

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Marvin H. Dukes, III

SC Court of Appeals

Appellate Case No.: 2014-000636
Beaufort County Case No.: 2013-CP-07-00918

MARE BARACCO.....Appellant,

vs.

BEAUFORT COUNTY, SOUTH CAROLINA.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. ARE THE ISSUES ON APPEAL AS SET FORTH BY BARACCO ARE PRESERVED FOR REVIEW BY THIS COURT?

- II. WAS THE NOTICE PROVIDED BY THE COUNTY PROPER AND AUTHORIZED BY S.C. CODE ANN. §47-3-710 AND WOULD HAVE PROVIDED DUE PROCESS TO BARACCO?

- III. ARE BARACCO'S ALLEGATIONS OF ERROR AND INAPPROPRIATE CONDUCT UNFOUNDED AND BASED ON HER MISUNDERSTANDING OF THE LEGAL PROCESS SHE INITIATED?

STATEMENT OF THE CASE

This case arises from an incident that occurred on July 4, 2012 in which Mare Baracco's Rhodesian Ridge Back mix escaped his enclosure and attacked and killed another dog. Baracco was ticketed by the Town of Port Royal for a violation town ordinance 3-53 for allowing the animal to run at large. The Plaintiff was subsequently found not guilty of the charge in Port Royal's municipal court. As a result of this incident Baracco was notified by the County on July 9, 2012, that the dog had been declared dangerous and that she was being given 72 hours to comply with the requirements for owning a dangerous animal and the penalties should she fail to comply. **[Official Notice dated July 9, 2012]**

On July 10, 2012, Baracco wrote a letter to the Beaufort County Magistrate's Court requesting a hearing on an injunction/revocation of issuance of "Dangerous Animal Notice." **[Baracco Letter to Magistrate's Court dated July 10, 2012]** In this letter, Baracco makes specific reference to S.C. Code §43-3-710¹ and the application of this statute to her animal. As a result of this request, a hearing was held on August 8, 2012 where Baracco was represented by counsel, Kimberly Smith.² The County was represented by Beaufort County Animal Control Officer Brittany Chaplin. A ruling was issued by Magistrate Kline on August 13, 2012. Baracco's counsel filed an appeal to the circuit court on August 15, 2012.

¹ This is a mis-citation to S.C. Code Ann § 47-3-710. It is clear from the quotation in the letter that the citation is to the Regulation of Dangerous Animals Act.

² It appears that the Magistrate's Office, not having a caption provided to them and as a result of Ms. Baracco's letter, erroneously captioned this matter The State of South Carolina vs. Mare Baracco. While the notice was sent to Baracco by Beaufort County, she in fact, initiated the action in the magistrate's court.

Judge Marvin Dukes heard this appeal on December 28, 2012. Baracco was then represented by Kimberly Smith and Josh Gruber represented the County. At the hearing it was learned that Judge Kline had advised that he had done his own independent internet research of the Rhodesian Ridge Back breed in coming to his ruling below. As a result of this finding, Judge Dukes remanded the case back to the magistrate's court. Subsequent to the remand, with consent of Kimberly Smith, Josh Gruber advised the Chief Magistrate McEllyn that the case needed to be assigned to any Judge other than Judge Kline because of the inappropriate external research he performed. As a result, the case was re-assigned by the Chief Magistrate to Judge Brooks, and heard on March 12, 2013. The Court issued the order on March 13, 2013. **[Order of Judge Brooks dated March 13, 2013]** In that order, he addresses the issue raised as a Motion by Baracco "through her attorney, Kimberly Smith, seeking revocation of a 'Dangerous Animal' Notice." The case is stylized in the caption as a "rule to show cause" hearing, but was clearly a hearing seeking a revocation of the "dangerous animal" notice by Baracco and it is clear from the transcript the nature of that hearing. **[Transcript of Hearing before Judge Brooks dated March 12, 2013]** Following that hearing, the Court denied Baracco's motion for a revocation of the notice. **[Order dated March 13, 2013]**

On April 10, 2013, Baracco filed a Notice of Appeal to the Circuit Court, appealing the order of March 13, 2013 of Judge Brooks. **[Notice of Appeal dated April 10, 2013]** On May 2, 2013, Judge Brooks *sua sponte* brought Baracco before the court on a Rule to Show Cause. At that time he instructed

Baracco that for public health and safety reasons, she was required to comply with the requirements for having a dangerous animal pursuant to his order during the pendency of the appeal. This order was never appealed by Baracco.

On October 3, 2013, an appeal hearing was held before the Honorable Marvin Dukes, acting in his capacity as Special Circuit Court Judge. At that hearing the County was represented by Allison Coppage and Baracco was again represented by Kimberly Smith. The only issues raised were with regard to the sufficiency of the evidence resulting in the finding that Baracco's dog was dangerous. **[Notice of Appeal dated April 10, 2013 and Transcript of Hearing dated October 3, 2013]** The Court affirmed Judge Brooks order the sole finding being that "the decision to designate the Appellant's dog as a 'dangerous animal' was supported by the evidence on the whole record and was neither arbitrary nor capricious." **[Order of Judge Dukes dated October 4, 2013]** The order was received by the parties on October 16, 2013. No motion for reconsideration or to alter or amend pursuant to Rule 59 was filed by Baracco within the ten-day time limit.

Baracco filed a *pro se* appeal on November 12, 2013 appealing the Order of Judge Dukes date October 16, 2013. **[Notice of Appeal dated November 12, 2013]** On the same day, she filed in Circuit Court a "Motion for an Order Pursuant to Rule 60, SCRPC." **[Motion for an Order Pursuant to Rule 60]** In this order Baracco requests an Order relieving her from the final judgment and an order based on newly discovered evidence and/or fraud, misrepresentation, and/or misconduct of the adverse party. The Court of Appeals remitted the case

at the request of Baracco so that Judge Dukes could hear the Motion pursuant to Rule 60.³ **[Remittitur and Order of Court of Appeals dated March 10, 2014]** Judge Dukes heard that Motion Pursuant to Rule 60 and found that there were no grounds under the rule to grant the motion. **[Order of Judge Dukes dated March 20, 2013]** On April 16, 2014, Baracco filed the Amended Notice of Intent to Appeal appealing the Orders of Judge Dukes dated October 16, 2013 and March 20, 2014. **[Amended Notice of Intent to Appeal dated April 16, 2014]** This appeal follows.

³ Apparently the Court of Appeals perceived that the Plaintiff wished for a Motion to Reconsider to be heard and dismissed the appeal to allow for the motion to be heard. In fact, no Motion to Reconsider was ever filed, only the Motion pursuant to Rule 60.

ARGUMENTS

I. THE ISSUES ON APPEAL AS SET FORTH BY BARACCO ARE NOT PRESERVED FOR REVIEW BY THIS COURT.

Mare Baracco bases her appeal on seven grounds, none of which were issues raised to or ruled upon by Judge Dukes in his original order. The only issue of error raised to Judge Dukes on appeal was with respect to the sufficiency of the evidence upon which Judge Brooks order denying the revocation of the dangerous animal notice. That issue is not appealed in this appeal. Moreover, the issues appealed from herein were never raised to Judge Brooks either. Thus, it is respectfully submitted that the error complained of by Baracco is not preserved for review by the Appellate Courts.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. 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." Id. Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. Glover v.

County of Charleston, 361 S.C. 634, 606 S.E.2d 773 (2004) overruled on other grounds by *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005); see also *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved).

Baracco appeals that the court erred in the following aspects in its October 16, 2013 and March 20, 2014 orders: 1) Beaufort County did not have jurisdiction to issue her a dangerous animal ordinance violation notice; 2) that the magistrate's court did not have jurisdiction over the matter but rather the ALC did; 3) that the magistrate's court was used to circumvent Baracco's right to due process; 4) that that the magistrate's court erred in not dismissing the case when the respondent informed the court it was not a civil matter (involving the May 2, 2013 Rule to Show Cause hearing); 6) that the "official notice" violated the appellant's right to due process; and 7) that the respondent's actions constitute fraud, a "sham legal process," barratry, and pollution of the administration of justice.

Not one of these issues was raised to or ruled upon the magistrate or at the appeal hearing to the circuit court. [**Transcript of March 12, 2013 hearing, Transcript of October 3, 2013 hearing, Order of Judge Brooks dated March 13, 2013 and Order of Judge Dukes dated October 4, 2013**] Baracco first makes the challenge based on the case being administrative in nature for the first time at the Rule 60 Motion hearing, and the other arguments were never raised below. Moreover, the fifth issue involved a hearing and order that was

unappealed by Baracco, i.e. the May 2013 Rule to Show Cause hearing. Clearly, the general principals of error preservation should apply in this case. Baracco should be precluded from raising a multitude of issues for the first time on appeal having never addressed them to the lower court. Based on the foregoing, Baracco's appeal should be dismissed as the error she alleges was not preserved for appellate review.

II. THE NOTICE PROVIDED BY THE COUNTY WAS PROPER AND AUTHORIZED BY S.C. CODE ANN. §47-3-710 AND WOULD HAVE PROVIDED DUE PROCESS TO BARACCO.

Baracco takes exception to Beaufort County's handling of and the notice given to her that her dog had been deemed a dangerous animal citing numerous problems from the fact that the Beaufort County acted outside of its jurisdictional boundaries in issuing the dangerous animal notice, to the fact she claims she was entitled to an administrative hearing before the ALC, to the assertion that the dangerous animal notice violated her right to due process. These arguments both lack merit and are a result of a process that Baracco herself put in motion.

This case arises from an incident that occurred on July 4, 2012 in which Mare Baracco's Rhodesian Ridge Back mix escaped his enclosure and attacked and killed another dog. As a result of this incident the Baracco was notified by the County on July 9, 2012, that the dog had been declared dangerous and that she was being given 72 hours to comply with the requirements for owning a dangerous animal and the penalties should she fail to comply. **[Official Notice dated July 9, 2012]** The notice advises the animal owner of the requirements of

having a dangerous animal in Beaufort County and the penalties should the owner not meet those requirements

Title 47 Chapter 3 Article 13 deals with the regulation of Dangerous Animals in the entire state of South Carolina. As part of that Article, S.C. Code Ann. § 47-3-710 defines a dangerous animal, §47-3-720 provides that no person owning a dangerous animal can allow it to go unconfined and §47-3-760 provides for penalties for violations of the provisions of sections 720 and 730 and 760(E). Additionally §47-3-760(E) requires that

A person owning a dangerous animal shall register the animal with the ***local law enforcement authority of the county*** in which the owner resides. ***The requirements of the registration must be determined by the county governing body.*** (emphasis added)

In Beaufort County, the ownership of a "dangerous animal" is regulated by Beaufort County Ordinance 14-35. This ordinance largely mirrors the provisions of §47-3-710 *et seq.* However, while state law is silent as to how an animal is determined to be a "dangerous animal," Beaufort County's requirements for registration and regulation of a "dangerous animal" pursuant to Beaufort County Ordinance 14-35(b) allows an animal control officer to declare an animal to be a dangerous animal by delivering a written notice of declaration to the owner. The notice gives the owner of the animal declared to be dangerous 72 hours to comply with the requirements for owning the dangerous animal set forth under Ordinance 14-35 before they are in criminal violation of the ordinance, giving them the benefit of a warning that they may be in violation of the law --- an extra protection from criminal penalty not provided under state law.

Baracco has complained that Beaufort County's ordinance should not have applied to her and the Beaufort County animal control officer was without authority to declare her dog to be a dangerous animal. However, as set forth above, in order to comply with state law, Baracco was required to comply with the requirements as set forth by the **County** governing body. Thus, the actions taken by the animal control officer (at that time also a deputy sheriff) in making an administrative declaration that Baracco's dog was a dangerous animal and then providing Baracco with the "dangerous animal notice" were completely authorized under the law of South Carolina as set forth at S.C. Code 47-3-760(E).

Baracco herself placed this matter before the Magistrate's Court when on July 10, 2012, Baracco wrote a letter to the Beaufort County Magistrate's Court requesting a hearing on "an injunction/revocation of issuance of 'Dangerous Animal Notice.'" [Baracco Letter to Magistrate's Court dated July 10, 2012] While there was no specific procedure to challenge the determination of the animal control officer outside the due process provided during a criminal trial, the magistrate is **also** permitted pursuant to Beaufort County Ordinance 14-35(a) to make the determination that an animal is dangerous. Thus, the County conceded to Baracco's request to the Magistrate that matter go before the magistrate to judicially determine if Baracco's dog should be deemed a "dangerous animal." This matter was heard first by Judge Kline but was remanded by Judge Dukes for a subsequent re-hearing before Judge Brooks. Judge Brooks found, based on the evidence before him, that the animal was, in

fact, dangerous and refused to revoke the declaration. The matter was then appealed to Judge Dukes who affirmed and now appealed to this court.

It is completely without merit that Baracco now contends that she was not provided due process. In fact, she had more than ample opportunity to be heard. First, had she never requested the Magistrate's court hear the matter on July 10, 2012, ultimately, she would have been issued a criminal citation for failing to comply with S.C. Code 47-3-720, 730, or 760(E). If that had happened, she would have been given the opportunity to challenge the determination of the animal as a "dangerous animal" during the criminal proceeding. However, since she requested the Magistrate's court hear the matter before the issuance of the citation and because the County agreed to allow the magistrate to do so since the magistrate also had authority to deem the animal to be a dangerous animal, Baracco was provided the due process of a hearing prior to any resulting criminal charges. In fact, Baracco was provided with a level of due process by Beaufort County not required by S.C. Code Ann. §47-3-710 *et seq.*

Baracco also contends that somehow she was entitled to have this matter heard by the ALJ pursuant to the Administrative Procedures Act. This argument is totally without merit and lacks any statutory support whatsoever. Baracco appears to have grasped upon this idea as a result of Beaufort County's characterization of this matter not as criminal (as the original erroneous caption of the this matter by either Baracco or the Magistrate's Court, State of South Carolina vs. Mare Baracco would seem to have indicated) but as an appeal from an administrative determination. In fact, the case began based on an

administrative determination in the discretion of the animal control officer that Baracco's dog was a dangerous animal. The magistrate's court confirmed this administrative determination with its own judicial determination as authorized under Beaufort County Ordinance 14-35(a), and the matter was subsequently appealed to the Circuit Court and now this Court. However, what is clear is that the provisions of S.C. Code Ann. §1-23-310 *et seq.* would in no way apply as this controversy fits into none of the jurisdictional granting categories set forth in the APA.

Contrary to the multiple allegations of error in jurisdiction and violations of due process made by Baracco, it is clear that the procedure utilized in this matter was correct and authorized by both Beaufort County Ordinance 14-35 in conjunction with S.C. Code Ann. §47-3-760(E).

III. BARACCO'S ALLEGATIONS OF ERROR AND INAPPROPRIATE CONDUCT ARE UNFOUNDED AND BASED ON HER MISUNDERSTANDING OF THE LEGAL PROCESS SHE INITIATED.

Baracco makes many allegations of inappropriate and unethical conduct in this matter. These are largely based on her misunderstanding of the roles of individuals involved in this matter and the nature of the legal process initiated by her and her former counsel. However, as set forth above, the case, while not completely typical, was not at all violative of Baracco's rights and was in compliance with state law. While Baracco would cast Beaufort County and its attorneys in the light of her persecutors, in fact the County was along for a legal procedural "ride" that was initiated and perpetuated by her and her former

counsel. There is support in the record authorizing every action taken by Beaufort County in this matter.

CONCLUSION

While Baracco makes many assertions of error in this appeal, she does not in fact appeal the basis of the Court's rulings, first, that her dog was a "dangerous animal" and, second, that the court erred in finding there was no new evidence or fraud, misrepresentation, etc. to grant her motion Pursuant to Rule 60. Instead, she argues many other issues on appeal that were not raised to the court in a timely fashion, or as with most of the issues, at all. However, it is clear that the actions of Beaufort County and the judicial determination of the magistrate that Baracco's dog was a dangerous animal were authorized by S.C. Code Ann. § 47-3-710 *et seq.* and Beaufort County Ordinance 14-35. Therefore, it is respectfully submitted that the court should deny Baracco's appeal as the error asserted is not preserved and, alternatively, the determination that Baracco's dog was a dangerous animal was authorized under the law of this state, and the Court should affirm the court below.

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By: 

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July 30, 2015

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Marvin H. Dukes, III

Appellate Case No.: 2014-000636
Beaufort County Case No.: 2013-CP-07-00918

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SC Court of Appeals

MARE BARACCO.....Appellant,

vs.

BEAUFORT COUNTY, SOUTH CAROLINA.....Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Initial Brief of Respondent and Designation of Matter upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 30th day of July, 2015 addressed to the following:

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Deputy Clerk
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1015 Sumter Street
Columbia, SC 29201

Re: Mare Baracco vs. Beaufort County, South Carolina
Civil Action No.: 2014-000636
Our File No: 11369 MBL

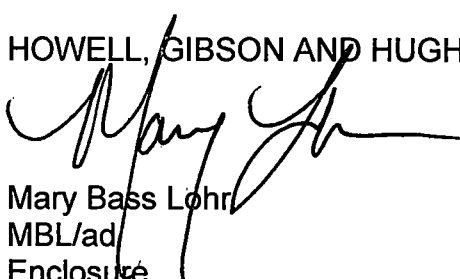
Dear Hon. Kitchings:

Please find enclosed herewith for filing Initial Brief of Respondent, Designation of Matter, and Certificate of Service with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


Mary Bass Lohr
MBL/ad
Enclosure

cc: Ms. Mare Baracco (via U.S. Mail only)
Allison Collins Coppage (via U.S. Mail only)
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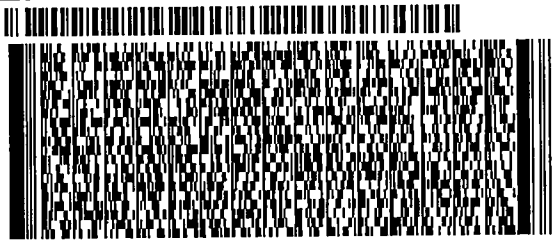
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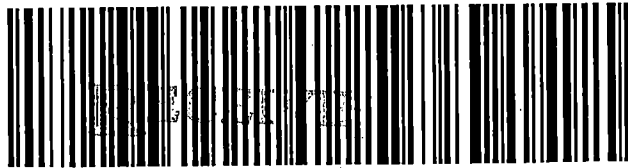
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