

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2013-CP-26-5009

K N S Foundation, LLC d/b/a Elite Appellant

v.

City of Myrtle Beach Respondent

MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO SUPPLEMENT
THE RECORD ON APPEAL
AND IN SUPPORT OF
APPELLANT'S MOTION TO VACATE AND TO REMAND

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The Appellant, KNS, Foundation LLC, d/b/a Elite ("KNS"), submits this Memorandum in Opposition to Respondent Myrtle Beach's ("Myrtle Beach") Motion to Supplement the Record on Appeal. This Memorandum is also submitted in support of its Motion to Vacate and Motion to Remand filed contemporaneously with this Memorandum.

KNS contends that Myrtle Beach did not submit an original certified record of the proceedings before the City Council of Myrtle Beach to the Circuit Court, as it is required to do pursuant Rule 75, SCRCP. As a result, the Circuit Court did not have the complete record on appeal before it when it rendered its Order Denying Amended Appeal from the decision of the City Council of Myrtle Beach (see Exhibit A to Appellant's Motion filed contemporaneously herewith). This issue has been briefed in both KNS's Briefs and Myrtle Beach's Brief, and those arguments are incorporated herein by reference.

This appeal arises out of Myrtle Beach's revocation of three business licenses issued to KNS. As a result, KNS was forced to close and has not able to reopen for business. A hearing was held before the City Council of Myrtle Beach on June 25, 2013. During that hearing, both Myrtle Beach and KNS presented testimony and exhibits. At the conclusion of the hearing, City Council, in a three (3) to two (2) decision, voted to revoke KNS's business licenses.

KNS then timely appealed to the Circuit Court the decision of Myrtle Beach to revoke KNS's business licenses. KNS attached to its appeal some, but not all, of the exhibits that were introduced before City Council. Recognizing its duty to provide a certified record to the Circuit Court, Myrtle Beach, in its Response to Appeal (see Exhibit B to the Motion filed contemporaneously herewith), asserted an **OBJECTION TO EXHIBITS** objecting to the exhibits KNS attached to its appeal, except for the copy of the

Order of City Council. In its Objection, Myrtle Beach stated that the Clerk of the City of Myrtle Beach would provide the record for the appeal pursuant to the South Carolina Rules of Civil Procedure. As is demonstrated by the Affidavit of the Honorable Melanie Huggins-Ward (see Exhibit A to Appellant's Motion filed contemporaneously herewith), this apparently was not done, although Myrtle Beach argues that it attempted to file the exhibits.

The Honorable William H. Seals, Jr. heard the appeal, and in his written decision affirmed Myrtle Beach's revocation of KNS's business licenses. Judge Seals' review was done without the benefit of all of the exhibits that were introduced at the hearing before City Council. The failure of Myrtle Beach to file the exhibits was discovered when the Record on Appeal in this instant appeal was being assembled.

Although KNS recognizes that it has the duty to prepare the Record on Appeal before this Court, South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review. See Johnson v. South Carolina Dept. of Probation, Parole and Pardon Services, 372 S.C. 279, 283, 641 S.E.2d 895, 897 (S.C. 2007). This general rule should not apply to the facts of this case.

As shown above, Myrtle Beach had the duty of providing the Circuit Court with the certified original record. Without the exhibits from the hearing before it, the Circuit Court could not review the entire original certified record. As a result, the Circuit Court could not reasonably determine whether there was sufficient evidence to support Myrtle Beach's revocation of KNS's three business licenses.

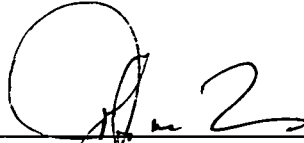
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By analogy, when an appeal is taken from a grant of summary judgment “[i]t is [the appellate court’s] duty to undertake a thorough and meaningful review of the trial court’s order and the entire record on appeal”. Owen v. Link Process Systems Co., 342 S.C. 232, 235, 536, S.E.2d 86, 88 (Ct. App. 2000). KNS argues that it deserves the same level of review that this Court would have undertaken had this appeal been from a grant of summary judgment.

KNS has not waived its right to object to the record being supplemented at this stage. As explained above, the lack of the original certified record only came to light when KNS’s counsel was preparing the Designation of Matter for the Record on Appeal. Additionally, Myrtle Beach had the initial duty to ensure that the certified original record was provided to the Circuit Court, as required by Rule 75, SCRPC. KNS’s counsel had the right to rely on Myrtle Beach’s representation that it would certify and file the original record. Myrtle Beach’s Petition to Supplement the Record should be denied because there is no evidence that the exhibits, other than the ones submitted by KNS, were considered by the Circuit Court. This appeal should be remanded back to the Circuit Court with instructions that the Order of the Circuit Court dated September 23, 2013 and filed September 30, 2014 be vacated and that the appeal be considered with the original certified record available for the Circuit Court to review.

WHEREFORE, the Appellant prays that Respondent’s Motion to Supplement Record on Appeal be denied, that the Order Denying Amended Appeal dated September 23, 2013 and filed September 30, 2013 be vacated, and that this matter be remanded to the Circuit Court with instructions that it consider the Appellant’s appeal with the certified original record before it.

Respectfully submitted,



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September 2, 2014

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