

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Circuit Court Judge of the 9th Judicial Circuit

App. Case No. 2023-000296

J. Doe,

Appellant,

v.

Design Review Board (DRB)
and the
Town of Sullivans Island (SI),

Respondents.

MOTION TO STRIKE,
AND, IF DENIED, MOTION FOR ENLARGEMENT OF TIME AND
MOTION FOR ABEYANCE PENDING RESOLUTION

Without being disagreeable, there is disagreement with the other side's motion. The appellant respectfully requests interpretation of law and disposition by a panel of State Constitutional Judicial Officers nominated, vetted, and voted for interpretation of the law. As a threshold matter, Mr. Walker fundamentally misconstrues the function of the appellate courts by requesting an evidentiary ruling with introduction of evidence outside the scope of appeal, evidence outside the record, evidence which is misrepresented and disputed, and evidence which is insufficient to prove the truth of the matter asserted while denying the other side's substantial rights including due process and meaningful opportunity to be heard at a meaningful time. *See Norris v. Ferre*, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (evidence not presented to the lower court is not proper on appeal). *See Wmsbg. Rural Water & Sewer Co., Inc., v. Wmsbg. Cty. Water & Sewer Authority*, 367 S.C. 566, 627 S.E.2d 690 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence."); *Toal et al., Appellate Practice in South Carolina* (3rd ed. 2016) p. 418. The following statutes and South Carolina Constitutional protections, privileges, and immunities are pertinent:

Art. 1, § 23. Provisions of Constitution mandatory.

The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms. (1970 (56) 2684; 1971 (57) 315.)

Art. I, § 22. No person "shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ... and he shall have in all such instances *the right to judicial review*." (Emphasis supplied.)

Art. 1, § 2. Religious freedom; freedom of speech; right of assembly and petition.

The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department for a redress of grievances. (1970 (56) 2684; 1971 (57) 315.)

Art. 1, § 3. Privileges and immunities; due process; equal protection of laws.

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property, without due process of law, nor shall any person be denied the equal protection of the laws. (1970 (56) 2684; 1971 (57) 315.) (Emphasis supplied.)

Art. 1, § 4. Attainder; ex post facto laws; impairment of contracts; titles; effect of conviction. No bill of attainder, ex post facto law, no law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate. (1970 (56) 2684; 1971 (57) 315.) (Emphasis supplied.)

Art. 1, § 14. Trial by jury; witnesses; defense.

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; *to be confronted with the witnesses* against him; to have compulsory process for obtaining witnesses in his favor, and *to be fully heard* in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315.) (Emphasis supplied.)

Art. V, § 8. Election of members of Court of Appeals.

The members of the Court of Appeals shall be elected by a joint public vote of the General Assembly for a term of six years and shall continue in office until their successors shall be elected and qualify. In any contested election, the vote of each member of the General Assembly present and voting shall be recorded. Provided, that for the first election of members of the Court of Appeals, the General Assembly shall by law provide for staggered terms. (1985 Act No. 9.)

Art. V, § 9. Jurisdiction of Court of Appeals; binding effect of Supreme Court decisions.

The Court of Appeals shall have such jurisdiction as the General Assembly shall prescribe by general law. The decisions of the Supreme Court *shall bind the Court of Appeals as precedents*. (1985 Act No. 9.) (Emphasis supplied.)

Art. V, § 16. Compensation of Justices and judges; practice of law and dual office holding.

The Justices of the Supreme Court and the judges of the Court of Appeals and Circuit Court shall each receive compensation for their services to be fixed by law, which shall not be diminished during the term. They shall not, while in office, engage in the practice of law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions except in the militia, nor shall they be allowed any fees or perquisites of office. Any such Justice or judge who shall become a candidate for a popularly elected office shall thereby forfeit his judicial office. (1972 (57) 3176; 1973 (58) 161; 1985 Act No. 9.)

S.C. Code § 14-8-220

Power of Court and judges to administer oaths and writs; appeal. The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. An appeal shall be allowed from decision of any one judge to a panel of the Court.

S.C. Code § 14-8-80

By statute, the Legislative intent, letter, and spirit of the law *require at least three judges to constitute a quorum of the Court of Appeals for de novo interpretation of the law, to decide appeals, and for disposition of appeals by right.* The concurrence of a majority of the judges is necessary to decide cases and there is *no statutory authority* for a panel's or a single individual's overreaching impermissible dismissal after briefs have been filed based on unilateral after-created evidence not presented to the lower court. S.C. Code § 14-8-80. (Emphasis supplied.)

The record shall not include matter which was not presented to the lower court. Rule 210(c), SCACR. If the opposing party includes matter not presented below, it would be "appropriate to make a motion to strike that matter." See *Wmsbg. Rural Water & Sewer Co., Inc., v. Wmsbg. Cty. Water & Sewer Authority*, 367 S.C. 566, 627 S.E.2d 690 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence."); Toal *et al.*, *Appellate Practice in South Carolina* (3rd ed. 2016) p. 418. The undersigned timely submits motion to strike the other side's motion which is disputed, which is outside the record in this appeal to the Circuit Court, which is incomplete, which is insufficiently, if at all, supported, which includes affidavit insufficient to prove the truth of the matter asserted, which impermissibly denies substantial rights including procedural and substantive due process, which impermissibly relies on unreliable hearsay, and which, even if true, though denied, does not support the motion. Accordingly, the motion should be stricken or denied. In the alternative, deferral of motion to dismiss until consideration of final briefs, including reply brief, is respectfully requested.

Moreover, Mr. Walker overlooks, misapprehends, and/or fails to address the fact that the appeal turns on interpretation of the law including but not limited to, S.C. Code § 5-31-450:

SECTION 5-31-450. Drains for surface water.

Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person.

HISTORY: 1962 Code Section 59-224; 1952 Code Section 59-224; 1942 Code Section 7301; 1932 Code Section 7301; Civ. C. '22 Section 4449; Civ. C. '12 Section 3026; 1902 (23) 1038; 1953 (48) 272.

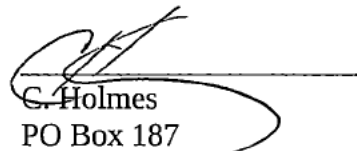
Accordingly, the Legislature intended to and did enact legislation including S.C. Code § 5-31-450 which is not moot. The motion should be stricken or denied. In the alternative, deferral of motion to dismiss until consideration of final briefs, including reply brief, is respectfully requested. "The touchstone 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).

Further, due to the Holidays and out-of-state travel, this motion for enlargement of time regarding return to the other side's motion as well as motion for enlargement of time regarding reply

brief is respectfully submitted. This deadline has not been extended previously. By analogy, the South Carolina Rules of Court are based on the Federal Rules of Court and appellant timely submits the motions with abeyance request. The Court has broad discretion under Rule 6(b)(1), Fed. R. Civ. P. See *Lonestar Steakhouse & Saloon v. Alpha of Va., Inc.*, 43 F.3rd 922, 929 (4th Cir. 1995). "[A]n application under Rule 6(b)(1) normally will be granted in the absence of bad faith or prejudice to the adverse party." *Mickalis Pawn Shop, LLC, v. Bloomberg*, 465 F.Supp.2d 543, 545 (D.S.C. 2006) (citations omitted). It is respectfully submitted there is no bad faith and no legal prejudice to the other side which supports the motions. See supporting affidavit attached.

For substantial justice affecting substantial rights, appellant hereby respectfully requests the Court's disposition of the motions with abeyance pending resolution and if denied, deferral of motion to dismiss pending final briefs including reply brief.

Respectfully submitted,



C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010
Appellant

7. The undersigned respectfully requests interpretation of the Legislature's duly enacted laws including but not limited to, the following:

SECTION 5-31-450. Drains for surface water.

Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person.

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8. Significantly and materially, Mr. Walker's out-of-time attempts to "unilaterally add after-created evidence" are unprofessional, disputed, and insufficient to prove the truth of the matter asserted. See *Wmsbg. Rural Water & Sewer Co., Inc., v. Wmsbg. Cty. Water & Sewer Authority*, 367 S.C. 566, 627 S.E.2d 690 (2006) ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence."); Toal *et al.*, *Appellate Practice in South Carolina* (3rd ed. 2016) p. 418.

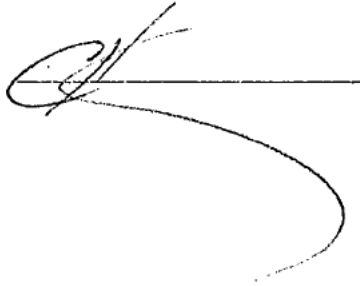
9. The record reflects this matter is not moot.

10. To the extent there is ambiguity, the rule of lenity supports the appellant's position.

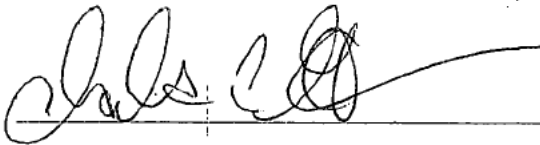
11. There is no bad faith and no legal prejudice to the other side which supports our motions.

12. Further, previously scheduled out-of-state travel over the Holidays supports our motions.

FURTHER THE AFFIANT SAITH NOT.



Subscribed and sworn to before me,
Notary Public, this 20th day
of December, 2024.



NOTARY PUBLIC

My commission expires: 1-8-2026



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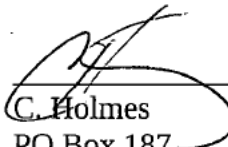
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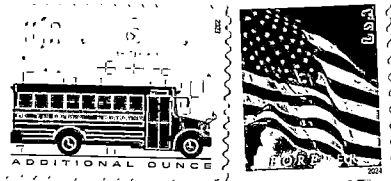
Respondents.

PROOF OF SERVICE

I certify that a true copy of the above document was served upon the respondents by regular first class mail postage pre-paid on this date at this address: GT Walker, 66 Hasell St., Chas., SC 29401.

Dated December 23, 2024.


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SC Court of Appeals

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