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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Jessica A. Salvini, Circuit Court Judge

Case No. 2021-CP-39-00329
Court of Appeals Case No. 2025-001327

Michael and Mary Smith,

Appellants,

v.

King Asphalt, Inc.

Respondent.

**SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION
FOR APPOINTMENT OF COUNSEL**

Michael and Mary Smith
Appellants, pro se
220 Stancil Street
Easley, SC 29640
MichaelDSmith@housemail.com

Opposing Counsel of Record:
Catharine Garbee Griffin Esq.
Baker, Ravenel & Bender LLC
3710 Landmark Drive, Suite 400
Columbia, S.C. 29204
CGriffin@brblegal.com

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, Michael and Mary Smith, Appellants pro se in the above-styled matter, and respectfully submit this Supplemental Brief in support of the pending Motion for Appointment of Counsel and Remand to Repair the Record.

I. THE STATUTORY LIST IS NOT EXCLUSIVE OF CONSTITUTIONAL OR INHERENT AUTHORITY

South Carolina statutory law enumerates specific categories of civil proceedings in which appointment of counsel is mandatory: parental rights proceedings under S.C. Code §§ 63-7-1620, 63-7-2560(A) and (B); involuntary commitments for mental health and substance abuse treatment under S.C. Code §§ 44-17-410, 44-17-530, 44-52-60, 44-52-70, and 44-24-90(D); protection of persons under disability under S.C. Code §§ 62-5-303B and 62-5-403A; and post-conviction relief under S.C. Code § 17-27-60.

The existence of these statutes does not foreclose the authority of this Court to appoint counsel outside those categories. The statutory list addresses mandatory appointment; it does not strip this Court of discretionary appointment authority rooted in constitutional due process, Rule 608(b) of the South Carolina Appellate Court Rules, or the inherent equitable power of the Court to ensure the fair administration of justice.

II. RULE 608(b), SCACR, AUTHORIZES DISCRETIONARY APPOINTMENT

Rule 608(b), SCACR, expressly preserves the authority of this Court to appoint counsel in civil appellate proceedings in "those few cases in which it is reasonably necessary to do justice." This

Court has recognized that rule in *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983), and *Ex parte Martin*, 321 S.C. 533, 471 S.E.2d 134 (1995).

The rule functions as a fail-safe mechanism to prevent manifest injustice where:

- The legal issues exceed the capacity of a layperson to comprehend or navigate;
- The adversary possesses trained counsel and institutional resources creating structural imbalance;
- The substantive rights at stake are of such magnitude that denial of counsel would violate fundamental fairness; or
- The absence of representation would render the judicial process itself unreliable or illegitimate.

The appointment of counsel under Rule 608(b) is not a constitutional entitlement in every civil case, but a discretionary remedy invoked in extraordinary circumstances to preserve the integrity of the adjudicative process. This case presents those extraordinary circumstances.

III. DUE PROCESS ANALYSIS CONFIRMS APPOINTMENT IS BOTH PERMISSIBLE AND NECESSARY

The Due Process Clause of the Fourteenth Amendment does not guarantee appointed counsel in all civil matters. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981). However, *Lassiter* confirms that due process analysis is inherently fact-specific and case-by-case. The three-factor *Mathews v. Eldridge* balancing framework applied in *Lassiter*, the private interest affected, the risk of erroneous deprivation, and the governmental interest in accurate adjudication, is the proper analytical tool for determining whether appointment is constitutionally permissible in a given case. Applied here, all three factors confirm that this case falls squarely within the category of exceptional circumstances where appointment is both constitutionally permissible and necessary to prevent erroneous deprivation.

Factor 1, The Private Interest:

This appeal is Appellants' only remaining opportunity to obtain any measure of justice for personal injuries sustained in a 2019 accident that has consumed nearly seven years of their lives, depleted their financial resources, and left them substantially behind on ordinary living expenses. The underlying claim is not a commercial dispute, it is a personal injury action brought by injured, indigent, functionally illiterate individuals against a corporate defendant. That interest, while not implicating physical liberty, is of substantial magnitude and is irreplaceable. Denial of counsel does not merely disadvantage Appellants, it extinguishes their only remaining opportunity to be heard on the merits.

Factor 2, The Risk of Erroneous Deprivation:

This is the most compelling factor. Michael Smith is functionally illiterate. Both Appellants suffer from documented health and cognitive limitations. The certified record is structurally defective, approximately 300 of 830 exhibit pages are illegible, confirmed by the Deputy Clerk's own email, and critical digital evidence remains omitted entirely. The three preserved appellate issues require interpretation of state regulatory standards, application of the negligence per se doctrine, analysis of summary judgment procedure, and statutory construction of S.C. Code § 56-5-1535(F)(1). The risk that this appeal will be decided on procedural default rather than its merits, solely because Appellants cannot navigate a corrupted record without counsel, is not speculative. It is certain. That is precisely the erroneous deprivation *Lassiter* identifies as the central concern of due process analysis.

Factor 3, The Interest in Accurate Adjudication:

The State and this Court have a direct institutional interest in ensuring that appellate decisions

rest on the merits rather than on the procedural inability of unrepresented, functionally illiterate litigants to brief issues from a defective record. A decision against the Smiths rendered under these circumstances would not reflect the reliability that the adjudicative process demands. The trial court itself recognized this, finding that "all of this clearly warrants that Plaintiffs have counsel." (Order Mar. 19, 2024, p. 4.) That finding is unrebutted on appeal.

IV. THE COURT'S INHERENT EQUITABLE AUTHORITY SUPPORTS

APPOINTMENT

South Carolina courts retain inherent authority to regulate their own proceedings and ensure the fair administration of justice. This authority includes the discretionary power to appoint counsel where necessary to prevent a manifest miscarriage of justice, even in the absence of express statutory authorization.

The South Carolina Supreme Court has recognized that appellate courts possess broad discretionary authority to manage proceedings, ensure fairness, and prevent abuse. The appointment of counsel in extraordinary circumstances is a permissible exercise of that authority when no other remedy adequately protects the integrity of the judicial process. That principle is confirmed by the trial court's own March 19, 2024 Order finding that "all of this clearly warrants that Plaintiffs have counsel", a finding Respondent has never challenged on appeal.

V. EXTRAORDINARY CIRCUMSTANCES EXIST IN THIS CASE

A. Legal Complexity Beyond Layperson Capacity

This appeal presents three preserved issues of statewide importance that require professional appellate advocacy:

- Whether the trial court erred in applying a 2-inch height differential standard when the SCDOT contract and South Carolina Work Zone Safety Guidelines prohibited a differential exceeding 1 inch for milled surfaces reopened to traffic, a question requiring interpretation of state regulatory standards and their relationship to the negligence per se doctrine;
- Whether a trial court may impose a mandatory expert witness requirement in a negligence per se action based on statutory violations, and whether doing so at summary judgment without prior notice constitutes reversible error, a question with statewide implications for how negligence per se claims are litigated in South Carolina; and
- Whether the trial court misinterpreted the statutory definition of a highway work zone under S.C. Code § 56-5-1535(F)(1), a question of statutory construction that directly controlled the standard of care applied to Respondent.

Michael Smith is functionally illiterate. Both Appellants suffer from documented health and cognitive limitations. The handwritten petition filed March 25, 2024, stating "We cant read and write we need help we are both very sick", is itself physical proof that these Appellants cannot identify controlling authority, frame dispositive legal questions, or preserve issues for appellate review without assistance. Furthermore, the certified record is structurally defective.

Approximately 300 of 830 exhibit pages are illegible, blacked out, flipped, or sheared, as confirmed by the Deputy Clerk's own email. Critical digital evidence submitted on USB (SCHP dashcam video, 911 calls, insurance interview, Trooper audio) remains omitted from the certified record. No layperson, much less a functionally illiterate one, can brief complex appellate issues from a corrupted and incomplete record.

B. Adversarial Imbalance

Respondent King Asphalt, Inc. is represented by experienced appellate counsel at Baker, Ravenel & Bender, LLP, a Columbia firm with institutional resources, full access to the South Carolina appellate electronic filing system, Westlaw or Lexis legal research platforms, and professional support staff. Respondent filed a 212-page memorandum at the summary judgment hearing, handed to the court and to Mr. Smith simultaneously on the morning of the hearing,

reframing the entire theory of the case without prior notice. Appellants had no counsel present to object, request a continuance, or preserve the issue. That structural imbalance at the trial level persists and intensifies at the appellate level, where briefing requirements, preservation doctrine, and record citations demand legal training that Appellants do not possess.

C. Fundamental Interest at Stake

This appeal is Appellants' only remaining opportunity to obtain justice for injuries sustained in 2019. As Appellants documented under oath, the nearly seven years of litigation depleted their financial resources, left them substantially behind on ordinary living expenses, and exhausted the proceeds of a prior partial settlement, proceeds that went primarily to their then-attorney and were obtained at a time when Mr. Smith was impaired by prescription narcotics. Denial of counsel does not merely disadvantage Appellants, it extinguishes that opportunity entirely and renders the result of this appeal the product of procedural attrition rather than merits adjudication.

VI. CONCLUSION

The statutory list of civil proceedings requiring appointed counsel does not displace the constitutional, inherent, or rule-based authority of this Court to appoint counsel where extraordinary circumstances demand it. *Lassiter* confirms that due process analysis is case-by-case, and all three *Lassiter* factors weigh in favor of appointment here. Rule 608(b) independently authorizes appointment where "reasonably necessary to do justice." The trial court found that counsel is warranted. The record proves it. Respondent has never rebutted it.

Appointment of counsel is necessary to ensure the reliability of these proceedings, the protection of fundamental rights, and the integrity of the judicial process.

WHEREFORE, Appellants respectfully request that this Court exercise its discretionary authority under Rule 608(b), SCACR, the Due Process Clause of the Fourteenth Amendment, and its inherent equitable power, and enter an Order appointing counsel to represent the Smiths for the duration of this appeal.

Respectfully submitted,

/s/ Michael Smith
Michael Smith, Appellant pro se

/s/ Mary Smith
Mary Smith, Appellant pro se

220 Stancil Street
Easley, SC 29640
MichaelDSmith@housemail.com

Dated: February 27, 2026

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2026, I served a true and correct copy of the foregoing SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL with COS upon the Court and Respondent's counsel of record by electronic mail:

SC Court of Appeals : ctappfilings@sccourts.org

Catharine Garbee Griffin, Esq.
Baker, Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400
Columbia, SC 29204
CGriffin@brblegal.com

s/ Michael D. Smith
Michael D. Smith
Pro Se Appellant

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