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SC Court of Appeals

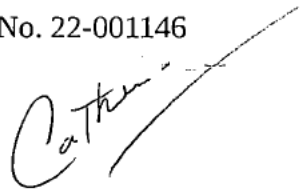
4 May 2023

Fax: 803.734.1839

The Honorable Catherine Harrison  
Clerk, SCCOA  
1220 Senate St.  
Columbia, SC 29201

Re: COA Case No. 22-001146

Dear Ms. Harrison:



Thank you for your most recent correspondence. We hope this letter finds you and your kind staff well. Without being disagreeable, there is disagreement. We are writing to correct a misunderstanding regarding the pending motion to reconstruct the record and motion for reconsideration. See *Clements v. Young*, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992) (appellant moved for reconstruction of the record on remand to the lower court where the hearing was unrecorded). See Rule 240, SCACR. "There is no limit to the type of motion that could be filed in the appellate courts," including but not limited to, timely motion for reconsideration. *Toal et al., Appellate Practice in South Carolina*, Third Ed. (2016), p. 379. Another action is pending in the Family Court between the same parties for the same claim including retirement and marital property. The Family Court attorney defendant herein filed this duplicitous and duplicative action in the circuit court to make an end run around the jurisdiction of the Family Court. The Family Court attorney defendant has unclean hands. Family Court confidentiality and privacy is hereby requested. Under the facts, the Family Court is the

proper forum to provide clear title for real estate or other transactions. Matters of great public importance are raised, including but not limited to, denial of substantial rights such as confidentiality and privacy rights regarding Family Court matters herein, including retirement and marital property, which are capable of repetition, capable of evading judicial review, and incapable of vindication after-the-fact and which must be raised or waived. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Shah v. Richland Mem. Hosp.*, 350 S.C. 139, 564 S.E.2d 681 (Ct. App. 2002); Toal *et al.*, *Appellate Practice in South Carolina*, Third Ed. (2016), p. 144-145.

The question of jurisdiction is a question of law. Jurisdiction can be raised at any time as in the pending motion. Jurisdiction cannot be waived. *Knight v. Kelly*, 289 S.C. 318, 345 S.E.2d 490 (1986); *Martin v. Skinner*, 286 S.C. 527, 335 S.E.2d 252 (Ct. App. 1985). When deciding a jurisdictional question based on facts, a reviewing court has the **power and duty to review the entire record including the reconstructed record from the trial court**, find the jurisdictional facts within the record, and decide the jurisdictional question in accord with the preponderance of the evidence. *Canady v. Chas. Cnty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975); Toal *et al.*, *Appellate Practice in South Carolina*, Third Ed. (2016), p. 276 (emphasis supplied). It is respectfully submitted dismissal is premature pending reconstruction of the record in the trial court.

Further, it is respectfully submitted the most recent correspondence overlooks, misconstrues, or misapprehends applicable law. Specifically, pursuant to Rule 240, SCACR, Former Chief Justice Toal's appellate practice book expressly states, "There is no limit to the type of motion that could be filed in the appellate courts," including but not limited to, timely motion for reconsideration herein; otherwise, censorship would prevail. Former Chief Justice Toal *et al.*, *Appellate Practice in South Carolina*, Third Ed. (2016), p. 379. In particular, the proper forum with exclusive original jurisdiction is the Family Court for the intertwined issues herein of equitable division including but not limited to, retirement and marital property reserved and preserved in the attached copy of the certified Divorce Decree. S.C. Code § § 63-3-510 to 530. This matter involves the Decree of Divorce, after almost 30

years and three children of the marriage, to which Family Court attorney defendant, with decades of experience, agreed on the record, into which that agreement was incorporated, from which defendant never appealed, and which is now the law of the case. See Rule 16, SCRFC. “The family court has jurisdiction of the parties and control of all subsequent proceedings from the time of service of the summons and complaint....” *Wazney v. Wazney* (S.C. App. 2019). The meritorious motions are timely served and filed, therefore, the pending petition for rehearing en banc is properly addressed to the new ruling and new issues regarding the appellant’s right to reconstruct the record in the trial court for the impermissible ex parte hearing adversely affecting the appellant’s individual and property rights without notice and where, without explanation, the SCCA’s audio for transcripts has a critical gap in the recording for this hearing despite finding recordings for essentially all other hearings on that day. The South Carolina Constitution in article 1, section 9 provides that “[a]ll courts shall be public.” The United States Supreme Court has interpreted the guarantees of freedom of speech found in the First Amendment to the United States Constitution to include a guarantee of open and public courts. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). It is respectfully submitted that State and federal statutory and constitutional rights are implicated and the adversely affected litigant has a State and federal statutory and constitutional right to reconstruct the record in the trial court below which is hereby requested. Further, it is respectfully submitted reconstruction of the record below is a prerequisite to meaningful appellate review of the Court of Appeals decision as well as factual support for disposition herein. Former Chief Justice Toal in her appellate practice book confirms that the April 11, 2023, decision raises new issues which are subject to a new petition for rehearing. Former Chief Justice Toal *et al.*, *Appellate Practice in South Carolina*, Third Ed. (2016), p. 295-297. Further, reversal of the decision on motion to reconstruct, and the record reflects it should be reversed, renders void/voidable the decision herein thereby complying with Rule 221, SCACR. See *Tench v. S.C. Dept. of Educ.*, 347 S.C. 117, 553 S.E.2d 451 (2001) (holding that the failure to petition the Court of Appeals for rehearing on an issue effectively resulted in the abandonment of a party’s right

to be heard on that issue); Former Chief Justice Toal *et al.*, *Appellate Practice in South Carolina*, Third Ed. (2016), p. 391. It is respectfully submitted dismissal is premature pending reconstruction of the record in the trial court. To the extent there is ambiguity, the rule of lenity supports the appellant's position. Accordingly, the appellant respectfully submits meritorious petition and motion.

Moreover, the South Carolina Clerk of Court Manual and the *Miller* case provide as follows:

The Clerk of Court's duty is not discretionary. The Clerk of Court should not construe a *filing*... it is not within the Clerk of Court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely. 21 C.J.S. Courts § 338 (2006) ("[A] clerk of court cannot ordinarily determine questions of law [or] render judgments."). *Miller v. State*, 659 S.E.2d 492, 377 S.C. 99 (S.C. 2008) (emphasis supplied).

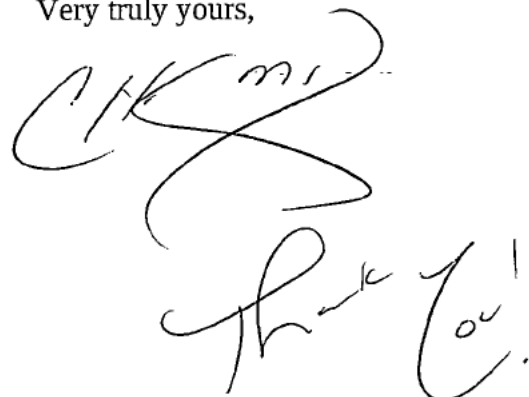
In this case, refusal to file effectively determines questions of law and/or impermissibly renders judgment by denying meaningful opportunity to be heard at a meaningful time for full and fair record on appeal (ROA), thereby arbitrarily and capriciously denying substantial rights and meaningful appellate review. To the extent there is wrongful direct or indirect *ex parte* consolidation of a 2022 appeal with a 2020 appeal, and the record reflects there is, Rule 214, SCACR, provides, "A party may move to consolidate two or more appeals..." Toal *et al.*, *Appellate Practice in South Carolina*, 3rd Ed. (2016), p. 370. The Family Court attorney defendant herein failed and refused his professional responsibility to move for consolidation by filing a motion, paying the filing fee every other attorney must pay, serving the other side, and providing the other side a meaningful opportunity to be heard at a meaningful time. Appellant is prejudiced thereby and objects. Accordingly, the lower appellate court order herein is reversible as a matter of law. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a

hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

Under the facts, the record reflects there is no statutory notice for the impermissible ex parte hearing in the trial court adversely affecting the appellant's individual and property rights where, without explanation, the SCCA's recording for transcripts has a critical gap in the recording for this hearing despite finding recordings for essentially all other hearings on that day. "[C]ourts shall be public." S.C. Const. art. 1, sec. 9. Our objection is timely raised. Because the April 11, 2023, order raises new matter and new issues including but not limited to, denial of motion to reconstruct the record, petition for rehearing en banc is properly entered herein regarding new matter and new issues. Further, motion for reconsideration of denial of petition for rehearing en banc is timely served and filed. Accordingly, we respectfully request that the filing be forwarded to the Court. Please find enclosed a check for the filing fee (though we have not yet received the returned check). At your earliest convenience, please confirm receipt of the enclosed check # 3088 for the filing fee at 843.883.3010 or at the back-up number 843.883.9030. If you do not receive the check shortly, we are happy to promptly forward a duplicate.

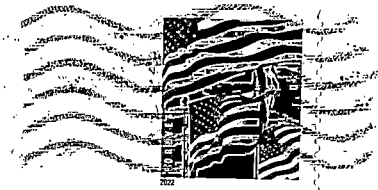
Thanking you in advance for your kind consideration and with best personal regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to be 'C. H. M.', is written above the phrase 'Thank you!' which is also written in black ink.

CHARLESTON SC 294

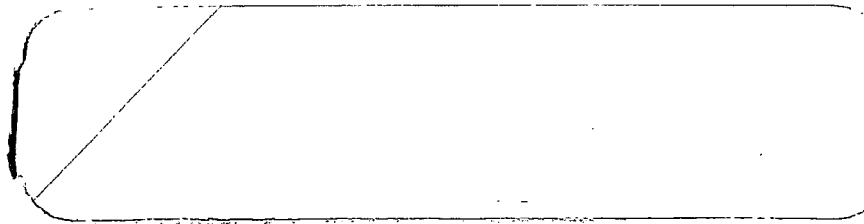
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