

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM Horry COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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Opinion No. 5284 (S.C. Ct. App. Filed January 23, 2015)

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Fayrell Furr and Karole Jensen ..... Petitioners

vs.

Horry County Zoning Board of Appeals..... Respondent

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**REPLY BRIEF OF PETITIONERS**

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**SC SUPREME COURT**

**TABLE OF CONTENTS**

Table of Authorities .....ii

Argument..... 1

    I.    The Court of Appeals erred as a matter of law in reversing the  
          Circuit Court case ..... 1

    II   The Court of Appeals erred by not looking to state law when  
          terms were undefined in the ordinance.....3

Conclusion.....4

**TABLE OF AUTHORITIES**

**Cases**

*Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2005)..... 3

*Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197,  
602 S.E.2d 444 (Ct. App. 2008), rehearing denied..... 3

Petitioners would offer this Reply to the Respondent's Brief which was received July 20, 2015.

## ARGUMENT

### **I. The Court of Appeals erred as a matter of law in reversing the Circuit Court.**

The Respondent goes to great lengths to argue that this case involves a zoning board's finding of fact. The Respondent's argument that this matter is a factual finding by the Zoning Board of Appeals and is entitled to judicial deference is clearly wrong. Horry County's zoning ordinances endorse reference to the South Carolina statutes to provide meaning for terms not otherwise defined in the ordinance. ("Terms used in this code unless otherwise specifically provided shall have the meanings prescribed by the statutes of the state for the same terms.") In this case, the General Assembly has explicitly defined hospice, hospital, nursing home and permanent overnight resident group care home. Under South Carolina's statutory scheme, each definition is mutually exclusive of the other. By definition, a hospice cannot be a nursing home or a permanent overnight resident group care home. Further, it defies logic to argue that a hospice, which cares for dying people, is a specialized treatment facility providing less than primary health care. Hospices require doctor admission and involve life ending treatment. Nursing homes and permanent overnight resident group care homes do not involve such treatment.

Respondent also argues that experts' testimony can change legal definitions. Respondent states that the Certificate of Need proves that a hospice can be built in the CFA zoning area. In fact, whether or not DHEC decided to grant a Certificate of Need has nothing to do with the legal definitions of hospice, hospital, nursing home or permanent

overnight resident group care home.<sup>1</sup> Further, it makes no difference that witnesses at the Zoning Board hearing attempted to argue that a hospice is more like a permanent overnight resident group care home when in fact South Carolina law clearly states they are different legal entities.

In effect, Respondent's arguments are premised upon the belief that there are no absolutes in the law and that a hospice can be a nursing home or a permanent overnight resident group care home. The Petitioners point out that just because Respondent says something loudly and frequently enough doesn't make it so. Petitioners assert that these statutory definitions mean that DHEC would never allow a nursing home to be operated as a hospice or a permanent overnight resident group care home to be operated as a hospice simply because of the level of medical care required and physician involvement in a hospice.

Accordingly, the Court of Appeals erred as a matter of law in finding that a hospice was akin to a nursing home or a permanent overnight resident group care home when as a matter of law the General Assembly had already defined those terms which are mutually exclusive of one another.

In sum, Respondent's arguments that various experts opined at the Zoning Board of Appeals hearing that a hospice was more like a nursing home or a permanent overnight resident group care home strains credibility since one need only look at the definitions of hospice, hospital, nursing home, and permanent overnight resident group care home to find as a matter of law that a hospice could not be built on the subject property based on the very

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<sup>1</sup> One has to doubt that DHEC would approve hospice care in a permanent overnight resident group care home or a nursing home since there are different regulations for each facility.

definitions of those terms in South Carolina. For this reason Petitioners request that the Court of Appeals be reversed and that the Circuit Court's decision be affirmed.

**II. The Court of Appeals erred by not looking to state law when terms were undefined in the ordinance.**

It is undisputed that the term hospice is not defined in the Horry County zoning ordinances. The Court of Appeals in making its ruling declined to address the state statutes which define hospice, hospital, nursing home and permanent overnight resident group care home. If the Court of Appeals had applied these definitions as a matter of law it would have determined that a hospice was not allowed in the CFA zoning area. Further, it was error to consider expert testimony from physicians and DHEC officials that a hospice was similar to a nursing home or permanent overnight resident group care home. The reason being that this was a matter of statutory interpretation and the Court should not have accepted legal opinions about statutory definitions from Mr. Levitt (or others) who testified that the standards for licensure of a hospice are more similar to a nursing home licensure requirements than hospital licensure requirements. This was clearly a matter of law and not a matter of accepting "expert" legal opinions as to the definitions of hospice, hospital, nursing home, and permanent overnight resident group care home.

In fact, courts in this state have held that legal opinions by experts are of no value to the court. See *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 602 S.E.2d 444 (Ct. App. 2008), rehearing denied (generally expert testimony pertaining to issues of law is inadmissible). See also *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2005) (affidavit of shareholder's expert primarily contained legal arguments and conclusions and thus trial court properly refused to consider it in determining summary judgment motion... expert testimony on issues of law is generally inadmissible.).

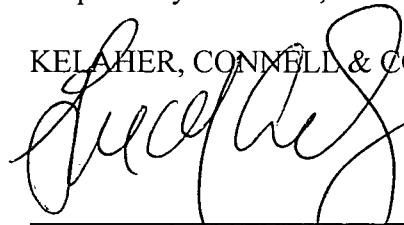
Based on this case law, Respondent's evidence regarding interpretation of DHEC regulations (and statutory interpretation) was wholly inappropriate and should not have been considered. Finally, Dr. Sasser's testimony and Ms. Faucher's testimony also were opinions on the law and should not have been considered. Each of the experts offered by the Respondent the Zoning Board attempted to give reasons why a hospice was like a nursing home or a permanent overnight resident group care home. These legal definitions were mutually exclusive under state law and expert testimony was not appropriate on this question of law. This is a simple matter of the Court applying the statutory definitions of hospice, hospital, nursing home, and permanent overnight resident group care home to the zoning ordinance and determining as a matter of law that a hospice could not be built by definition in the area requested by the Respondent.

#### CONCLUSION

It is for these reasons that this Court should reverse the Court of Appeals and affirm the ruling of the Circuit Court.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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**PROOF OF SERVICE**

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Reply Brief of Petitioners** on the Respondent, through counsel of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Emma Ruth Brittain, Esquire  
Lea Montgomery Cromer, Esquire  
Thomas & Brittain, P.A.  
Post Office Box 1290  
Myrtle Beach, South Carolina 29578

DATE OF MAILING: July 27, 2015

*Shelia Y. McCumbee*  
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,  
this 27<sup>th</sup> day of July, 2015

*Jay C. Burt*  
Notary Public for South Carolina  
My Commission Expires: 2-17-19

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