

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Deborah Brooks Durden, Administrative Law Judge

Docket No. 13-ALJ-17-0104-CC

William J. Montgomery,Appellants,

v.

Spartanburg County Assessor, Respondents.

**RESPONDENT’S RETURN TO MOTION FOR
LEAVE TO FILE BRIEF OF AMICUS CURIAE**

Respondent William J. Montgomery submits this Return to the Motion for Leave to File Brief of Amicus Curiae, filed by the South Carolina Department of Revenue. Respondent objects to the Motion and to the proffered Amicus Brief because it is filled, not primarily with legal argument, but with opinion testimony, much of it speculative, and with newly proffered factual testimony that was not presented to the Administrative Law Court.

Testimony not presented to the lower court is not appropriate for consideration by the appellate court. “The Record shall not, however, include any matter which was not presented to the lower court or tribunal.” SCACR 210(c). “[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.” SCACR 210(h).

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are **presented** to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time **on appeal**, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was **not presented** and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was **not presented** to or passed upon by the **trial court** cannot be raised **on appeal**); Rule 210(c), SCACR (record **on appeal** shall not include **matter** which was **not presented** to lower court).

Elam v. South Carolina Dep’t. of Transportation, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004) (emphasis in original).

Respondent objects to major portions of the proffered Amicus Brief because they were not presented to the Administrative Law Court. The first paragraph on page 2 is filled with testimony concerning the processes of the appraisal of real property in South Carolina. This is classic expert opinion testimony.

The second paragraph on page 2 includes statements of factual testimony about how County Assessors receive training. In footnote 1, the proposed Amicus Brief admits that this information is “not part of the transcript from the ALC, and likely not part of the Motion for Summary Judgment below.” The remainder of footnote 1 is expert testimony about how an appraiser determines what type of soil is being taxed. This expert testimony was not presented to the court below.

The first full paragraph on page 4 is primarily opinion testimony about the meaning and intent of section 110.1 of *South Carolina Property Tax*, the Department’s publication. The second paragraph on page 4, which continues on page 5, is primarily testimony about the purpose and use of the publication *South Carolina Property Tax*. (The Amicus Brief

does not reference the other Departmental publication: *Valuation of Agricultural Real Property in South Carolina*, which also advises County Assessors and Appraisers in accord with the legal position of the Respondent and the Administrative Law Court.)

The first two paragraphs under Section II on pages 6 and 7 consist of opinion testimony about how property is to be classified and valued.

The first paragraph below the quotation on page 9 and the first half of the second paragraph on page 9 are opinion testimony about how certain statutory sections should be interpreted and the effect that interpretation would have on County Appraisers and Assessors. The remainder of the long paragraph that extends from the bottom of page 9 through page 10, as well as footnote 6, is all factual testimony about the qualifications and skills of some theoretical appraiser or assessor. Footnote 7 on page 10 is opinion testimony suggesting that, “presumably, the legislature has left the actual process up to the professional, licensed appraisers.” This is both speculation and opinion testimony.

On page 11, the paragraph below the quotation is opinion testimony about “legislative intent,” which the Amicus Brief suggests is “to provide guidance to the appraisers for the unfamiliar process of valuing agricultural land.” This is new opinion testimony at best and rank speculation at worst.

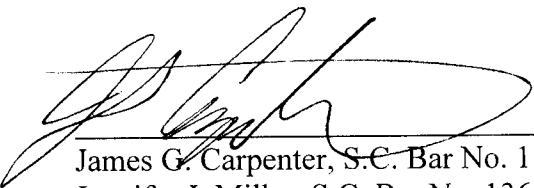
The top paragraph on page 12 suggests, in opinion testimony, that the legal position suggested by the Respondent and adopted by several Administrative Law Court opinions is “absurd.” The bottom paragraph on page 12 is speculative opinion testimony about the intent of the Legislature and the economic impact of the law as read by the Respondent and the Administrative Law Court.

None of this testimony was presented to the Administrative Law Court; nor was it subjected to cross-examination; nor was the Respondent given an opportunity to submit opposing testimony or other evidence. This case went to the Administrative Law Court on stipulated facts and on Cross Motions for Summary Judgment. Because none of this testimony, factual or opinion based, was presented to the Administrative Law Court, it has no place in the Record on Appeal, nor in the consideration of this Court.

If all of this new testimony of alleged fact and opinion were eliminated from the proposed Amicus Brief, very little of the proposed Amicus Brief would remain. The proposed Amicus Brief appears to be little more than an attempt by the Appellants' in the Department to infuse additional fact and opinion testimony (not tested by cross-examination) into the Record on Appeal, when they had failed to present such testimony to the Administrative Law Court, and after the parties have already submitted their initial briefs and designated matters for the Record on Appeal.

Wherefore, Respondent objects to the proposed Amicus Brief, opposes the Motion to file it, and prays the Court that the Motion be DENIED.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



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July 2, 2014

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing Respondent's Return to Motion for Leave to File Brief of Amicus Curiae upon counsel for the Appellants by first class mail, postage prepaid this Wednesday, July 02, 2014, addressed as follows:

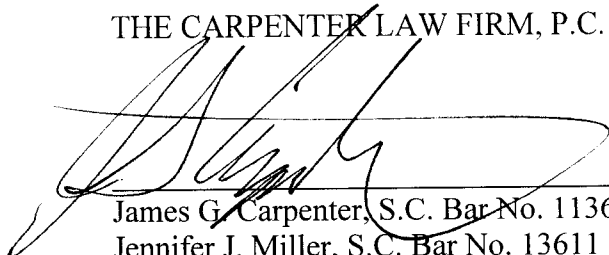
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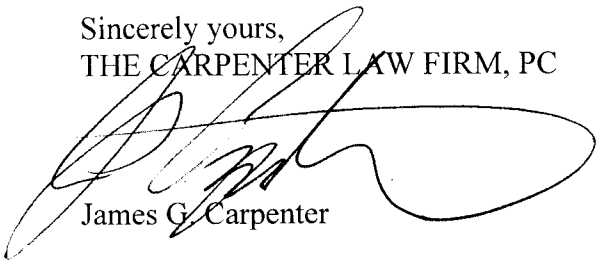
Re: William J. Montgomery vs. Spartanburg County Assessor
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Dear Ms. Kitchings:

Respondent encloses Respondent's Return to Motion for Leave to File Brief of Amicus Curiae, with a certificate of service.

If you have any questions, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

Enclosure
CC w/ enclosure: opposing counsel

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