

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
John C. Hayes, III, Circuit Court Judge

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NOV 03 2014

SC Court of Appeals

Case No. 2013-002391
General Sessions Case No. 2010-GS-45-00283

The State of South Carolina, Respondent,

v.

Justin McBride, Appellant.

APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO STRIKE INITIAL BRIEF AND
MOTION TO HOLD DUE DATES IN ABEYANCE

Appellant, Justin McBride, pursuant to Rule 240 of the SCACR, hereby responds to Respondent's Motion to Strike Initial Brief of Appellant for Arguing Facts Outside the Record and Motion to Hold Due Dates in Abeyance. For the reasons set forth below, Appellant respectfully requests this Honorable Court deny Respondent's Motion.

The basis of Respondent's Motion rests entirely on two statements on page 8 of Appellant's Initial Brief¹ in connection with Appellant's argument

¹ Those statements merely represent Appellant's explanation for the belief that this case did not originate in family court. In other words, as the case did

that the circuit court lacked subject matter jurisdiction to conduct the trial of this matter. Respondent claims that Appellant's entire initial brief should be stricken because, in connection with this jurisdictional argument, Appellant references the lack of any record of this case's being originally filed in the family court. As such references the non-existence of evidence, rather than the existence of evidence, it is clear that such could not be present in any record on appeal.

That said, and more importantly, subject matter jurisdiction – the issue being discussed in connection with the objected to statements – does not require reliance on issues and arguments raised below or contained in the record on appeal. Despite Rule 210's requirement that the Record on Appeal contain only matters that were presented to the court below,² a challenge to subject matter jurisdiction, like that being made in this case, is not limited to the Record on Appeal or issues considered by the trial court.

not originate there, there can be no "record" of it. The statements are intended to provide the only basis on which one can demonstrate a negative. By definition the non-existence of a thing could not be included in any court record. Moreover, reference to a review of the South Carolina court docketing records merely points to information about which a court could properly take judicial notice. Finally, as set forth in more detail herein, arguments regarding subject matter jurisdiction are not limited to facts and arguments made in the lower court.

² It is interesting that the only citation in support of Respondent's Motion is Rule 210(h) regarding the content of the Record on Appeal. This Rule does not relate to the contents of a parties' briefs and the Respondent does not make any objection to Appellant's Designation of Matter to be Included in the Record on Appeal. Thus, to the extent Respondent believes any reference to matters outside the Record are inappropriate – which Appellant denies in connection with the unique status of subject matter jurisdiction – Respondent remains free to make such arguments in its own brief.

“[S]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.” State v. Gentry, 610 S.E.2d 494, 363 S.C. 93, 100 (2005) (citation omitted). The “concept of subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised [below].” Id. (quoting United States v. Cotton, 535 U.S. 625, 629-30 (2002) (change in original)). The South Carolina Supreme Court similarly understands “that issues related to subject matter jurisdiction may be raised at any time.” Id. (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)).

Where subject matter jurisdiction can be raised at any time – including being raised by a party or the Court on appeal – limitations as to the record are inapplicable as the Court must determine, as a matter of law, whether the court that rendered the challenged decision had jurisdiction to do so.

Furthermore, even if the statements in support of Appellant’s understanding that this case was not originally filed in the family court are objectionable, inclusion of those statements does not necessitate, nor would due process or fairness permit the striking of Appellant’s entire initial brief. Respondent remains able to argue in its own brief whether points made by Appellant are proper for consideration by this Court, and this Court remains competent and able to determine whether to consider such points.

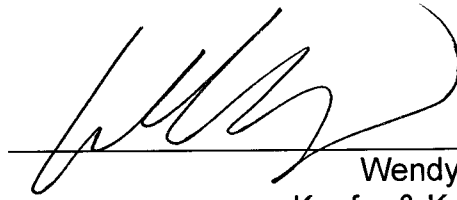
In determining the issue of subject matter jurisdiction raised here, however, this Court may consider any, none or all of the points raised by Appellant, as well as any considerations the Court itself deems necessary to determine this issue.

Finally, Respondent State of South Carolina also requested that all time lines be held in abeyance while this Motion is pending. This appears to be a clear attempt for further delay of this appeal. Respondent has already twice moved for and received additional time to prepare its initial brief. Rule 240 expressly states that “[u]nless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition.” SCACR 240(b).

Appellant respectfully requests that Respondent’s Motion be denied in its entirety, that Appellant’s Initial Brief (and ultimately, the Final Brief) be presented to this Court as originally filed, and that the Court give any and all arguments the weight and consideration this Court deems appropriate.

In the alternative, and only if the Court were inclined to grant Respondent’s Motion – and because Appellant does not believe it changes the Court’s requirement to analyze subject matter jurisdiction – Appellant should be permitted to refile its Initial Brief without the objectionable statements. In the event the Court so requires refiling, Appellant would request that no additional extensions of time be provided following that refiling for the Respondent to file its Initial Brief.

October 30, 2014



Wendy J. Keefer
Keefer & Keefer, LLC
1643B Savannah Hwy, Suite 226
Charleston, South Carolina 29407
(843) 860-1534
wendykeefe@yahoo.com

Adam Owensby
The Carolina Firm LLC
39 Broad St., Suite 201-B
P.O. Box 21043
Charleston, South Carolina 29413
(843) 732-2326
adam@carolinafirm.com

OF COUNSEL
Andrew B. Greenlee
Brownstone Law, P.A.
201 N. New York Avenue, Suite 200
Post Office Box 2047
Winter Park, Florida 32790-2047

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PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondent's Motion to Strike Initial Brief and Motion to Hold Due Dates in Abeyance on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on October 30, 2014, addressed to attorneys of record, David Spencer, Salley W. Elliott and Alan McCrory Wilson at the S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211:



Wendy J. Keefer
Keefer & Keefer, LLC
1643B Savannah Hwy, Suite 226
Charleston, South Carolina 29407
(843) 860-1534
wendykeefer@yahoo.com



1643B Savannah Highway, Suite 226
Charleston, South Carolina 29407
(843) 860-1534
(843) 225-7635 (facsimile)

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SC Court of Appeals

Via U.S. Mail & Facsimile

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: The State of South Carolina v. Justin McBride
Case No. 2013-002391

Dear Clerk:

Enclosed for filing please find an original and seven (7) copies of the Appellant's Return to Respondent's Motion to Strike Initial Brief and Motion to Hold Due Dates in Abeyance, along with proof of service of same.

I would greatly appreciate your returning a filed copy to me in the enclosed, stamped return envelope. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Wendy J. Keefer
Keefer & Keefer, LLC
1643B Savannah Hwy, Suite 226
Charleston, SC 29407
(843) 860-1534
wendykeefer@yahoo.com

cc: Alan McCrory Wilson
Salley W. Elliott
David Spencer



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