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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable 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.

AMENDED MOTION FOR RECONSIDERATION ADDRESSED TO THE CHIEF JUDGE
AND MOTION FOR ABEYANCE PENDING RESOLUTION, AND
IF DENIED, MOTION FOR RULE 240(j), SCACR, DE NOVO PANEL APPEAL, AND
MOTION FOR ABEYANCE PENDING RESOLUTION, AND
IF DENIED, MOTION FOR REMAND, AND
MOTION FOR ABEYANCE PENDING RESOLUTION

Without being disagreeable, the undersigned respectfully submits amended motion for reconsideration addressed to the Chief Judge and motion for abeyance pending resolution and, if denied, motion for Rule 240(j), SCACR, *de novo* panel appeal and motion for abeyance pending resolution and, if denied, motion for remand and motion for abeyance pending resolution for the February 13, 2025, opinion after the clerk misconstrued the undersigned's filings including motion to strike. This matter involves one of the most desirable locations of residential property on the East Coast, if not the country. Significantly and materially, Rule 210(c), SCACR, provides, "The record SHALL not include matter which was not presented to the lower court." Rule 210(c), SCACR (emphasis supplied). The record reflects the motion to strike is not a return, the filing fee is fully paid for determination of the motion on the merits regarding striking unilateral, after-created evidence not presented to the lower court, and appellant respectfully submits ministerial staff's attempts to "construe" a filing and confiscate filing fees are disputed. Moreover, the South Carolina Constitution Art. V, § 9 (*infra*), which is mandatory and prohibitory, and binding precedent from 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).

To the extent there is ambiguity, the rule of lenity supports appellant's position. Accordingly, the appellant respectfully enters motion addressed to the Chief Judge for reconsideration with abeyance including motion to strike out-of-time, after-acquired so-called evidence not presented to the lower court. Defendant's motion to dismiss is a dispositive motion and if appellant's motion to strike is denied, appellant respectfully enters motion for Rule 240(j), SCACR, *de novo* appeal with abeyance, and if denied, motion for remand for meaningful opportunity to propound discovery and respond to

after-acquired so-called evidence not presented to the lower court in order to provide meaningful record for meaningful review on appeal. Once again, defendants have unclean hands. Procedural and substantive due process require opportunity to brief the out-of-time after-acquired evidence not presented to the court below, not timely presented before briefing herein, and/or waived as untimely which is hereby requested. If not stricken, appellant respectfully submits motion for remand.

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.)

To the extent a ministerial clerk misconstrued a litigant's filing and impermissibly interpreted the law, the South Carolina Constitution and statutory authority provide for de novo interpretation of the law by State Constitutional Judicial Officers. As set forth more fully below, the undersigned

respectfully submits motion to strike after-acquired evidence outside the record after briefing which was never presented to the lower court.

The SCACR prohibit after-acquired evidence never presented to the lower court. "The record SHALL not include matter which was not presented to the lower court." Rule 210(c), SCACR (emphasis supplied). The adversely affected party has had no meaningful opportunity to respond to the misrepresentations, material omissions, and frank falsehoods in defendants unreliable so-called evidence. If expedited amended motion to strike unilaterally after-created evidence is denied, motion for remand is respectfully requested for presentation of after-acquired evidence to the lower court with meaningful opportunity to propound discovery and to present evidence in order to obtain adequate record in the lower court for meaningful review herein. "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).

Material to review, after failing to timely file his initial brief without requesting an extension, defendant lacks diligence and files his out-of-time brief after five (5) times more than the allowed amount of time pursuant to Rule 208, SCACR. The appellant respectfully submits amended expedited motion to strike the other side's motion which is in violation of the SCACR and which seeks out-of-time dismissal long after the briefs are due based on defendant's unprofessional introduction of unilaterally after-created evidence not presented to the lower court in the proceeding below. Rules

209(c) and 210(c), SCACR, and generally. “Thus, if the opposing party includes matter not presented below, it would be appropriate to make a **motion to strike that matter**...as the accompanying brief may have to be revised.” Toal *et al.*, *Appellate Practice in South Carolina* (S.C. Bar 2002, 2nd ed.), p. 261 (emphasis supplied). Binding Supreme Court precedent provides, “Nothing in the appellate court rules permits a party to unilaterally add after-created evidence.” *Wmsbg. Rural Water & Sewer Co., Inc., v. Wmsbg. Cty. Water & Sewer Authority*, 367 S.C. 566, 627 S.E.2d 690 (2006). Further, “there is no limit to the type of motion that could be filed in the appellate courts.” Toal *et al.*, *Appellate Practice in South Carolina* (3rd ed. 2016) p. 379. None of the unilateral after-acquired fabricated evidence which is not presented to the lower court is proper. Rules 209(c) and 210(c), SCACR, and generally. Defendants should and would object to introduction of unilateral, after-created, out-of-time evidence outside the record to finally decide the appeal in order to deny the other side any meaningful opportunity to respond. Pursuant to S.C. Const. art. V, § 16 (*supra*), S.C. Code § 14-8-80 (*supra*), and generally, if the motion to strike is denied, the appellant respectfully requests disposition by a quorum of the appeal 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 unilaterally after-created evidence not presented below, including 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. *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 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* (2nd ed. 2002) p. 261. The undersigned timely submits expedited amended motion to strike the other side’s unilateral after-created so-called evidence 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 defendant’s motion. Accordingly, defendant’s motion should be stricken or denied.

Moreover, Mr. Walker overlooks, misapprehends, and/or fails to address the fact that the appeal requests 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

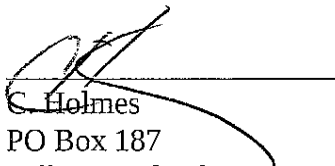
which is not moot. The motion should be stricken or denied. See supporting affidavit and previously

filed affidavits. If denied, remand to propound discovery and provide full and fair record for meaningful review is respectfully requested. Moreover, remand should and would further resolution by allowing defendant to make motion to include certain parties defendant wants to name.

CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, the undersigned respectfully requests this Court grant the undersigned's motions with abeyance pending resolution. The State Constitution and statutory authorization require disposition with interpretation of law by a quorum of State Constitutional Judicial Officers on the appeal panel regarding dispositive motion to dismiss. Defendant's unilateral, after-created evidence is not presented to the lower court, is not timely presented before briefing herein, and/or is waived as untimely which is respectfully requested. The undersigned requests defendant's unilateral after-created evidence be stricken with abeyance. If denied, due process requires defendant to present the unilateral after-created evidence to the lower court on remand in order to provide meaningful opportunity to respond and adequate record for meaningful review which is hereby requested.

Respectfully submitted,



C. Holmes
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Appellant

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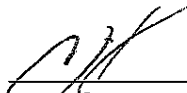
Design Review Board (DRB)
and the
Town of Sullivans Island (SI),

Respondents.

PROOF OF SERVICE

I certify that a 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 5/5/2025



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