

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

**REPLY TO  
RESPONDENT CITY OF MYRTLE BEACH'S RESPONSE  
IN OPPOSITION TO APPELLANT'S  
MOTION TO VACATE AND TO REMAND**

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**SC Court of Appeals**

The Appellant, KNS, Foundation LLC, d/b/a Elite ("KNS"), submits this Reply to City of Myrtle Beach's ("Myrtle Beach") Response in Opposition to Appellant's Motion to Vacate and Motion to Remand ("Myrtle Beach's Response").

### **Statement of Case**

KNS responds to three points raised in Myrtle Beach's Response. First and foremost, Myrtle Beach accuses KNS of having implied or alleged that Judge Seals had made false statements in his Orders affirming the decision of City Council (Myrtle Beach's Response, pp. 2-3). This allegation is most inappropriate. KNS has only argued that Judge Seals did not have the full record on appeal before him when he rendered his decision. Nothing in KNS's argument that the Circuit Court was not provided the full record on appeal for review can be interpreted to suggest that the Circuit Court had made false statements. To now argue that KNS suggested that Judge Seals made false statements is not only inaccurate, but is a reckless and inappropriate assertion not supported by the record.

Second, as stated in its Motion to Vacate and Motion to Remand and accompanying memorandum ("Motion to Vacate"), KNS pointed out that Myrtle Beach had objected to KNS submitting any documents with its appeal to the Circuit Court, other than a copy of the Order of City Council. Myrtle Beach now claims that it was only objecting to new evidence being submitted by KNS in response to its appeal. As previously shown in its Motion to Vacate, Myrtle Beach objected to KNS introducing any documents on the grounds that it, alone, had the duty of preparing and presenting the record on appeal to the Circuit Court.

Third, the Affidavit of Thomas E. Ellenberg does not provide any probative support to Myrtle Beach's claim that it properly filed with the Circuit Court the complete Record on Appeal. Common practice would show that a party filing an official pleading or document with the circuit court would provide, at a minimum, a document with a caption showing what was being filed, and also show a date stamp from the Clerk's office of when it was filed. Myrtle Beach has not provided even a document bearing the caption of the case showing that attached to it was the record on appeal being filed in this matter. Additionally, Myrtle Beach has not provided any correspondence or document showing that it notified KNS's counsel that the Record on appeal had been filed.

### **Argument**

KNS has fully addressed the issues raised in Myrtle Beach's Response. Appellant, therefore, republishes here its argument on this issue filed with the Court of Appeals in its Reply Brief:

#### ***I. THE RECORD ON APPEAL IS DEFECTIVE.***

*Facts regarding the record on appeal are clear and undeniable:*

##### *1. The Record on Appeal Submitted to the Circuit Court Was Defective.*

*The record on appeal that the City should have delivered to the Circuit Court, was defective.*

*The Clerk of Court's stamp shows the transcript was filed, but not the exhibits. As shown by the frequent references in the City's brief in this Court, the exhibits are an indispensable part of the record on appeal. The transcript was also filed late, and it is not clear if the Circuit Court judge actually ever saw it.<sup>1</sup>*

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<sup>1</sup> The Clerk's stamp shows a transcript was filed on September 18, 2013, which is the same day as the entry of the Circuit Court's Form 4 Order. Also, the transcript was placed in the wrong case file, *i.e.*, Civil Action No. 2013-CP-26-04103, the file of the previous case in which a

2. *The Court Below Proceeded Without the Full Record, and the Decision Is Based on That Defective Record on Appeal.*<sup>2</sup>

*In the circumstances presented by this case, the proper route for this Court is to unwind the sequence of events, concluding with the Order Denying the Amended Appeal, and send the case back to the Circuit Court to secure a proper and complete record on appeal under S.C. Code § 18-7-80. Only then can the Circuit Court properly hear and decide the appeal from the Myrtle Beach City Council.*

*That is the course followed by the Supreme Court in other cases of defective records on appeal. E.g., State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964); State v. Barbee, 280 S.C. 328, 313 S.E.2d 297 (1984); State v. Evans, 260 S.C. 523, 197 S.E.2d 282 (1973). In these cases the Supreme Court has held that “it was clearly error for the circuit court to hear the appeal . . .” State v. Barbee, 280 S.C. at 329, 313 S.E.2d at 298. It is true that these cases say an appellant is the party with the obligation to secure a proper record on appeal, but those were all cases where the lower court appellant was seeking an outright reversal of the Magistrate’s decision. The Supreme Court rejected that remedy but remanded each case so that a proper appeal, on a proper record, could take place.*

*In this case, moreover, the default was not that of a neutral magistrate, but rather that of the City, one of the parties to this case. To allow a party to benefit by its own default would be a manifest injustice not supported by any precedent. In fact, counsel for the City acknowledged the City’s obligation to provide the record and said it would do so. (R. p. 35) The City’s objection amounts to an estoppel of City’s present argument. See Queen’s Grant II Horizontal Property*

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<sup>2</sup> KNS/Elite presumes the lower court was unaware that the full record was not before it. The Circuit Court Order does not reference the transcripts or the exhibits.

Regime v. Greenwood Development Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911-912 (Ct. App. 2006).

3. *The City Makes Two Main Arguments, Both of Them Wrong.*

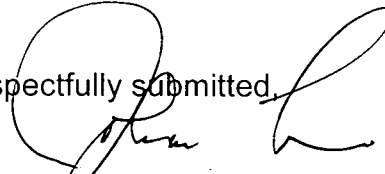
*First, the City says KNS/Elite failed to preserve this issue below, but the issue did not come to light until after the decision below, when counsel for KNS/Elite was searching for the record to file in this appeal.*

*Second, the City relies on the case of Joyner v. Glimcher Properties, 356 S.C. 460, 589 S.E.2d 762 (2002), but that was a dismissal for want of prosecution after the appellant took no action for many months, even after the matter was raised. That, too, was a default by a neutral magistrate rather than a party to the case. The Court of Appeals relied on the fact that no record had been filed, which it distinguished from a defective record (as in the Supreme Court cases referred to above, and the instant case). All in all, there is no case where an appellate court has let stand a judgment based on a defective record.*

**Conclusion**

KNS has demonstrated that the complete Record on Appeal was not provided to the Circuit Court. Myrtle Beach has not established, in its Response to KNS's Motion to Vacate that the Record on Appeal was actually provided to the Circuit Court before the Circuit Court rendered its decision denying KNS's appeal. For these reasons, KNS respectfully prays that this Court vacate the Order Denying KNS's appeal and remand the matter back to Circuit Court.

Respectfully submitted,



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Counsel for Appellants

September 15, 2014

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge  
Trial Court Case No.: 2013-CP-26-04103

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Appellate Case No. 2013-002793

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

v.

City of Myrtle Beach ..... Respondent

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PROOF OF SERVICE

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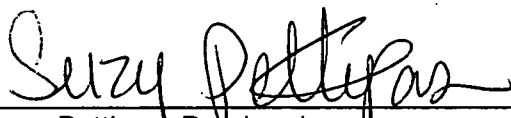
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I certify that I have served a copy of the Appellant's REPLY TO RESPONDENT CITY OF MYRTLE BEACH'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO VACATE AND TO REMAND by depositing a copy of it in the U.S. Mail on September 15, 2014, addressed to the attorneys of record:

Michael W. Battle, Esq.  
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900 Main Street, Suite C  
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September 15, 2014

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Honorable Jenny Abbott Kitchings  
Clerk of the Court  
South Carolina Court of Appeals  
Post Office Box 116929  
Columbia, South Carolina 29211

Re: *KNS Foundation, LLC d/b/a Elite v City of Myrtle Beach*  
Appellate Case No. 2014-002793

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the **Appellant's Reply to Respondent City of Myrtle Beach's Response in Opposition to Appellant's Motion to Vacate and to Remand**, together with my **Proof of Service**, to be filed in the above-referenced case. I would appreciate your returning a clocked copy to me in the enclosed, self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,

LAW OFFICES OF JOHN M. LEITER, PA



Suzy Pettipas  
Paralegal

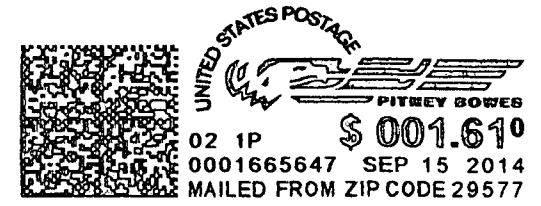
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Enclosures

cc: Howell V. Bellamy, III, Esq.  
Armand G. Derfner, Esq.  
Michael Warner Battle, Esq.

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