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SC Court of Appeals

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September 14, 2023

**VIA E-MAIL AND U.S. MAIL**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201  
[ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

South Carolina Court Administration  
1220 Senate St., Suite 200  
Columbia, SC 29201  
[transcripts@sccourts.org](mailto:transcripts@sccourts.org)

**RE: *Justin O'Toole Lucey v. The Town of Mount Pleasant, South Carolina, and WIN515, LLC***  
**Appellate Case No. 2023-001006**  
**Charleston County Circuit Court Case No. 2022-CP-10-03328**

Dear Ms. Kitchings:

In accordance with Rule 207(a), SCACR, Appellant Justin O'Toole Lucey ("Appellant") is contemporaneously furnishing all parties, the Office of Court Administration, and yourself, the clerk of the appellate court, with copies of correspondence with the court reporter in the above-captioned matter, as well as the transcript of the January 27, 2023 hearing in the lower court and invoice for the same, which Appellant received today via said correspondence from the court reporter.

Counsel for all opposing parties are receiving copies of this correspondence and its enclosures via email to their email addresses listed on the South Carolina AIS.

Yours Sincerely,



Evan P. Williams

Enclosures

cc (via e-mail): Brian L. Quisenberry, Esq. ([bquisenberry@ycrlaw.com](mailto:bquisenberry@ycrlaw.com))  
Zachary M. Kern, Esq. ([zkern@ycrlaw.com](mailto:zkern@ycrlaw.com))  
Ross A. Appel, Esq. ([ross@mklawsc.com](mailto:ross@mklawsc.com))

**From:** Green, Pamela E. <PGreen@sccourts.org>  
**Sent:** Thursday, September 14, 2023 1:37 PM  
**To:** Evan Williams  
**Subject:** Re: Justin O'Toole [Lucey] v. Town of Mount Pleasant [Circuit Ct. No. 2022-CP-10-3328] [Appellate No. 2023-001006]  
**Attachments:** Justin Lucey v. Town of Mount Pleasant-1-27-23.pdf; scan1068.pdf

Apparently I'm an idiot and emailed it to myself. You think I would have noticed that when I received the delivery receipt. I am so sorry. I've attached it and will correct that also with Court Administration. Once again, I apologize.

*Pamela E. Green*

Circuit Court Reporter  
At-Large

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**From:** Evan Williams <ewilliams@bybeetibbals.com>  
**Sent:** Thursday, September 14, 2023 1:25 PM  
**To:** Green, Pamela E. <PGreen@sccourts.org>  
**Cc:** Transcripts <transcripts@sccourts.org>; Jeff Tibbals <jst@bybeetibbals.com>; Elliott Jones <ejones@bybeetibbals.com>; Whitney Moore <wmoore@bybeetibbals.com>; Caroline McLaughlin <cmclaughlin@bybeetibbals.com>; Holmes, Tammie <tholmes@sccourts.org>; ross@mklawsc.com <ross@mklawsc.com>; bquisenberry@ycrlaw.com <bquisenberry@ycrlaw.com>; zkern@ycrlaw.com <zkern@ycrlaw.com>; Court Of Appeals Filings <ctappfilings@sccourts.org>  
**Subject:** RE: Justin O'Toole [Lucey] v. Town of Mount Pleasant [Circuit Ct. No. 2022-CP-10-3328] [Appellate No. 2023-001006]

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Good afternoon Ms. Green,

We wanted to check in on the status of the requested transcript of the hearing in the above-captioned case. We have not received a copy of the transcript, but Ms. Holmes (copied here), advised the parties via separate correspondence that it was completed on September 8, 2023.

Please let us know when you have a moment.

Thank you,

Evan

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Evan P. Williams

**BYBEE & TIBBALS**

735 Johnnie Dodds Blvd. Suite 104, Mt. Pleasant, SC 29464  
O: 843.881.1623 D: 843.513.1036 M: 502.727.9203

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**From:** Evan Williams  
**Sent:** Wednesday, August 23, 2023 11:15 AM  
**To:** Green, Pamela E. <PGreen@sccourts.org>  
**Cc:** Transcripts <transcripts@sccourts.org>; Jeff Tibbals <jst@bybeetibbals.com>; Elliott Jones <ejones@bybeetibbals.com>; Whitney Moore <wmoore@bybeetibbals.com>; Caroline McLaughlin

<cmclaughlin@bybeetibbals.com>

**Subject:** RE: Justin O'Toole v. Town of Mount Pleasant

Thank you, Ms. Green. Please let us know if we can provide anything to assist.

Evan

---

Evan P. Williams

**BYBEE & TIBBALS**

735 Johnnie Dodds Blvd. Suite 104, Mt. Pleasant, SC 29464

**O:** 843.881.1623 **D:** 843.513.1036 **M:** 502.727.9203

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**From:** Green, Pamela E. <[PGreen@sccourts.org](mailto:PGreen@sccourts.org)>

**Sent:** Tuesday, August 22, 2023 6:05 PM

**To:** Evan Williams <[ewilliams@bybeetibbals.com](mailto:ewilliams@bybeetibbals.com)>

**Cc:** Transcripts <[transcripts@sccourts.org](mailto:transcripts@sccourts.org)>

**Subject:** Justin O'Toole v. Town of Mount Pleasant

Mr. Williams,

I have been asked to prepare the above referenced transcript. Please feel free to reach out to me if you have any questions.

*Pamela E. Green*

Circuit Court Reporter

At-Large

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I N D E X

(WHEREUPON, there were no exhibits marked or testimony taken during this hearing.)

1 P R O C E E D I N G S

2  
3 THE COURT: I believe the next one is 2022-CP-10-03328,  
4 Lucey versus WIN515, LLC. Let me get that pulled on my  
5 screen. I have a motion to dismiss.

6 who do I have with me?

7 MR. QUISENBERRY: Good morning, Your Honor.

8 MR. LUCEY: Justin Lucey for the plaintiff.

9 THE COURT: Yes, sir.

10 MR. APPEL: Your, Your Honor, good morning. Ross Appel  
11 here with McCullough Khan Appel. I'm here on behalf of  
12 WIN515, LLC. We are the moving party today on the incident  
13 motion to dismiss.

14 MR. QUISENBERRY: And, Your Honor, Brian Quisenberry.  
15 I represent the Town of Mount Pleasant in this appeal.

16 THE COURT: Okay.

17 MR. LUCEY: And, Your Honor, I'm not sure if I spoke  
18 over somebody else earlier. This is Justin Lucey here for  
19 myself and the plaintiff.

20 THE COURT: All right. A motion to dismiss is before  
21 us. So, let's go right to that. Motion -- notice of motion  
22 and motion to dismiss.

23 Mr. Appel.

24 MR. APPEL: Thank you, Your Honor.

25 Good morning. I am here today on behalf of WIN515,

1 LLC. This is an entity owned by David Seay. He's actually  
2 on the call today. He's a local Mount Pleasant resident and  
3 business owner here in the, the town and this is a zoning  
4 appeal involving a piece of property at 515 Coleman  
5 Boulevard.

6 It's at the corner of Coleman Boulevard and Simmons  
7 Street over in Mount Pleasant and my client submitted plans  
8 and received all necessary zoning approvals for a three  
9 story office and retail building at this, at this property.  
10 The property is currently a vacant lot and I want to stress  
11 to Your Honor that this project is 100 percent permitted by  
12 right as a matter of zoning.

13 So, the use is allowed by right. The height is allowed  
14 by right. It's satisfy all applicable requirements of  
15 zoning.

16 The only public board approval that this project needed  
17 was approval by the Town of Mount Pleasant Commercial Design  
18 Review Board. This is akin to the Board of Architectural  
19 Review in Charleston. This is a board that has a limited  
20 scope of re -- of review. The review is limited to sight,  
21 landscape, and architecture. And I want to give a little  
22 bit of background for Your Honor if you'll indulge me just  
23 to kind of give a complete picture of the full context of  
24 this case.

25 The matter went before the DRV back on December 8<sup>th</sup>

1 of 2021. There was considerable public opposition to this  
2 project. However, none of the opposition was on the basis  
3 of sight, landscape, or architecture, which is, again, the  
4 sole purview, the limited jurisdiction of the DRV.

5 The community was concerned with things along the lines  
6 of traffic, safety at this intersection, and then just  
7 frankly general policy preferences regarding development and  
8 what type, type of development is appropriate where.

9 The result of that DRV meeting was a denial. We, we  
10 appealed that decision. The case went to mediation. The  
11 case did not settle at mediation. But my client resubmitted  
12 to the DRV with a, with a substantially revised design for  
13 the project and the DRV staff put the matter on the DRV  
14 agenda for June 29<sup>th</sup>, 2022.

15 At that hearing the DRV members received a briefing in  
16 executive session. I don't know what was discussed in that  
17 executive session. I might surmise that a reminder to the  
18 DRV of their proper scope of, of review was discussed.  
19 That's my theory of what was discussed behind closed doors  
20 because the board came out of executive session and  
21 unanimously approved the project. Again, for sight,  
22 landscape, and architecture.

23 On July 25<sup>th</sup>, 2022, Mr. Lucey filed the incident  
24 lawsuit that we are seeking to dismiss today. Although the  
25 lawsuit is captioned as a complaint, and it was filed as a

1 normal civil action, if, if you read the allegations of the  
2 filing, it's clear that this is an attempt by Mr. Lucey to  
3 appeal the decision from the Design Review Board to this  
4 Court and I want to give a little bit of background on, on  
5 Mr. Lucey who's here today.

6 He is not representing a client in this matter other  
7 than himself. I mean he is, he is proceeding as a very  
8 skilled pro se party. He is an attorney, of course, and he  
9 is the plaintiff in this case.

10 Mr. Lucey is actually involved in numerous zoning  
11 appeals throughout Mount Pleasant where he is challenging  
12 decisions by various zoning boards and zoning officials.  
13 Mr. Lucey owns several commercial properties over on Mill  
14 Street in the Shem Creek area which everybody knows, of  
15 course, and these properties include investment properties,  
16 his law office, and things of that nature.

17 Critically, and this is very important for our motion  
18 to dismiss grounds that we'll be talking about in a minute,  
19 Mr. Lucey's properties are half a mile away from 515  
20 Coleman. Mr. Lucey does not own property adjacent to the  
21 property at issue in this case. He does not own property in  
22 the immediate vicinity of the property at issue in this  
23 case.

24 So, on August 8<sup>th</sup>, 2022, we filed the incident motion  
25 to dismiss claiming that Mr. Lucey's attempt at, at an

1 appeal is jurisdictionally defective in numerous respects,  
2 and these grounds are all -- are outlined in the brief that  
3 we filed on Friday. I'm just gonna run through them real  
4 quickly and then touch on the specific grounds.

5 Mr. Lucey failed to name a necessary party in this  
6 zoning appeal. WIN515, LLC is named. The Town of Mount  
7 Pleasant is named. But the Design Review Board itself is  
8 not a named party in this appeal and we would submit that,  
9 based on the statutory framework governing zoning appeals as  
10 well as the case law, that the DRV itself is a necessary  
11 party that must be named within the 30 day appeal time  
12 period. And the case law talks about how these  
13 jurisdictional defects can not be cured past the 30 day  
14 period, which is long, long passed.

15 Second. Rule 74 of the Rule of Civil -- of the Rules  
16 of Civil Procedure provide that appeals to the Circuit Court  
17 must be filed and timely served on all respondents within 30  
18 days of the decision being appealed. So, obviously the  
19 decision was never served on the DRV as a distinct  
20 respondent entity because the DRV is not named in the case.

21 Next, we've got a statutory standing argument in this  
22 case that Mr. Lucey has not properly established  
23 "substantial interests" in the decision on appeal, which is  
24 the statutory standing test in this case. And then,  
25 finally, there's a failure to exhaust administrative

1 remedies argument as well.

2 If the Court finds that we're right on any of those  
3 four procedural grounds, Mr. Lucey's appeal must be  
4 dismissed with prejudice. It only takes one. We think we  
5 satisfied them all, of course, but it only takes one. And I  
6 don't want to go any further without remarking -- and this  
7 is not something I get to say all the time, Your Honor.

8 Do a lot of litigation, zoning litigation in the Town  
9 of Mount Pleasant. I'm pleased to say that I am aligned  
10 with the Town of Mount Pleasant today. The Town of Mount  
11 Pleasant agrees with us that Mr. Lucey's appeal needs to be  
12 dismissed with prejudice for many of the same reasons I just  
13 mentioned and that are outlined in the Town of Mount  
14 Pleasant's memo that was filed in this case.

15 So, I want to be clear that it's a two against one  
16 scenario in this, in this case and I want to be clear that  
17 this is not a merits hearing on Mr. Lucey's appeal, on the  
18 substance of Mr. Lucey's appeal. This is a motion to  
19 dismiss.

20 A hearing on appeal petition itself has not been  
21 scheduled yet and I think one of the main reasons why that  
22 has not happened is because the action was filed as a civil  
23 action. It was not filed as an appeal. It's a -- there's a  
24 special code you have to enter into when you file a zoning  
25 appeal through, through our court system. And so it's being

1 treated mechanically, for all intents and purposes, as a  
2 normal civil action.

3 So, we're only here today to talk about these threshold  
4 procedural, jurisdictional grounds. We're not here to argue  
5 about what the DRV did or didn't do or whether the building  
6 looks good or doesn't look good, things of that nature.

7 This is just a procedural situation.

8 So, if Your Honor will indulge me, and I appreciate the  
9 time this morning, I just want to hit some high points of  
10 our legal arguments here to make sure that the record is  
11 complete and this is all covered again in our briefs. But I  
12 want to just put a -- put an explanation point on some of  
13 these topics.

14 Zoning appeal procedure in South Carolina is strictly  
15 governed by the South Carolina Planning and Enabling Act of  
16 1994. There are, you know, statutory standing provisions  
17 that are clearly outlined in the statute that limit the  
18 universe of parties that can bring appeals over these quasi  
19 judicial zoning board decisions and the reason for that is,  
20 is obvious. The General Assembly does not want to let  
21 anybody in the world file lawsuits to hang up and hold up  
22 development projects.

23 So, in order to sort of limit the universe of folks  
24 entitled to bring these appeals, the Legislature limited  
25 statutory standing to folks with "a substantial interest"

1 and it's crystal clear here that the case law in South  
2 Carolina requires adjacenting or close proximity to  
3 establish that statutory standing requirement.

4 I'm -- used to say a few years ago, but it's -- time's  
5 kind of been creeping along. In 2014 the South Carolina  
6 Supreme Court decided the Carnival Cruise Ship case. This  
7 was a lawsuit brought by the Historic Charleston Foundation  
8 against the Ports Authority and the Carnival Cruise Line and  
9 the Supreme Court made it crystal clear that physical  
10 adjacency, an immediate proximity is necessary to, to meet  
11 that substantial interest test.

12 Mr. Lucey does not own and no where is it alleged in  
13 his filing that he owns properties that are physically  
14 adjacent to 515 Coleman, the project site at issue in this  
15 case. All of his parcels are on the other side of Coleman  
16 Boulevard approximately a half a mile away along Mill Street  
17 and some of those other feeder streets over there by the  
18 Creek. It's on the other side of, of town over there.

19 So, we don't have the substantial interest satisfied  
20 here. Any -- and Mr. Lucey's not representing any party  
21 with ownership or any type of property interest adjacent to,  
22 to 515 Coleman.

23 In addition to the physical proximity prong, the case  
24 law also talks about how you can't establish a substantial  
25 interest in a zoning appeal when the alleged harm is purely

1 hypothetical or conjectural in nature and this arises out of  
2 the Beaufort Realty versus Beaufort County case out of the  
3 Court of Appeals from 2001. As best as I can glean from Mr.  
4 Lucey's filing, and from his comments at these various  
5 hearings that we had with the Town of Mount Pleasant, his  
6 big concern is over the safety of this intersection of  
7 Simmons Street and Coleman Boulevard over there in Mount  
8 Pleasant.

9 Mr. Lucey is a, is a fine attorney but he is not a  
10 traffic engineer. There's no evidence that's ever been  
11 submitted either at the DRV hearing or in Mr. Lucey's appeal  
12 that provides any sort of technically competent evidence  
13 that gets to the point of safety and traffic.

14 Again, we're building a relatively small office  
15 building here and, therefore, any of these just suggestions  
16 that have been tossed out about safety and harm and things  
17 of that nature, these are purely hypothetical and  
18 conjectural harms that are, that are directly the type of  
19 alleged harms that the Courts have rejected as being  
20 sufficient to ground statutory standing in the context of  
21 zoning appeals. The Courts and our Legislature required  
22 parties appealing land use decisions to come forward with  
23 more than just, you know, talk and assumption and hyp --  
24 hypothetical and conjectural harms.

25 And, finally, Your Honor, the statutory substantial

1 interest test, the case law also talks about how standing  
2 does not arise in situations where the alleged harms and  
3 alleged interests are indistinguishable from the general  
4 members of the public.

5 Okay. This is one of the busiest intersections or  
6 busiest right of ways in the Town of Mount Pleasant. It's,  
7 it's Coleman Boulevard.

8 In Mr. Lucey's filing he talks about how he and his  
9 family members drive past this property and walk along the  
10 streets surrounding the property frequently. That makes Mr.  
11 Lucey no different than the thousands and tens of thousands  
12 of people that interact with this area of Mount Pleasant  
13 everyday.

14 This is a political and policy agreements. Mr. Lucey  
15 does not like this project. He's entitled to his opinion --  
16 the, the opinion. I respect his opinion but that opinion  
17 and that political and policy preference does not give rise  
18 to a substantial interest as stated by the General Assembly  
19 and as interpreted by the Courts.

20 The Courts want to see a clear, discernible, definable  
21 impact to an adjacent property owner to ground standing and  
22 this, this, this, this attempted an appeal comes nowhere  
23 close to satisfying the substantial interest test.

24 So, as a jurisdictional matter, we believe that Mr.  
25 Lucey has failed to allege a substantial interest. In fact,

1 substantial interest is not mentioned. These, these, these  
2 items are not even addressed in, in the appeal and we think,  
3 for that reason, the appeal should be dismissed with  
4 prejudice.

5 I mentioned three other grounds. I'm just gonna go  
6 through them real quickly. Mr. Lucey failed to name a  
7 necessary party in this case. That is the DRV itself.

8 As the town's brief really does a good job of hitting  
9 home, without naming the DRV itself, this Court does not  
10 have any jurisdiction to award Mr. Lucey with the relief  
11 he's asking for. Because when you look at the statutory  
12 framework that governs these zoning appeals, it speaks to  
13 the Court ordering the board to reverse its decision or  
14 ordering a rehearing before the board and taking all kinds  
15 of action with respect to the board. But the board is not a  
16 member or a -- rather a party to this case. There's simply  
17 no jurisdiction for the appeal.

18 If you do any case law searches over zoning appeals in  
19 South Carolina for decades, there's one common thread you'll  
20 find in the reported decisions. The quasi judicial boards  
21 themselves are all named in the action. It's one of these  
22 things that's such a basic elementary step of, of this  
23 procedure that it, it, it, it almost goes without saying  
24 that the, the board itself is a necessary party. And the  
25 town and the board are distinct entities for these purposes.

1           The town is a, is a municipal corporation. The DRV is  
2 a separate quasi judicial body that's established by the  
3 town. But, often times in these cases, you will have  
4 separate legal representation for these boards and they are  
5 separate entities.

6           So, by virtue of Justin naming the town itself, that  
7 does not subsume the DRV. These are separate delineated  
8 entities that need to be added and the failure to do so  
9 renders the appeal jurisdictionally defective because the  
10 case law that we cite talks about how all necessary parties  
11 have to be named within the original 30 day appeal window in  
12 order for the appeal to be jurisdictionally sound. And this  
13 is not something that can be cured as a normal civil action  
14 can, the Rule 15 and, you know, things of nature, because  
15 the, the zoning appeal statutes don't provide the, the  
16 ability to amend the decision or the filing rather outside  
17 of that appeal window.

18           And this is all covered in the Austin v. Board of  
19 Zoning Appeals case and the Vulcan Materials versus  
20 Greenville County Board of Appeals case both cited in our  
21 brief. And, by the way, both of those cases have the board  
22 of appeals as respondents in the caption. So, that further  
23 makes my argument that the board itself has to be named in  
24 these cases.

25           Rule 74, Your Honor, requires all necessary respondents

1 to be served within 30 days. Obviously that did not happen  
2 here because the DRV hasn't even been named. The affidavit  
3 of service on record for the town just simply states the  
4 town was served.

5 There's no evidence in the record, Your Honor, that the  
6 DRV has ever been served because the DRV has never been  
7 named and I will also say, if you look at the final sentence  
8 of Rule 74, and that rule is titled procedure on appellate  
9 to the Circuit Court, which we are, we are -- which we are  
10 here on today, it states that "the proceedings in the  
11 Circuit Court shall be in accordance with these rules." And  
12 I mention that, Your Honor, because we moved to dismiss this  
13 case under Rule 12 and we think we're entitled to avail  
14 ourselves of a, a motion to dismiss on jurisdictional  
15 grounds in, in light of this rule and other authorities.

16 And, finally -- and, again, I appreciate Your Honor  
17 allowing me to, you know, make a full record on this matter.

18 Mr. Lucey contains various allegations in his filing  
19 about various staff decisions that he disagrees with. In  
20 other words, one of the big ones is he takes issue with the  
21 fact that the DRV even was allowed to consider this matter  
22 back in June of 2022 after having denied it in December of  
23 2021.

24 Well, appeals of staff decisions don't go to this  
25 Court. It goes to the DRV itself or perhaps the Board of

1 zoning Appeals itself. And, again, this is covered by a  
2 separate section of the Planning Enabling Act that governs  
3 administrative appeals similarly.

4 Those avenues were never taken by Mr. Lucey in this  
5 matter. They can't be brought here first. He has to  
6 exhaust his administrative remedies. He's failed to do so.  
7 And so those grounds that are contained in his appeal are  
8 similarly procedurally defective and fatally defective and,  
9 and render the appeal fundamentally quad and subject to  
10 dismissal.

11 So, Your Honor, I appreciate your time this morning. I  
12 would refer you to our briefs where we get into all of these  
13 issues further and I'll just perhaps close by saying, you  
14 know, my client's a small businessman. He invested in this  
15 property. He's developed this property in reliance on the  
16 rules of the road set forth by the Town of Mount Pleasant.

17 Again, nothing that he's proposing to do here is  
18 contrary to the zoning of the property. And to enable a  
19 fundamentally flawed zoning appeal to delay his case and  
20 cost him a fortune as this case is dragged, is dragged out  
21 is, is really a terrible result that we're trying to avoid  
22 here. That's why this motion to dismiss is so important.

23 We need to throw this case out before it even gets  
24 started so that my client can avail himself of his property  
25 rights and of his rights that are afforded to him under the

1 Town of Mount Pleasant's procedures.

2 So, I'm happy to answer any questions. Again, I  
3 appreciate the time to go through everything this morning  
4 and look forward to answering any questions you might have.

5 Thank you.

6 THE COURT: Thank you. I don't have any at this point  
7 in time.

8 Mr. Lucey, you have the microphone.

9 MR. LUCEY: Yes, sir.

10 Since the town's also opposing me, Your Honor, would it  
11 make sense for them to go first and then for me to respond  
12 at a single time?

13 THE COURT: That'd be good. Let's do that. I'm sorry.  
14 Mr. Quisenberry.

15 MR. QUISENBERRY: Yeah, that's all right, judge. I  
16 appreciate it.

17 I'm not gonna take long. I -- we, we incorporate most  
18 of the developer's arguments as the Town of Mount Pleasant.  
19 We filed a, a very brief memo in support of, of the  
20 developer's motion that has a few points I just want to hit  
21 on real quickly.

22 Of course, you know, the town has a Design and Review  
23 Board. That is -- the town shares an appeal from that  
24 board's decision. This happens frequently and, you know,  
25 these, these things have to -- there is a procedure in the

1 statutes for accomplishing an appeal of the board's decision  
2 and they're quite specific about what's required.

3 You know, for instance, the Statute 6-9-920, it states  
4 that once an appeal of a board decision is filed, the  
5 Circuit Court must immediately notify the secretary of the  
6 Design Review Board of the appeal so then they can take --  
7 start taking steps they need to handle the appeal.

8 well, of course, that didn't happen here. The  
9 secretary of the board was never notified of this action  
10 because the DRV wasn't named as a party. So that shows you  
11 right there, Your Honor, that this is defective and it  
12 should be dismissed.

13 And as far as whether it, it, you know, he can cure  
14 this, you don't have to worry about that. Our position is,  
15 is that he can't and that it's untimely. But if he -- if  
16 you dismiss it, he attempts to refile against DRV, we'll  
17 deal with that then. But you can just dismiss it as being  
18 fatally flawed at this time because the DRV's not a party  
19 and we agree on the standing grounds.

20 You know, we would face, as the town -- as the DRV  
21 would face these challenges every project if, if anyone  
22 could file these, anyone that owned land in Mount Pleasant.  
23 And, you know, we have to have development move forward.

24 So, yes, it makes sense that anyone that lives adjacent  
25 to a property that's impacted that specifically can

1 challenge. But not anyone that owns land a half a mile  
2 away.

3 And to the extent Mr. Lucey challenges our description  
4 of where his properties are, you could ask him for the  
5 addresses and he -- and you can pull them up, Your Honor, on  
6 a map and see what we're talking about there. They're  
7 loaded -- located in a different neighborhood across a busy  
8 high -- state highway tucked into that neighborhood across  
9 the highway.

10 So, these aren't -- you can't even see this proposed  
11 development from his, from his property.

12 So, we echo the, the, the arguments and we believe the  
13 motion should be granted.

14 THE COURT: Thank you.

15 Okay. Mr. Lucey, you---

16 MR. LUCEY: Thank you, sir.

17 THE COURT: ---have the floor.

18 MR. LUCEY: Yes, sir. Thank you, sir.

19 So, you've heard most of the background. You didn't  
20 hear what really happened.

21 The DRV turned this whole thing down as violating the  
22 ordinances, and when everybody went on summer vacation, the  
23 applicant and the, the town, which were already in a  
24 lawsuit, cooperated. They mediated and they made a decision  
25 together and they rammed this thing through while

1 everybody's on vacation.

2 I was in Scotland. I couldn't show up at this hearing  
3 to, to, to object to it and, and they didn't -- they failed  
4 to give notice to known, interested parties. They published  
5 a notice a few days ahead of time on a website and did an  
6 end run around all of the neighboring citizens.

7 Let's talk about what, what, what this neighborhood is.  
8 This is a very small neighborhood on the edge of Shem Creek  
9 and, Your Honor, this is an intersection. At Simmons and  
10 Colemans is one of two entrances to this neighborhood.

11 My -- across the street -- I don't know if you heard  
12 this earlier, Your Honor. Across the street from the  
13 subject parcel is a school. It's a middle school.

14 My two grown children went to that middle school and  
15 crossed this intersection to get there. My four year old  
16 will be going to that middle school and regularly crosses  
17 this intersection now with me and will do so again when he  
18 goes there.

19 Contrary to what the Court has heard for about 35 or 45  
20 minutes now, my residence is two blocks from this  
21 intersection. My closest commercial property is two blocks  
22 from this intersection.

23 Now, the definition of a neighbor in the Cambridge  
24 Dictionary is one who lives near you. Doesn't have to live  
25 next to you. It's one that lives near you.

1           This property is on the edge of our neighborhood and  
2 it's on a very dangerous intersection. And, in 2021, prior  
3 to, prior to the, the second matter, 25 or so citizens  
4 showed up and testified to the DRV as to the problems with  
5 the way they're planning to develop this property. And,  
6 Your Honor, one of the last things you heard from the movant  
7 was oh, my client's a, a reasonable small business person  
8 who, who should be allowed to do what he's suppose to do  
9 with this property.

10           well, the, the guy bought it for \$400,000 cause  
11 everybody knows it's a problem property. It has no access.  
12 You can't get in. You can't get out.

13           The parking plan that they submitted with this  
14 application is, is, is purely speculative because you can't  
15 actually -- when there's traffic on the road, you can't  
16 actually enter and exit this parcel except to do so across  
17 the crosswalk where the children walk to and from school  
18 everyday. You've never seen such a busy children --  
19 intersection in your life.

20           As far as me being a gadfly who appeals everything all  
21 around Mount Pleasant, that's, that's not correct. This is  
22 only the second time I've been involved in a zoning matter  
23 and the only two zoning matters I've ever been involved in  
24 are the two in my neighborhood. Happens to be that, that  
25 plaintiff's -- defense, excuse me, the appellee's counsel is

1 involved in that matter too.

2 Let's talk about the -- and by the way, my residence  
3 being two blocks from this intersection, my residence has  
4 been there for 10 years. Long before this guy bought this  
5 property. And my nearest commercial property -- I've been  
6 practicing law with my law office there. The nearest  
7 commercial property's two blocks away. The main office in  
8 my complex, my main office, is, is four blocks away. I've  
9 been practicing there for 25 years, 24 years prior to this  
10 guy buying this particular parcel.

11 with regards to the priorities, Your Honor, addressing  
12 the six legal issues that are, are squarely presented to  
13 this Court, regard to the parties, the board is created by  
14 and a part of the Town of Mount Pleasant. They didn't give  
15 you any evidence as to a separate entity.

16 why?

17 Because there is none. There's no separate  
18 incorporation paper. There's no active Legislature creating  
19 a different commission down in, in, in the Town of Mount  
20 Pleasant to decide these matters.

21 what the Legislature did is the Legislature authorized  
22 the municipalities, such as the Town of Mount Pleasant, to  
23 create its own boards and hand to them the architectural  
24 matters and that's what this is. This is an arm of the Town  
25 of Mount Pleasant. It has no separate existence apart from

1 the Town of Mount Pleasant. If you go to the Town of Mount  
2 Pleasant web page, you will find this board and we submitted  
3 those web pages in our opposition, Your Honor.

4 There is no precedence supporting their position that  
5 the board has to be named as a party. There may be cases  
6 where the board has been named as a party. Sure. But  
7 there's no precedent that says they must be named as a  
8 party. And if the Court will notice, the Spanish wells case  
9 cited by the movement (sic) does not stand for that  
10 proposition one iota.

11 The Spanish wells case held that the permittee, the  
12 permitter, or the applicant is a necessary party. It did  
13 not hold that the board is a necessary party and there's not  
14 one case in either of their briefs that holds otherwise. In  
15 fact, the, the suggestion by the town of the statute  
16 requirement that the board immediately be provided a copy by  
17 the Clerk of Court, contrary to the town's position,  
18 supports the plaintiff's position.

19 why?

20 Because if I had to sue the board and I had to serve  
21 the board within 30 days, there's no need for the clerk to  
22 provide the board a copy because I'd already done it. So  
23 the statute they rely upon implies that the board does not  
24 need to be a necessary party. And, by the way, the statute  
25 they cited here this morning and in their brief and 6 -- I

1 think it's 6-1-920 or six something 920, it doesn't exist.  
2 I think they're referring to Section 120 and, and that would  
3 be the -- what I would refer to in this matter.

4 with regards to -- oh, yes, 6-9-920. That's the  
5 statute that doesn't exist. I believe they're trying to  
6 refer to 6-9-120. And, and, by the way, the fact that the  
7 clerk has to give somebody notice is, is not precedent that  
8 you have to sue somebody.

9 The clerk also has to give the attorney general, the  
10 State of South Carolina notice of any unfair trade practice  
11 action.

12 Does that mean that anybody filing an unfair trade  
13 practice action must sue the attorney general?

14 No, that's ridiculous and so is their argument that  
15 the -- that Section 6-9-120 supports any requirement  
16 whatsoever for the, the -- requiring the board to be named  
17 as a party.

18 with regards to the standing, we've discussed what the  
19 definition of the neighbor is, one who lives near you.  
20 Clearly the standing is properly alleged. Personal property  
21 is two blocks away. Commercial property, two blocks away.  
22 And use of this intersection on a regular basis, daily or  
23 twice a day, clearly the, the standing.

24 And, again, there's also the public interest aspect of  
25 standing, and with regards to that, again I'd call the

1 Court's attention to this being one of the most dangerous  
2 intersections in Mount Pleasant next to Moultrie Middle  
3 School, which has been there for decades and decades and  
4 decades and decades, decades longer than this guy who bought  
5 this speculative piece of property to make a buck.

6 So, there is public interest and I do have a unique  
7 aspect to that public interest because my kids went to  
8 school there and my four year old's gonna go to school  
9 there. This personally affects my family.

10 With regards to the exhaustion of remedies, Your Honor,  
11 and, and let me hit several issues in, in, in combination,  
12 they're complaining about how the complaint was styled as  
13 opposed to an appeal and, and they're complaining about  
14 exhaustion and remedies. And there's a bit of an overlap  
15 there because part of the complaint, Your Honor, actually  
16 sounds in mandamus. It wants to force the town to do what  
17 their ordinance says, which is that a project may not come  
18 back up for review within 12 months after it's denied  
19 without substantial change. That change didn't take place  
20 here.

21 So, it's not just an appeal. It's also seeking  
22 mandamus. So having phrased it as a complaint is totally  
23 absolutely proper.

24 But with regards to the issue of exhaustion itself,  
25 Your Honor, attached to the complaint is the letter written

1 to the Town of Mount Pleasant with regards to the  
2 deficiencies in the actions that the town was taking.  
3 Attached to our opposition to the motion, Your Honor, is the  
4 Town of Mount Pleasant's letter in response to that original  
5 complaint letter by me.

6 The Town of Mount Pleasant -- and, and within my  
7 original complaint letter, I said to the town to the extent  
8 it's necessary and appropriate, please consider this an  
9 appeal to BOZA on any matter herein. The town wrote back  
10 and refused to take an appeal to BOZA. The town wrote back  
11 and says you need to take everything to Circuit Court.

12 So, to the extent that the permittee or the town now  
13 want to take the position that the -- part of this should of  
14 been a BOZA appeal, they can't take the position. They're  
15 estopped from taking that position because they wrote back  
16 and refused to take that appeal that was properly and timely  
17 submitted to them and said take everything to Circuit Court.  
18 So we have exhausted our remedies.

19 Your Honor, I'd point out to the Court that, that the  
20 different positions taken -- if you -- if the Court would  
21 look at the, the movant's memo and the town's memo or even  
22 what we heard today. The different positions taken by these  
23 two parties both seeking the same goal. They're both  
24 seeking the dismissal. But the different justifications  
25 each of them proffers to the Court shows that the law on

1 this is not clear. It's not clearly supporting either one  
2 of them because the town would of picked up on the movant's  
3 law or the movant would of supported the town's position and  
4 neither one do that.

5 They, they have completely different grounds for their  
6 motion to dismiss and, and, and neither one of them has any  
7 precedence on point that said I had to sue the board or that  
8 I don't have standing or that I have failed on exhaustion or  
9 that there is a problem with service.

10 This was served. I attached to the opposition  
11 memorandum the service, timely service, on the town and the  
12 timely service on the permittee.

13 We're at the motion to dismiss stage, Your Honor. Any  
14 motion to dismiss that takes 45 minutes to argue obviously  
15 has questions of fact involved in it. This one clearly  
16 does. The, the, the -- even standing itself. The question  
17 of fact, does two blocks away constitute a neighbor?

18 Okay. Well, then first question of fact. Is it two  
19 blocks or half mile?

20 They're, they're trying to tell you I'm a half mile  
21 away.

22 Okay. So the first question of fact is it two blocks  
23 or a half mile. And then the second question of --  
24 mis-question of fact and law is a two block away property a  
25 neighbor.

1           These are not proper issues to be decided on a motion  
2 to dismiss. Not in this context.

3           Your Honor, I'm happy to answer any questions that you  
4 have. The plaintiff opposes the motion to dismiss obviously  
5 and we ask that you overrule it.

6           THE COURT: Thank you.

7           Anything in brief reply?

8           MR. APPEL: Thank, thank you, Your Honor. I'm gonna be  
9 very brief here.

10           Before Your Honor got on the call this morning, Mr.  
11 Lucey was telling us about his new plane. Mr. Lucey has a  
12 lot of money and probably---

13           MR. LUCEY: Objection. Move to strike. Improper  
14 argument.

15           MR. APPEL: My point is, my point is he's just talking  
16 about all these properties he owns. Let's look at the  
17 complaint.

18           The complaint states, in Paragraph 10, plaintiff  
19 resides and owns properties near the crossing. No specific  
20 properties are identified. No addresses are mentioned in  
21 his complaint. No TNS numbers are included in his  
22 complaint.

23           If you look at the attachment to his complaint, there's  
24 a footnote that gives further clarification about the  
25 properties that he owns. He talks about his office building

1 and annex that are located at the corner of Mill and Lucas  
2 Street.

3 That is not two blocks away. That's half a mile away  
4 on the other side of Coleman where Justin Lucey's office and  
5 his assemblage of commercial properties are located. There  
6 is nothing in the record, Your Honor, substantiating  
7 anything about personal residence two blocks away or  
8 anything to that nature. That is just testimony at a  
9 hearing right now and Your Honor's review is limited to the  
10 pleadings of record.

11 There's nothing in the record that supports Mr. Lucey  
12 owning a residence or any other property two blocks away.  
13 He doesn't own adjacent properties. He doesn't own  
14 properties in the, in the near vicinity and he doesn't have  
15 some -- a substantial interest.

16 When that---

17 THE COURT: Anything -- I'm, I'm sorry. Didn't mean to  
18 cut you off, sir.

19 MR. APPEL: Oh, I'm sorry, Your Honor. I'm, I'm  
20 bringing it to a, to a close here.

21 This Spanish wells case, this is the case from the  
22 Supreme Court that says the developer is a necessary party  
23 in the zoning appeals.

24 why is the developer a necessary party?

25 If you look at the language from that decision that we

1 quote in our brief, it says it's because it serves judicial  
2 economy because the permittee will be bound because it's a  
3 party to the appeal. If the DRV is not mentioned as a party  
4 or named as a party, the DRV can not be bound by this  
5 Court's decision and this gets to the statutes that  
6 Mr. Quisenberry was talking about. It, it goes without  
7 saying that the DRV is a, is a necessary party in this case.

8         6-29-930(a) of the statute says "in the event of the  
9 decision where the board is reversed by the Circuit Court,  
10 which Mr. Lucey is asking you to do, the board must be  
11 charged with the cost which must be paid by the governing  
12 authority which established the Board of Architectural  
13 Review." That, that relief can not be afforded without the  
14 DRV being named as a party.

15         And all of this talk about traffic safety and things of  
16 that nature, that was never properly brought before the DRV.  
17 This is the body that decides what color paint the building  
18 should be. It's a limited board. All of the review  
19 involving traffic safety and things of that nature has been  
20 completed and approved by the DOT, town staff, and things of  
21 that nature. That was irrelevant before the DRV. It's  
22 irrelevant today.

23         Mr. Lucey's attempting to argue the merits of the  
24 appeal, which is not before the Court today. He doesn't  
25 have standing. He didn't file his appeal properly.

1 Mr. Lucey is a, is a very skilled attorney. He should  
2 be charged with knowing the law and how it works and it's a  
3 very procedural statute as Mr. Quisenberry pointed out and  
4 this appeal fails in numerous procedural respects and  
5 your -- Your Honor finds that any of them are, are  
6 problematic, which we believe all of them are, the case is  
7 subject to dismissal with prejudice.

8 Thank you, Your Honor, and appreciate all the time this  
9 morning.

10 THE COURT: Yes, sir. Thank you.

11 Anything at all in response by the town?

12 MR. LUCEY: Yes, Your Honor. The complaint has a  
13 letter attached to it which identifies my address as being  
14 on Rue De Muckle. The Court can take judicial notice that  
15 Rue De Muckle is one block long and its only location is one  
16 block from the subject property. So the evidence is in the  
17 record that I am a neighbor.

18 Thank you, sir.

19 THE COURT: Thank you.

20 Anything from Mr. Quisenberry?

21 MR. QUISENBERRY: Yeah, of course this is an appeal.  
22 There is no discovery. There's no new evidence.

23 So, you know, the fact that he's saying that this is  
24 too early to, to grant the dismissal, what -- everything has  
25 to be in the record already. There's not gonna be anything

1 added.

2 So this is the time to make a decision about standing.  
3 This is the only time.

4 All right. Second, I misspoke. The statute 6-29-920.  
5 Not 6-9-920. I just left off 29. I apologize.

6 6-29-920, you'll see all the procedures that are  
7 required and why the board has to be a party. You know, the  
8 Court can't notify the secretary and comply with that  
9 statute if they're not a party.

10 Third, Lucey, you know, his argument supports our  
11 motion when he said well, some of these might be BOZA, some  
12 of these might be DRV. I can just follow the town and  
13 you-all figure it out.

14 Of course that's not the case. He has to name the  
15 board so we, we know who he's challenging, what decision  
16 he's challenging.

17 So, you know, he can't just file with the town and the  
18 town figures out who he's appealing from.

19 So, Your Honor, that supports the motion to dismiss and  
20 why the DRV has to be a party.

21 Thank you.

22 THE COURT: Thank you.

23 Gentlemen, thank you very much. It's good being with  
24 you. It's under advisement. Of course, my law clerk and I  
25 will review this and give it some thought and, of course,

1 get something out to you as quickly as we can.

2 MR. QUISENBERRY: Thank you.

3 MR. LUCEY: Thank you, sir.

4 MR. APPEL: Thank you.

5 THE COURT: Thank you.

6

7 \* \* \*END OF REQUESTED TRANSCRIPT OF RECORD\* \* \*

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Charleston County, South Carolina, on the 27<sup>th</sup> day of January, 2023.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 7<sup>th</sup>, 2023



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PAMELA E. GREEN, Court Reporter

# PAMELA E. GREEN - Circuit Court Reporter

Post Office Box 819 Reidville, SC 29375  
pgreen@sccourts.org

8-Sep-23

For  
Transcript

Evan Patrick Williams  
735 Johnnie Dodds Blvd. Suite 104  
Mount Pleasant, SC 29464

| Details                                | Amount          |
|----------------------------------------|-----------------|
| Justin Lucey v. Town of Mount Pleasant |                 |
| 2022-CP-10-3328                        |                 |
| 34 Pages at \$4.25 Per Page            | \$144.50        |
|                                        |                 |
| Subtotal                               | \$144.50        |
| Other Costs                            |                 |
| <b>Total Cost</b>                      | <b>\$144.50</b> |

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Requester's Signature: Evan Patrick Williams

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**From:** Evan Williams  
**Sent:** Thursday, September 14, 2023 2:53 PM  
**To:** Green, Pamela E.  
**Subject:** RE: Justin O'Toole [Lucey] v. Town of Mount Pleasant [Circuit Ct. No. 2022-CP-10-3328] [Appellate No. 2023-001006]

Thank you, Ms. Green. It is ok, I appreciate you working to complete the transcript and your quick response below.

Thank you,

Evan

---

Evan P. Williams

**BYBEE & TIBBALS**

735 Johnnie Dodds Blvd. Suite 104, Mt. Pleasant, SC 29464  
O: 843.881.1623 D: 843.513.1036 M: 502.727.9203

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**From:** Green, Pamela E. <PGreen@sccourts.org>  
**Sent:** Thursday, September 14, 2023 1:37 PM  
**To:** Evan Williams <ewilliams@bybeetibbals.com>  
**Subject:** Re: Justin O'Toole [Lucey] v. Town of Mount Pleasant [Circuit Ct. No. 2022-CP-10-3328] [Appellate No. 2023-001006]

Apparently I'm an idiot and emailed it to myself. You think I would have noticed that when I received the delivery receipt. I am so sorry. I've attached it and will correct that also with Court Administration. Once again, I apologize.

*Pamela E. Green*

Circuit Court Reporter

At-Large

---

**From:** Evan Williams <[ewilliams@bybeetibbals.com](mailto:ewilliams@bybeetibbals.com)>  
**Sent:** Thursday, September 14, 2023 1:25 PM  
**To:** Green, Pamela E. <[PGreen@sccourts.org](mailto:PGreen@sccourts.org)>  
**Cc:** Transcripts <[transcripts@sccourts.org](mailto:transcripts@sccourts.org)>; Jeff Tibbals <[jst@bybeetibbals.com](mailto:jst@bybeetibbals.com)>; Elliott Jones <[ejones@bybeetibbals.com](mailto:ejones@bybeetibbals.com)>; Whitney Moore <[wmoore@bybeetibbals.com](mailto:wmoore@bybeetibbals.com)>; Caroline McLaughlin <[cmclaughlin@bybeetibbals.com](mailto:cmclaughlin@bybeetibbals.com)>; Holmes, Tammie <[tholmes@sccourts.org](mailto:tholmes@sccourts.org)>; [ross@mklawsc.com](mailto:ross@mklawsc.com) <[ross@mklawsc.com](mailto:ross@mklawsc.com)>; [bquisenberry@ycrlaw.com](mailto:bquisenberry@ycrlaw.com) <[bquisenberry@ycrlaw.com](mailto:bquisenberry@ycrlaw.com)>; [zkern@ycrlaw.com](mailto:zkern@ycrlaw.com) <[zkern@ycrlaw.com](mailto:zkern@ycrlaw.com)>; Court Of Appeals Filings <[ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)>  
**Subject:** RE: Justin O'Toole [Lucey] v. Town of Mount Pleasant [Circuit Ct. No. 2022-CP-10-3328] [Appellate No. 2023-001006]

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Good afternoon Ms. Green,

We wanted to check in on the status of the requested transcript of the hearing in the above-captioned case. We have not received a copy of the transcript, but Ms. Holmes (copied here), advised the parties via separate correspondence that it was completed on September 8, 2023.

Please let us know when you have a moment.

Thank you,

Evan

—

Evan P. Williams

**BYBEE & TIBBALS**

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**From:** Evan Williams

**Sent:** Wednesday, August 23, 2023 11:15 AM

**To:** Green, Pamela E. <[PGreen@sccourts.org](mailto:PGreen@sccourts.org)>

**Cc:** Transcripts <[transcripts@sccourts.org](mailto:transcripts@sccourts.org)>; Jeff Tibbals <[jst@bybeetibbals.com](mailto:jst@bybeetibbals.com)>; Elliott Jones <[ejones@bybeetibbals.com](mailto:ejones@bybeetibbals.com)>; Whitney Moore <[wmoore@bybeetibbals.com](mailto:wmoore@bybeetibbals.com)>; Caroline McLaughlin <[cmclaughlin@bybeetibbals.com](mailto:cmclaughlin@bybeetibbals.com)>

**Subject:** RE: Justin O'Toole v. Town of Mount Pleasant

Thank you, Ms. Green. Please let us know if we can provide anything to assist.

Evan

—

Evan P. Williams

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---

**From:** Green, Pamela E. <[PGreen@sccourts.org](mailto:PGreen@sccourts.org)>

**Sent:** Tuesday, August 22, 2023 6:05 PM

**To:** Evan Williams <[ewilliams@bybeetibbals.com](mailto:ewilliams@bybeetibbals.com)>

**Cc:** Transcripts <[transcripts@sccourts.org](mailto:transcripts@sccourts.org)>

**Subject:** Justin O'Toole v. Town of Mount Pleasant

Mr. Williams,

I have been asked to prepare the above referenced transcript. Please feel free to reach out to me if you have any questions.

*Pamela E. Green*

Circuit Court Reporter

At-Large

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**Sep 14 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
R. Keith Kelly, Circuit Court Judge

---

Circuit Court Case No. 2022-CP-10-03328  
Appellate Case No. 2023-001006

---

Justin O'Toole Lucey, Appellant,

v.

The Town of Mount Pleasant, South Carolina, and  
WIN515, LLC, Respondents.

---

**PROOF OF SERVICE**

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I certify that I have served communications with the court reporter, as required under Rule 207, SCACR, as well as the transcript of the proceedings in the lower court, on the above-named Respondents via email to their respective counsel of record, on September 14, 2023, containing the above-referenced documents as attachments in .pdf, sent to the addresses shown below.

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Respectfully submitted,

s/Evan P. Williams

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September 14, 2022