hodges – Adams Outdoor Advertising" (the "Citations"). (R. p. 362).[3] The Citations noticed a trial in the Magistrate's Court for alleged criminal violation(s) of CDC § 5.6.50.E. (*Id.*) However, the tickets did not state the name of the owner, or address or legal description, of the subject land, or provide any detail as to the nature of the violation or what aspect of the ordinance was allegedly violated. (*Id.*) This information is required under CDC § 9.4.50.B. (R. p. 399).

The County testified that it, rather than the clerk of court as required, mailed the citations to Respondents. (R. p. 399 (CDC §§ 9.4.50.C.-D.); R. p. 251, lines 17-22). Hodges testified that he did not know if he ever received the Stop Work Order, and that he did not sign the purported

[3] The terms "Uniform Summons Ticket," used in the CDC, and "Uniform Ordinance Summons," as shown on the Citations at issue, are the same type of document. **If** a person fails to adhere to the County's warning notice of an alleged CDC violation issued "in accordance with [CDC] Section 9.4.40[,]" these criminal citations are issued under CDC § 9.4.50.B. (R. p. 399).

certified mail receipt for the Citations. (R. p. 238, lines 7-9; R. p. 239, lines 4-10; R. p. 251, line 17-p. 252, line 11; *see also* R. p. 89).[4] Prior to executing the Citations, the County also failed to issue the required notice of alleged violation in accordance with CDC § 9.4.40 to either of the Respondents. (*See, e.g.*, R. p. 177, line 14-p. 178, line 14; R. p. 189, lines 14-21; R. p. 233, lines 1-8).

STANDARD OF REVIEW

In this appeal involving a criminal case that originated in Magistrate's Court, the Court of Appeals' standard of review is an error of law standard. "[A]n appellate court reviewing the circuit court's appeal may review for errors of law only." *State v. Williams*, 417 S.C. 209, 218, 789 S.E.2d 582, 587 (Ct. App. 2016) (internal citation omitted). "'In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception.'" *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) (internal citations omitted). Likewise, the appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (internal citation omitted).

ARGUMENT

The specificity, breadth, and intensity of the CDC's land use regulations is astounding – it regulates everything from exterior paint colors and color schemes, to windowpane patterns, to the items to be screened from view and the type of screening material used. And according to the County, its citizens risk criminal charges and potential imprisonment without notice if a County

[4] "The County's exhibit 11 was not left with the Court. It was a receipt for certified mail *purportedly sent* to Defendants containing a stop work order and two citations sent after the work was completed on or about April 12, 2021." (R. p. 89 (emphasis added)).

employee believes they have violated any provision of the CDC. Cty. Br. pp. 4, 16 ("a person violating the CDC can be cited and, after conviction, be fined" and imprisoned).[5] The government conduct permitted under such a theory leads to a shocking and egregious result – the citizens and businesses of Beaufort County reside in a police state.

The County alternatively argues that it does not need to follow the CDC's provisions under certain circumstances. It need not issue the required notice of violation if the County Administrator, without reviewing any paperwork, just "knew that [work] is not appropriate underneath the Community Development Code." Cty. Br. p. 7. If a County official verbally tells your contractor to stop its work, CDC-compliant warning notices and ordinance summonses are not necessary. *Id.* at pp. 7, 10 ("[B]latant CDC violators are issued citations when the County's verbal directives are ignored.") (citing R. p. 185, lines 14-23).[6] If the County feels that you "essentially told [it] to pound sand[,]" the CDC's procedural mandates do not matter. *Id.* at p. 1.

As long as the County deems its process appropriate, the enforcement requirements of the code of ordinances it drafted are not applicable and need not be complied with. (*See* R. p. 560, lines 5-8 (County arguing that the "[t]he code requirements of the CDC about notices of warnings or violations are . . . just what the County adopted as a procedure[,]" and its failures to comply are irrelevant)).

[5] In its attempt to persuade the Court that penalties may be imposed without notice, the County conveniently omits that part of CDC § 9.5.10 providing that a person may be imprisoned if convicted of a violation. Cty. Br. 16.

[6] No criteria are contained in the CDC or offered by the County to define a "blatant" violation. Indeed, there is no violation of the CDC until the person charged is found guilty. (*See* R. p. 400 (CDC § 9.5.10)). Relatedly, the County Administrator testified that the instant case was not one involving repeat violations (alleged or actual). (R. p. 204, line 24-p. 205, line 3).

In its dogged pursuit to punish Adams for making sign repairs with SCDOT's approval, the County, using taxpayer dollars, has lodged this appeal concerning alleged technical violations of a zoning ordinance and criminal fines totaling $2,175. R. p. 562, lines 7-8. But the County's baseless attempts to discredit the Order and distort the record through mischaracterizations and deception do nothing to change the truth – it violated the CDC's plain mandates required to be followed in bringing criminal charges against Respondents.

I. THE LOWER COURT CORRECTLY REVERSED THE MAGISTRATE'S VERDICT BASED ON THE PLAIN AND ORDINARY MEANING AND LITERAL APPLICATION OF THE CDC PROVISIONS AT ISSUE.

Perplexingly, the County appears to believe this is an appeal of due process violation claims filed by Adams. Cty. Br. p. 2 (Statement of Issues on Appeal). The plethora of case law it cites regarding actual notice in civil lawsuits involving constitutional rights violations, as well as zoning permit denials and the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(16), have no relevance to the matter at hand. Cty. Br. pp. 15-17.

This is an appeal of criminal charges brought by the County against Respondents – it does not involve claims for violations of Respondents' due process rights or concern constitutional standards as to notice requirements. This appeal turns on the proper interpretation and application, as established under South Carolina law, of the subject penal ordinances, CDC §§ 9.4.40 and 9.4.50, to the facts at hand. Exemplary of its diversionary tactics, the County's brief conceals the text of those ordinances and any discussion thereof.

A. South Carolina Principles of Statutory Construction and Application.

This Court has a deep and thorough understanding of the well-established rules governing statutory interpretation in South Carolina, but the County's argument that the lower court erred in its application of the CDC necessitates a brief overview. "South Carolina has long recognized the

principle that penal statutes are to be strictly construed. . . . At the same time, the cardinal rule of statutory construction requires that we endeavor to 'ascertain and effectuate the intent of the legislature.'" *Hinton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004) (internal citations omitted).

Recently, this Court opined that "'statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.'" *State v. Miles*, 421 S.C. 154, 160, 805 S.E.2d 204, 208 (Ct. App. 2017) (internal citation omitted); *see also Hinton*, 357 S.C. at 333, 592 S.E.2d at 339 ("The legislature's intent should be ascertained primarily from the plain language of the statute." (internal citation omitted)).

The Circuit Court's Order echoed these standards. "'The ***statute's words must be given their plain and ordinary meaning*** without resort to subtle or forced construction to limit or expand the statute's operation.'" (R. p. 5 (internal citations omitted) (emphasis in original)). And, to accurately summarize the law, the Order stated that penal statutes, including criminal procedure statutes, "'must be strictly construed against the State.'" (*Id.* (internal citation omitted)).

B. The Circuit Court's Reversal Did Not Rely on the Rule of Lenity.

The County argues, without specificity or merit, that the Order relied on the rule of lenity to overturn the convictions. Cty. Br. p. 18. The County's admission that "the CDC is not ambiguous" (Cty. Br. p. 14) buttresses the Order's holding. The Circuit Court's ruling was based on its finding that no ambiguity exists in the pertinent CDC provisions – that the CDC unambiguously required a warning notice as a prerequisite to issuing a Uniform Summons Ticket.

> Moreover, **interpreting the CDC by giving its words their plain and ordinary meaning, a Notice of Violation is a condition precedent to the County's issuance of a Uniform Summons Ticket**. . . . Section 9.4.50 states that the County

> may issue a Uniform Summons Ticket "**if the person(s) to whom a warning notice has been given in accordance with Section 9.4.40** (Notice of Violation), fails to remove or abate the violation in the time specified in the notice[.]"

(R. p. 10 (quoting CDC § 9.4.50.B.) (emphasis in first sentence added)). Accordingly, the Circuit Court's reversal of the Magistrate did not rely on the rule of lenity (nor is the word "lenity" contained in the Order).

1. The County's Efforts to Inject Ambiguity in the Ordinance.

While the Order does cite this Court's decision in *Town of Sullivan's Island v. Murray*, 435 S.C. 22, 864 S.E.2d 909 (Ct. App. 2021), the Circuit Court's conclusion and reversal did not rest on the opinion. The County's assertion to the contrary (Cty. Br. p. 19) is simply another red herring argument that attacks a non-existent order. In reality, the Order only mentions the rule's underlying principles because of the County's own attempts to create ambiguity in the ordinance, via its argument that a Notice of Violation requirement is an "alternative" remedy which may be ignored. Cty. Br. pp. 3-4, 16.

The Circuit Court explicitly rejected the County's attempt in this regard. R. p. 11 ("The County argues, in **direct contravention of the plain and mandatory language in Section 9.4.50**, that it was not required to provide any Notice of Violation prior to issuing the Uniform Summons Tickets in this case.") (emphasis added). Notices of Violations (§ 9.4.40) and Uniform Summons Tickets (§ 9.4.50) are governed by and issued under CDC sections contained in Division **9.4**, entitled "Enforcement Generally." (R. pp. 398-99; R. p. 176, line 10-p. 177, line 23). The CDC's remedies and penalties are found in CDC Division **9.5**, appropriately titled "Remedies and Penalties." (R. pp. 400-01).

The County again argues, contrary to the plain language of the ordinance, that such warning notices and citations should be categorized as remedies or penalties – rather than mechanisms or

procedures for enforcement. Cty. Br. pp. 4, 16. Under this unfounded premise, it takes the illogical leap that the election of remedies provision of CDC § 9.5.40 (under Division 9.5) negates the clear requirements of Division 9.4 to issue a warning Notice of Violation before criminal charges are filed. Cty. Br. pp. 4, 16.

Indisputably, warning notices and citations are not categorized as remedies or penalties under the CDC. The County confuses the remedy of criminal punishment with the enforcement process specifically outlined for this remedy. Cty. Br. p. 16. By conflating the enforcement procedures of CDC Division 9.4 with remedies and penalties governed by Division 9.5, the County attempted (and is again attempting) to inject ambiguity into the ordinances at issue, §§ 9.4.40 and 9.4.50, both contained in Division 9.4.

2. The Order Negated the County's Remedies Argument Via Literal Application of the CDC's Text.

The Circuit Court first rejected this argument under the plain and ordinary meaning of the CDC's provisions. The Order found that the County's ability to exercise the remedies of Division 9.5 in any order has no bearing on the plain procedural requirements of Division 9.4.

> Sections 9.4.40 and 9.4.50 specify the enforcement procedure necessary to pursue prosecution – **the County must first issue a warning notice and then a citation ticket in order to prosecute for a conviction and remedy**. . . . **The issuance of a citation is not a remedy**. The remedy of fines or imprisonment, contemplated in Section 9.5.10, may only be levied by a court if the County is successful in its prosecution – after it properly issues a Warning Notice and Uniform Summons Ticket in accordance with Sections 9.4.40 and 9.4.50.

(R. pp. 11-12 (emphasis added)). Not only does the clear language of the ordinance negate the County's position, but it also fails when viewed with common sense. To accept the County's argument that the provisions of CDC Divisions 9.4 and 9.5 can be exercised in any order means

that a person can be forced to stand trial for criminal charges (§ 9.5.10) without having ever received a criminal citation or summons (§ 9.4.50).

Nor is a warning notice a remedy, under the CDC or otherwise, such that it can be skipped over or issued after criminal charges are filed (or after a guilty verdict entered). Especially because the CDC requires the notice to warn the alleged wrongdoer of the "penalty for failing to remove or abate the violation[.]" (R. p. 399 (CDC § 9.4.40.D.)).

It is readily apparent that the Order relied upon a literal application of the CDC's provisions, after affording them their plain and ordinary meaning, to rule that a warning notice was a mandatory prerequisite to a citation.

> **[I]nterpreting the CDC by giving its words their plain and ordinary meaning**, a Notice of Violation is a condition precedent to the County's issuance of a Uniform Summons Ticket . . . The County argues, in direct contravention of **the plain and mandatory language in Section 9.4.50**, that it was not required to provide any Notice of Violation[.]

(R. pp. 10-11 (emphasis added)).

The Order did go on to reference strict construction principles as an *alternative* ground to negate the County's contention: "even if the clear language at issue could be stretched or contorted to find an ambiguity as to whether the Notice of Violation requirement is an 'alternative' remedy that may be ignored, the law requires such an ambiguity to be resolved in favor of the Appellants." (R. p. 12).

Because no ambiguity exists, the determinative question is whether the County issued the requisite notice mandated by the clear language of its own code of ordinances. Based on the foregoing principles of penal code interpretation, as applied to the Magistrate's factual findings, the Circuit Court correctly found that the County did not comply with the CDC's requirements and that the Citations were improper as a result.

C. The County Failed to Issue a Warning Notice of Violation Required by the CDC.

Under the unambiguous language of CDC § 9.4.40, the County **must** issue a warning notice of violation when it "finds and determines a violation of" the CDC exists. (R. p. 398; *see also* R. p. 176, lines 10-21). And § 9.4.40 clearly requires that such notice "be delivered via U.S. Mail or hand delivered" and contain all the information set forth in the section's four subparts, A. through D. (R. pp. 398-99 (CDC § 9.4.40); *see also* R. p. 176, line 22-p. 177, line 2). The County did not issue a warning notice of violation required by CDC § 9.4.40 to either of Respondents. (*See, e.g.*, R. p. 233, lines 1-7).

The Code Enforcement Director, the issuing officer in this case, testified that she did not know if the County issued a notice of violation to Adams under § 9.4.40. (R. p. 177, lines 14-18). The Magistrate found that the County did not issue a Notice of Violation in compliance with the CDC. (R. p. 282 (the County "fail[ed] to adhere to the formal notice requirements")).

The record contains no evidence of a warning notice of alleged CDC violation being delivered by the County to Respondents by U.S. Mail or hand delivery, as explicitly required. And there is no communication or notice to Respondents in the record which "contained the requisite information of a Notice of Violation mandated by Section 9.4.40." (R. pp. 9-10).

Under § 9.4.40, "[t]he notice **shall** state" information as to the location and nature of the alleged violation, including the CDC provisions alleged to be violated, as well as the following:

> [T]he necessary action to remove or abate the violation; C. The date by which the violation should be removed or abated; and D. The penalty for failing to remove or abate the violation, **stating that if the nuisance recurs, a notice to appear in the appropriate court in Beaufort County will be issued without further notice**.

(R. pp. 398-99 (CDC §§ 9.4.40.B.-D.) (emphasis added)). None of the above information was issued via written notice by the County, including the required warning that failure to remove or

abate would result in a court summons. The Circuit Court correctly held that the Magistrate erred in its reading, and failure to apply the plain and ordinary language, of CDC § 9.4.40. (R. p. 9).

D. The County Failed to Comply with the CDC's Requirements for Executing and Issuing Uniform Summons Tickets.

The County's defense for its failure to issue the required Notice of Violation is to brush it off as a minor technicality. Yet the failure to issue the mandatory prerequisite notice is no small defect. In the absence of a warning Notice of Violation, **the County was not permitted to issue the Citations** and bring these criminal charges against Respondents. (R. pp. 398-99 (CDC §§ 9.4.40., 9.4.50.B.)).

The County's Code Enforcement Director testified that CDC § 9.4.50 governs the issuance of citations. (R. p. 177, lines 19-23). In pertinent part, § 9.4.50.B. states: "***if*** **the person(s) to whom a warning notice has been given** **in accordance with Section 9.4.40** (Notice of Violation), **fails to remove or abate the violation in** **the time specified in the notice**, the Code Enforcement Department shall fill out and sign, as the complainant, a Uniform Summons Ticket[.]" (R. p. 399 (CDC § 9.4.50.B.) (emphasis added)).

"When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). The literal meaning of § 9.4.50.B. is that the County is to sign a Uniform Summons Ticket only **if** 1) the person charged was previously given a warning notice that complied with § 9.4.40, and 2) said person fails to correct the violation in the time specified in said notice. (R. p. 399 (CDC § 9.4.50.B.)). The Order applied this literal meaning in reaching its conclusions. (R. p. 10).

The County did not issue a warning notice in accordance with CDC § 9.4.40; therefore, its own CDC did not permit issuance of the Citations. The trial testimony of the County's Code Enforcement Director confirmed the requisite process.

> Q: So if a warning notice has been given in accordance with 9.4.40, the County can issue a uniform summons ticket; is that correct?
>
> A: Yes.

(R. p. 178, lines 11-14). Ms. Antonacci was the issuing officer in this case and, as the Code Enforcement Director, the person responsible for enforcing the provisions of the CDC. (R. p. 152, line 20-p. 153, line 11; R. p. 175, lines 19-24; R. p. 188, lines 3-6).

Moreover, even if the mandatory prerequisites had been satisfied, "[t]he summonses did not comply with the provisions of Section 9.4.50 B of the Community Development Code[.]" (R. p. 282). The Citations were facially deficient and not properly served. The CDC requires six criteria or pieces of information be included in a citation, which is to be signed by the County's Code Enforcement Department, then provided to the Clerk of the appropriate Beaufort County court who mails a copy to all persons named in the ticket. (R. p. 399 (CDC §§ 9.4.50.B.-D.) (*see supra* pp. 4-5); R. p. 178, lines 15-19).

The Citations speak for themselves (R. p. 181, lines 3-10) and clearly show they do not contain the required information. (R. p. 282; R. p. 13 ("The County failed to (1) identify the owner of the land upon which the alleged violation took place; (2) list the address where the alleged violation took place with any specificity; and (3) the nature of the violation.")). And contrary to the plain and unambiguous language of CDC § 9.4.50.C.-D., the County's Code Enforcement Director testified that she, rather than the court's clerk, sent the Citations to Respondents. (R. p. 251, lines 17-22; *see also* R. p. 282). Additionally, the County only mailed one copy of the

Citations, rather than mailing separate copies to each of the Respondents as required by § 9.4.50.D. (R. p. 251, line 9-p. 252, line 12; R. p. 399).

The factual record is clear that the County failed to follow the CDC's provisions governing the issuance of criminal charges. Because the County failed to issue the Citations in accordance with its own code, the Circuit Court was correct in reversing the Magistrate's rulings.

E. The Circuit Court Correctly Held that the Magistrate's "Harmless Error" Finding Constituted Reversible Error.

In another misguided effort to distract the Court, the harmless error doctrine is taken out of context and misapplied by the County. It asks the Court to expand the doctrine's application to procedural errors committed by a municipal body in issuing ordinance citations. Yet, all of the authority the County cites as support involved trial and evidentiary procedures – because harmless error is a doctrine based upon errors at trial during the case's presentation to the jury.

> [T]he Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. . . . The common thread connecting these cases is that **each involved "trial error" — error which occurred during the presentation of the case to the jury**, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Arizona v. Fulminante, 499 U.S. 279, 307-08 (emphasis added) (case cited in Cty. Br. p. 21).

Because the County can muster no valid argument for its flagrant failures to comply with the CDC's requirements, it conceals and misrepresents the actual import of the case law cited. *See* cases cited Cty. Br. pp. 21-22. At issue here is whether the County served the mandatory predicate to the issuance of an ordinance summons. There is no alleged trial error at play and thus the harmless error doctrine has no bearing upon the decision at hand. Accordingly, the Circuit Court correctly held that the Magistrate erred in deeming the County's non-compliance with a penal code to be harmless error.

And, even if application of the harmless error doctrine in this instance was permissible, the County's argument is without merit. The code of ordinances clearly sets forth what steps must be taken and what information must be provided before the County can attempt to prosecute an alleged violator. The County's non-compliance is no small error or defect – it is a complete failure to adhere to the requirements of its ordinance governing the procedures and contents required of criminal notices and citations.

The County's lack of regard for the process required by its CDC is a substantial and egregious error that required reversal of the Magistrate's rulings. "The Verdict must be reversed because there is no evidence that the County issued a Notice of Violation, a prerequisite to a Uniform Summons Ticket, and a requirement for criminal prosecution of an alleged violation of the CDC." R. p. 12.

II. THE STATE REGULATION CONTROLS OVER THE COUNTY'S OFF-PREMISES SIGN MAINTENANCE ORDINANCE, AND SCDOT'S APPROVALS INVALIDATE THE CITATIONS.

As an additional sustaining ground, Respondents request that this Court affirm the lower court's reversal of the Magistrate Court on the basis that the provisions of CDC § 5.6.50.E. are not more restrictive than those of the State Regulation, such that that the subject CDC provisions are abrogated and sign maintenance decisions under the State Regulation are controlling on those issues. This matter was raised at trial and to the Circuit Court, which declined to address the issue, and, in accordance with Rules 208(b)(2) and 220(c), SCACR, is contained in the record on appeal. (*See, e.g.*, R. p. 131, line 1-p.132, line 5; R. p. 265, line 22-p. 266, line 7; R. pp. 364-65; R. pp. 381-85; R. p. 22 at ¶¶ 4, 5, 6, 8; R. p. 49, line 15-p. 51, line 16); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417-23, 526 S.E.2d 716, 721-25 (2000).

A. Because CDC § 5.6.50.E. Is Not More Restrictive than S.C. Code Ann. Regs. 63-350, the SCDOT-Approved Repair Work Did Not Violate the CDC.

The County contends, and the Magistrate erred in impliedly holding, that the CDC's maintenance ordinance is more restrictive than and controls over applicable state law. Cty. Br. p. 5; (R. p. 283).[7] Section 57-25-220 of the HACA, titled "Rule of construction," provides that the Act does not "abrogate[] or affect[] the provisions of a lawful ordinance, regulation, or resolution which is more restrictive than the provisions of [the HACA]." S.C. Code Ann. § 57-25-220 (R. p. 381).

The County cannot identify any specific language or provision of CDC § 5.6.50.E. that is more restrictive than the State Regulation. On comparison, the text of CDC § 5.6.50.E. (R. pp. 364-65) is clearly modeled after and contains language substantially similar to the State Regulation (R. pp. 384-85). Indeed, the County's trial counsel pointed out that its maintenance ordinance contains "pretty much the same" language as the State Regulation (R. p. 124, line 24-p. 125, line 3), and mischaracterized HACA's construction provision (R. p. 263, lines 16-17 ("The state law says you have to comply with the local ordinances."); R. p. 272, lines 7-10 ("the way the state law is set up, is that in addition to State approval, you have to get County approval[]")).

There is a significant distinction, though, in that the State Regulation imposes additional conditions and requirements not found in CDC § 5.6.50.E., making the state law more restrictive. Accordingly, under the text of § 57-25-220 of the HACA, the County's ordinance is abrogated by the HACA and State Regulation promulgated thereunder. As a result, SCDOT's authorizations

[7] The Verdict contains no express statement that all or part of CDC § 5.6.50.E. is more restrictive than provisions of HACA or Chapter 63 of the S.C. Code of Regulations. Rather, it merely quotes S.C. Code Ann. § 57-25-220 and in the following sentences summarizes certain provisions of CDC § 5.6.50.E., without any comparison to the State Regulation. (R. p. 283).

for repairs to the Billboards issued under the State Regulation are authoritative and Respondents' resulting work, permitted by SCDOT, did not constitute a violation of the CDC.

1. South Carolina's Fifty Percent Damage Provision Compared to the County's.

Because the Billboards were repaired under a fifty percent damage determination, the respective state and County code provisions on that issue are set forth for comparison below.

> In the event a nonconforming device is partially destroyed by wind or other natural forces including tornadoes, hurricanes, or other catastrophic occurrences, the Department must determine whether to allow the sign to be rebuilt. If the Department determines that the damage to the sign was greater than 50 percent of its replacement costs as determined by nationally recognized catalogues of vendors of construction and outdoor advertising materials as of the time of the damage, the sign must be dismantled at no cost to the Department and may not be erected again. A current issue of the catalogue or advertisement indicating materials to be replaced must be submitted with the request to rebuild. Salvage parts cannot be used to determine replacement value unless approved by the Department.

S.C. Code Ann. Regs. 63-350.C.(4) (emphasis added) (R. p. 384).

> If a sign is partially destroyed by wind or other natural forces, the Director must determine whether to allow the sign to be rebuilt. If the Director determines that the damage to the sign was greater than 50 percent of its replacement cost as of the time of the damage, the sign must be consistent with all current requirements of this chapter.

CDC § 5.6.50.E.4.c. (emphasis added) (R. p. 365).

As depicted with underlined emphasis, the County's ordinance contains no provision that imposes a more restrictive, or even different, requirement of the billboard owner.[8] But it is also clear on facial comparison that the State Regulation sets forth three conditions or requirements not

[8] The state's penalty of dismantling as opposed to the County's of requiring consistency with its current ordinances yields no different outcome, as the CDC requires removal of a sign determined to be more than fifty percent damaged. *See* CDC §§ 5.6.50.A., B., E., 5.6.20.A., J. (rendering billboards nonconforming, requiring removal of dilapidated or structurally unsound signs, and prohibiting new billboards).

contained in the County's ordinance: damage percentage is determined by nationally recognized catalogues of vendors, a current issue of the same must be submitted with the request, and salvage parts cannot be used for value determination unless approved by SCDOT. (R. p. 384).

Moreover, due to its absence of those specifications, CDC § 5.6.50.E., unlike the State Regulation, lacks any objective criteria by which the Director is to determine whether damage to a sign was greater than 50 percent of its replacement cost, and vests unbridled discretion in the Director to make such a decision.

2. Remaining Provisions Illustrate State Regulation is More Restrictive.

In addition, review of the laws' respective subparts shows that the remaining language of CDC § 5.6.50.E. contains no separate or added restrictions than that of the State Regulation. In ruling that CDC § 5.6.50.E. is more restrictive, the Magistrate looked to provisions other than its subpart E.4.c. at issue, noting that the CDC: a) prohibits restoration of structurally unsound signs; b) deems structural or other substantive maintenance to a sign abandonment of the same; c) prohibits "'replacement, rebuilding, … or re-erection of a sign[;]'" and d) only authorized repairs to damage in excess of normal wear if the County was notified of the damage and authorized the repairs. (R. p. 283).

The Magistrate failed to recognize that those exact same standards are contained in the State Regulation. *See* S.C. Code Ann. Regs. 63-350.A.-B. (providing, collectively, that signs which are not structurally safe, or are abandoned, are illegal); 63-350.C.(1) ("No maintenance may occur which will lengthen the life" of a sign.); 63-350.C.(6) (specifying that a relocated or moved billboard is no longer considered nonconforming); 63-350C.(7) ("Extension, enlargement, rebuilding . . . or re-erection of the sign will make it illegal."); and 63-350.C.(9) (providing that

repairs in excess of normal wear require that SCDOT be notified of the damage and authorize repairs for the same). (R. pp. 384-85).

The Magistrate also failed to take notice that the remainder of the State Regulation contains additional restrictions and requirements that are not found in CDC § 5.6.50.E., further demonstrating that the state law is more restrictive. *See, e.g.*, S.C. Code Ann. Regs. 63-350.C.(8), D., and E. (R. p. 385) (unlike the CDC, requiring that the authoritative body be notified of any routine or substantive sign maintenance prior to the work being performed, prohibiting vegetation alteration or addition within rights-of-way without SCDOT's approval, and prohibiting servicing of signs within or across certain rights-of-way, or across certain controlled access lines).

The County's argument on this matter at trial consisted of bluster alone. The County argued that its ordinance is more restrictive because the Director prohibited the work that the SCDOT had permitted. (*See* R. p. 272, lines 11-21 (As to the argument "about, you know, that [the] County's regulation's not more restrictive. Well, that's kind of silly since the director said, under the County's regulation, you can't do what you did. And under the state regulation, somehow . . . [Adams] got some letter from the DOT.")). In other words, the CDC provision is more restrictive because it apparently provides unfettered discretion to County officials.

This argument is conclusory and result-oriented. As detailed *supra*, the County's fifty percent damage provision contains no additional language than what is set forth in the State Regulation. The CDC provision does vary from the State Regulation, because it lacks objective, measurable standards or conditions the applicant must satisfy, instead leaving the decision to the Director's judgment, formed in this case during a drive-by. Because it is clear that the County's off-premises sign maintenance ordinance is not more restrictive than South Carolina's regulation, the State Regulation controls over and abrogates the provisions of CDC § 5.6.50.E. Accordingly,

Adams' repairs of the Billboards pursuant to SCDOT's approvals were proper and Respondents could not be charged with criminal offenses for the same.

B. The County's Unfounded Belief It Can Veto SCDOT's Approvals.

Although it repeatedly misrepresented the effect of the subject HACA provision at trial, the County did acknowledge in its sprawling opening argument that Adams only needs to comply with local ordinances more restrictive than state law. (R. p. 120, lines 8-22 ("So the state Law is the floor, the minimum standard that you have to comply with. But if something in the local government code is more restrictive, you have to comply with that.")).

But, rather than offer any specific ordinance language more restrictive than that of the State Regulation, the County relies on deception or falsities, such as its argument that it has the inherent ability to veto, or overrule, decisions by SCDOT as to maintenance of signs governed by the HACA. (R. p. 130, lines 10-14 ("[T]he state statute [] says local government regulations are not abrogated and the sign has to comply with state law as well as local government regulations."); R. p. 127, lines 14-25 ("But more importantly, and the overarching contention, was that regardless of what the State says, . . . the County's regulations are at play[.]"); *see also* R. p. 272, line 24-p. 273, line 6).

Because its ordinance is not more restrictive, the County claims it has ultimate authority over SCDOT as to repair of signs adjacent to SCDOT-controlled roads. (R. p. 271, line 4-p. 272, line 10 ("And, frankly, they might have gotten away with it with DOT. . . . But regardless of whether they got away with one, they came over to the County and they didn't -- they can't get away with it because the way the state law is set up, is that in addition to State approval, you have to get County approval.")).

The County's argument is that SCDOT's decisions under the State Regulation, and the regulation itself, do not matter and should not be afforded any consideration. "The onsite contractor called this a 'repair' but had no official paper work other than a letter from Mr. Melvin with SCDOT which, as you should know, is not a local permit nor proper authorization[.]" (R. p. 356; *see also* R. p. 272, line 22-p. 273, line 5 ("But [SCDOT's approval] doesn't really matter for the purposes of this hearing because this hearing is a citation under the Community Development Code in the County[.]")). Regardless of what SCDOT says, the County argues it is in charge and gets to make the decisions. (R. p. 196, lines 15-17 (Greenway testifying that "the DOT [approval] letter is irrelevant, they don't comply with local ordinances.")).

The County resorts to the argument that SCDOT's objective determinations must yield to a single official's arbitrary and subjective decision, which need not be based on any criteria, data, or documentation. It seems unlikely that the state legislature intended that its carefully formulated standards could be overruled on a whim by a local official with a grudge.

Such a position has no support under the law or the facts of this case. Respondents respectfully submit that the lower court's reversal of the Magistrate should be affirmed, as an additional sustaining ground, on the basis that the repairs to the Billboards performed with SCDOT's approval under the State Regulation were not chargeable offenses or violations, as the State Regulation is authoritative and controls over CDC § 5.6.50.E.

CONCLUSION

As part of its fervent efforts to achieve its goal of eliminating Adams' billboards, Appellant Beaufort County rushed to charge Respondents with criminal violations of the CDC. In so doing, the County decided that the requirements to bring those criminal charges – requirements it codified in the CDC – did not need to be followed. Perhaps more astounding is the County's

acknowledgement that this government overreach is a policy often employed, a policy it asks the Court to condone. In basic terms, the County says: we make the rules, and they apply to you, but not to us. It would indeed be a fundamental miscarriage of justice to allow such conduct to go unchecked. Moreover, CDC § 5.6.50.E., which Respondents were charged with violating, is abrogated by the state regulation under which SCDOT approved the repairs at issue. Accordingly, and for the grounds and reasons set forth herein, Respondents respectfully request that this Court affirm the Order of the Court of Common Pleas reversing the Magistrate Court's rulings.

Respectfully submitted,

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October 28, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master-In-Equity

Circuit Court Case No. 2021-CP-07-01507
Appellate Case No. 2022-000681

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

RULE 211(b) CERTIFICATION

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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