THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2013-002697

William J. Montgomery, ... Respondent,

v.

Spartanburg County Assessor,..... . Appellant

RESPONDENT'S BRIEF IN OPPOSITION TO THE BRIEFS OF AMICUS CURIAE

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STATEMENT OF THE CASE

Respondent William J. Montgomery submits this Brief in Opposition to the Briefs of Amicus Curiae, filed by the South Carolina Department of Revenue and the South Carolina Association of Counties. Respondent objects to the amicus briefs' inclusion of newly proffered factual testimony that was not presented to the Administrative Law Court and of opinion testimony, much of it speculative.

Respondent articulated in detail the factual assertions and the assertions in the nature of expert testimony in his Memoranda in Opposition to the Motions to File the Amicus Brief of the South Carolina Department of Revenue.[1]

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[1] Respondent objected to major portions of the Amicus Brief proffered by the Department of Revenue, 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 factual testimony describing County Assessors' 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 new expert testimony explaining an appraiser's determination of the type of soil being taxed. This expert testimony was not presented to the court below.

The first full paragraph on page 4 is primarily new 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 new 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 new 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 new opinion testimony arguing for a particular interpretation of certain statutory sections and speculating on 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 new theoretical testimony about the probable qualifications and skills of the average appraiser or assessor. Footnote 7 on page 10 is new speculative opinion testimony suggesting that, "presumably, the legislature has left the actual process up to the professional, licensed appraisers." On page 11 i006Ethe 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 new and 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.

Respondents also objected to the factual and opinion assertions in the Amicus Brief of the South Carolina Association of Counties.[2]

Appellants recorded a fairly meager factual record in the Administrative Law Court and chose to appeal this case even though it has a smaller factual record than a similar case from Greenwood County. *Dotsy, LLC v. Greenwood County Assessor*, No. 13-ALJ-17-0061-CC (S.C. Admin. Law Ct. 2014). The *Dotsy* case was filed in the Administrative Law Court and also addressed the same issue that Montgomery addressed, but in Greenwood County. *Dotsy* involved a much greater taxation. In *Dotsy*, the Administrative Law Court heard cross motions for summary judgment, denied them both, and conducted a full trial. The Greenwood Assessor presented an expert witness who had served in the Department of Revenue for more than 30 years. Through cross examination, counsel for the taxpayer elicited many admissions from that expert that were helpful to the taxpayer. With that factual record, Greenwood County chose not to appeal *Dotsy* to this Court, even though the counsel for the Assessor in *Dotsy* also serve as counsel for the Assessor in this case.

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[2] Respondent objected to statements of fact or opinion in the Amicus Brief proffered by the Association of Counties, because they were not presented to the Administrative Law Court. The first sentence under Background section on page 1 is an assertion of fact concerning the source of funding for counties in South Carolina. This is a factual assertion not presented to the Administrative Law Court.
On page 2, about two-thirds of the way down the page, the proposed amicus brief alleges a statement about what the General Assembly "recognized" when it enacted a particular statute. This assertion is without any evidentiary foundation, it was not subjected to cross-examination, and it was not presented to the Administrative Law Court.
On page 4, about one-third of the way down the page, the proffered amicus brief first asserts some facts about the historical interpretation of a statute by the Department of Revenue and county assessors, including the Spartanburg County Assessor. Similarly, on page 10, the first paragraph under section III, the amicus brief first asserts that its interpretation is "the long-standing interpretation . . . by the Department of Revenue and forty-six county assessors for the past 34 years." This is an attempt to insert alleged expert testimony that was not submitted to the Administrative Law Court and was not subjected to cross-examination. All of section III is based on this supposed factual assertion.

The Spartanburg Assessor did not call an expert witness at the Administrative Law Court, which would have subjected him to cross examination. The Assessor did not proffer an expert affidavit, in response to which Montgomery could have filed responsive affidavits. Now the Spartanburg Assessor attempts to supplement the more meager record and obtain the benefit of an expert witness without subjecting him to the important and salutary effects of cross-examination and the adversarial litigation process, or giving Montgomery a legitimate opportunity to submit opposing testimony. The Assessor seeks to refashion the factual record more to their liking by enlisting the help of their friends, or amici, the South Carolina Department of Revenue, and the South Carolina Association of Counties.

The Assessor and his counsel made the strategic decision to appeal the *Montgomery* case and to decline to appeal the *Dotsy* order. To allow the Assessor choose to appeal one case with a meager record, to ignore the case with the fuller record, and then to supplement the meager case record from the Administrative Law Court that did not contain the cross-examination of the Assessor's expert witness would not be just or fair to the taxpayer, Montgomery.

Respondent objected to major portions of the amicus briefs, because their factual assertions were not presented to the Administrative Law Court. Second, they were not tested with cross examination. Third, they were not subjected to the Rules of Evidence for competency or for an adequate evidentiary foundation. The amicus briefs are filled with proffered factual and expert opinion testimony.

ARGUMENT

I. THE APPELLATE RECORD SHOULD NOT CONTAIN NEW FACTS OR NEW EXPERT OPINION.

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 added). The amicus briefs would seek to supplement the factual and expert record contrary to the South Carolina Appellate Court Rules and contrary to "reported cases in South Carolina for at least four generations." *Id.*

Justice Scalia pointed out the inherent defects and the legal and logistical flaws in accepting factual data or other assertions in the nature of testimony, untested by the rules of evidence or the adversary process.

> ***Supreme Court briefs are an inappropriate place to develop the key facts in a case.*** We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert

> witnesses and the procedural protections of discovery. See Fed. Rule Crim. Proc. 16(a)(1)(F), (G); Fed. Rules Evid. 702–703, 705. ***An adversarial process in the trial courts can identify flaws in the methodology*** of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all.

Sykes v United States, 131 S.Ct. 2267, 2286, 180 L.Ed.2d 60 (2011) (Scalia, *dissenting*) (emphasis added). The facts and opinions presented in amicus briefs have none of the safeguards of the litigation process.

If all of this new testimony of alleged fact and opinion were eliminated from the amicus briefs, very little of the amicus briefs would remain. The amicus briefs attempt to infuse additional fact and opinion testimony (not tested by cross-examination) into the Record on Appeal, when the Assessor had failed to present such testimony to the Administrative Law Court, and after the parties on appeal have already submitted their initial briefs and designated matters for the Record on Appeal.

II. AN APPELLANT SHOULD NOT BE ALLOWED TO FLESH OUT A MEAGER FACTUAL RECORD BY USING AMICUS BRIEFS.

"The [amicus] brief shall be **limited to argument** of the issues on appeal **as presented by the parties**." SCACR 213. The amicus briefs in this action go well beyond "argument of the issues on appeal as presented by the parties. The amicus briefs present new factual assertions and opinions, which are **not argument**, and furthermore, they were **not presented** by the parties.

The Administrative Law Court decision in *Dotsy, LLC v. Greenwood County Assessor*, which address the same issue as raised in this case, addressed the legislative history of the relevant statutes. In *Dotsy*, the taxpayer's cross-examination of the expert witness (proffered by the Assessor) addressed this issue at some length. The *Dotsy* court traced the legislative development of the statutes governing the taxation of agricultural real

property, an important factor in interpreting the taxation statutes at issue. Much of this part of the *Dotsy* court's ruling arose from the matters addressed in cross examination of the Assessor's expert. The *Dotsy* court recounted the statutory background for the tax statutes at issue:

> The General Assembly defines "fair market value for agricultural purposes," how it is applied, and how it must be calculated in S.C. Code Ann. § 12-43-220(d)(2). Agricultural Use Values were originally enacted in 1975 by Act 208 § 2(d). Similar to the current § 12-43-220(d), Act 208 provided a tax break for agricultural "real property." However, Act 618 of 1976, § 5 amended Act 208 of 1975, § 2(d), changed statutory language from "agricultural real property" to "agricultural land." Act 618 of 1976 also added what is now § 12-43-220(d)(2)(A), but it did not contain references to "land" for growth of timber until three years later. The General Assembly then changed the reference from agricultural "land" back to agricultural "real property" in 1979 Act 133, § 2.

Id. at *7. The court turned to the historical changes in the wording of the statute that governs the taxation of agricultural real property.

> For a period of three years, from 1976 to 1978, South Carolina's agricultural real property valuation statute specifically applied only to agricultural land. However, in 1979, the General Assembly amended § 12-43-220(d)(1), so that the agricultural assessment value, the "fair market value for agricultural purposes" would apply not only to agricultural "land," but rather applied to agricultural "real property," which include the land and all structures attached. The change from agricultural "land" to "real property" was the only change made to Section 12-43-220(d)(1).

Id. at *8. Finally, the court came to the conclusion based on the statutory history and changes. The court rejected the statutory interpretation proffered by the Assessor.

> ***The Assessor's contention that a tract's Agricultural Use Value only applies to agricultural "land" may have been valid from 1976 to 1979. However, by enacting Act 133 of 1979, the General Assembly decisively changed the language of § 12-43-220(d) so that the property valuation "fair market value for agricultural purposes" would apply to and include not only land, but also all structures attached.*** This portion of § 12-43-220(d)(1) has not changed since it was amended by Act 133 of 1979. Therefore, in 2011, the Agricultural Use Value for Dotsy's Parcels already

> included the value of the structures on Dotsy's Tracts. The Assessor's separate assessment and taxation of Dotsy's non-residential houses and other structures was erroneous.

Id. at *8 (emphasis added). Materials in support of the Administrative Law Court's analysis and conclusion came extensively from the cross-examination of the Assessor's expert witness. This cross-examination was an important part of the taxpayer's case in *Dotsy*. Because the Assessor chose not to appeal *Dotsy*, the taxation authorities attempted to avoid addressing this persuasive analysis coming largely from the mouth of their own expert. Instead, they proffer a different analysis of the legislative development through the medium of amicus briefs.

The *Montgomery* case went to the Administrative Law Court on stipulated facts and on cross motions for summary judgment. Because none of this amicus brief testimony was presented to the Administrative Law Court, it has no place in the Record on Appeal, nor in the consideration of this Court.

III. AN AMICUS CURIAE SHOULD BE A FRIEND OF THE COURT, NOT A FRIEND OF A PARTY.

A recent law review article addresses the problem of the new factual and expert testimony that was not presented to the lower court, and is not a part of the lower court record. *The Trouble with Amicus Facts*, by Allison Orr Larson, Associate Professor of Law, the College of William and Mary School of Law. *To be published* in 100 Va.Law.Rev. ____ (2014). Professor Larson's article begins by tracing the history and development of the amicus brief.

> The amicus curiae – or "friend of the court"– is in no way a newfangled idea. Dating back to Roman law, the original amicus was a "bystander, who without having an interest in the case, of his own knowledge make a suggestion on a part of law or of fact for the information of the presiding judge." In pre-18th-century England, the amicus was a neutral lawyer

> physically present in the courtroom who would engage in impromptu "oral 'shepardizing' – the bringing up of cases not known to the judge." Early courts welcomed this form of amici curiae, on the theory that such neutral aids helped to avoid error and "served to maintain judicial honor and integrity."
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> Interestingly, the original amicus was the lawyer not client –- the amicus curiae stood in "an essentially professional relation to the court." Organizations could not serve as amici curiae. The word amicus really describes a professional relationship between a judge and a lawyer. It was not until the early 1900s the courts began to attribute amicus briefs to the organization that sponsored it rather than the lawyer who submitted it.
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> Once the amicus arrived in America, the adversary system took hold of it and it became common for an amicus to represent interests of another.
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> * * *
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> The turn of the twentieth century, then, brought dramatic change in the Amicus business – a total shift, as one scholar frames it, from "neutral assistance to partisan advocacy." . . . **Now amici are often compared to lobbyists**. Many interest groups are established in least in part for the purpose of participation as amici in appellate cases . . . .
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> The evolution of the amicus from neutral bystander to "adversarial weapon" has generated a fair amount of criticism –- both past and present. In 1949, Justice Frankfurter complained that the amicus briefs were "embarrassing" the court: "I do not like to have the Court exploited as a soapbox or as advertising medium or as the target not of arguments but of mere assertions that this or that group has this or that interest in the question to be decided."
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> * * *
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> Political scientists and legal scholars now tell us that "more than any other type of brief filed that an appellate court, those drafted by amici contain a significant portion of new evidence." **These briefs are filed after the record was closed, and the new information they present is not subject to cross-examination below**.

Id., pp. 7-15 (footnotes omitted) (emphasis added). The amicus briefs in this case are similar to those described by Professor Larson. They come from the Department of Revenue and the Association of Counties, both of which, like the Assessor, are involved in collecting property taxes. The amicus briefs seem like the filings of lobbyists or advocates; they are like an "adversarial weapon." They do not come from a neutral or disinterested

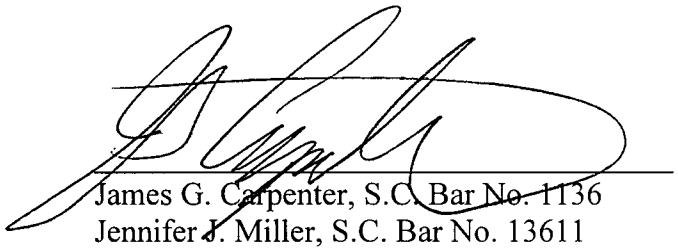
"bystander, who without having an interest in the case, of his own knowledge make a suggestion on a part of law or of fact for the information of the presiding judge." If accepted, these amicus briefs, with their untested assertions, would fundamentally alter the adversarial process as governed by the South Carolina Appellate Court Rules.

Instead of being "friends of the court," the amici in this case appear to be "friends of the Assessor."

CONCLUSION

WHEREFORE, Respondent Montgomery objects to the Amicus Briefs, and prays the Court to strike all assertions of fact or opinion not presented to the Administrative Law Court.

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



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