

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 28 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015-002297

John Doe,

Appellant,

v.

Board of Zoning Appeals (BZA) and
Town of Sullivans Island (S.I.),
S. I. Zoning Administrator, and
S. I. Building Dept., Individually
and In Official Capacity,

Respondents.

REPLY BRIEF

C. Holmes
P.O. Box 187
Sullivans Isd.,
SC 29482-0187
(843)883-3010
For Appellant

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REPLY

Appellant respectfully submits Reply. The record reflects that Respondents failed to timely file brief in violation of Rule 208, SCACR. The record reflects Respondents' untimely brief evades the issues on appeal. Pursuant to Rule 240, SCACR, failure to timely file and/or respond may be deemed consent to the relief sought. Appellant disputes Respondents' untimely, inaccurate, and disingenuous statement of the case, facts, and issues.

1. Respondents engaged in fraud upon the court in the presence of the court as documented in the attached transcript dated April 7, 2015, correspondence, and affidavit, which was timely served and filed; despite timely objection, the lower court erred in failing to address it thereby becoming an unwitting accomplice and/or enabler in wrongdoing perpetrated by untrustworthy Respondents' Counsel as officers of the court.

Walker failed to timely file his brief. Moreover, Walker failed to respond to and thereby evades the issues on appeal. Walker did not deny his fraud upon the court in the presence of the court. Failure to timely file and/or respond to the stated issues on appeal may be deemed consent to the relief sought. Moreover, the Record

on Appeal reflects Respondents' counsel's correspondence to Appellants, essentially an admission against interest, stating, "In response to your request, the BZA held a rehearing on September 11, 2014 and issued a Final Order on the rehearing on January 8, 2015 (mailed January 12, 2015)." The notice of appeal with request for mediation was timely served and filed on Monday, February 9, 2015. Further, the record reflects that untrustworthy counsel for Respondents materially omitted and substantially failed his professional duty to timely notify the Presiding Judge BEFORE THE ORDER WAS SIGNED that the other side had not received notice of the hearing or the proposed order. Walker failed to use the proper address for notice as published on the Charleston County website and referred to "Jane Doe" at the hearing. See attached transcript. Materially, Walker's quote on page 15 of his brief fails to disclose that the Postmaster provided notice well before the proposed order was signed. The record reflects lack of diligence and after-the-fact email notification to the Presiding Judge after the proposed order was signed. Walker's brief confirms that untrustworthy officers of the court misused and abused court staff and the Presiding Judge as unwilling and unwitting accomplices. Fraud upon the court in the presence of the court by untrustworthy officers of the court is NOT moot and this Court should reverse the lower court order. See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the

right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

2. Fraud upon the court in the presence of the court led to wrongful dismissal, it materially prejudiced the Appellant, and it is not moot even after dismissal. Controlling precedent provides that failure to exercise discretion under these circumstances is an abuse of discretion reversible as a matter of law.

Failure to exercise discretion under these circumstances is an abuse of discretion. Walker's frivolous argument that fraud upon the court in the presence of the court is somehow moot should be overruled. Walker did not deny prior misconduct in the case of *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). In that case, the Court of Appeals held the trial judge erred by dismissing the appellant's discovery abuse motion as moot even though the verdict was in favor of the defendant. *Id.* Respondents' counsel listed in the *Creighton* case (*supra*) includes the self-same untrustworthy respondents' counsel herein. The letter and spirit of that case condemns wrongdoing by untrustworthy officers of the court designed to deny the other side a full and fair hearing as in this case. The lower court erred. See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for

a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

3. The BZA hearing on the merits at the request of the property owner vests jurisdiction in the BZA at the pre-litigation stage; statutory authority provides that party with the right to appeal and to request mediation after the hearing; pursuant to the statute, Appellant timely filed notice of appeal and mediation; the lower court erred because, pursuant to S.C. Code § 6-29-825, the request for mediation “must” be granted. The lower court erred because it has no jurisdiction at the **pre-litigation** stage until and unless mediation is unsuccessful.

The BZA granted the Appellants party status at the hearing. The Record on Appeal reflects that Respondents' counsel admitted, "In response to your request, the BZA held a rehearing on September 11, 2014 and issued a Final Order on the rehearing on January 8, 2015 (mailed January 12, 2015)." The notice of appeal and request for mediation was timely served and filed on Monday, February 9, 2015. S.C. Code § 6-29-820(B). Respondents, bless their hearts, rely on an inapplicable statute which applies to folks who intervene after the hearing and who were not parties to the hearing. It makes sense that folks who were not parties to the hearing would file a petition setting forth grievances. Appellants were parties to the hearing and complied with the applicable statute, S.C. Code § 6-29-820(B). The BZA

confirmed and the Record on Appeal reflects that the Appellants ARE property owners whose land is the subject of a decision of the board of appeals. The lower court order should be reversed. See *Helicopter Solutions, Inc. v. Richard Hinde & Horry Cnty. Zoning Adm'r*, 414 S.C. 1, 776 S.E.2d 753 (S.C. App., 2015).

4. Even assuming the lower court had jurisdiction at the pre-litigation mediation stage, after BZA hearing on the merits at the request of the property owner and after timely filing of notice of appeal herein with request for pre-litigation mediation, statutory authority and legislative intent pursuant to S.C. Code § 6-29-825 provide that the requested mediation “must be granted”; the lower court erred in failing to grant mediation.

American jurisprudence is based upon due process with notice of appeal after hearing as was timely entered in this case pursuant to statute, S.C. Code § 6-29-820(B). With regard to *Newton*, Walker misconstrues the case because "first-level" appeal refers to those who first intervene after the BZA hearing. *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011). Specifically, in this case, the BZA at the hearing granted party status to the Appellants as property owners whose property is the subject of and whose property is adversely affected by a decision of the zoning administrator (Z.A.). The BZA then held a hearing on the merits. Pursuant to the applicable statute, S.C. Code § 6-29-820(B), after the hearing, notice of appeal is proper pending mediation. When interpretation of a statute is required, "words must be given their plain and ordinary

meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). The lower court order should be reversed.

5. Public policy supports the request for mediation after BZA hearing on the merits involving violation of impervious surface limitations and storm water runoff adversely affecting the property owner whose land is the subject of a decision of the BZA.

Legislative intent and express statutory authority provide that "mediation must be granted" at the statutory **pre-litigation** stage, S.C. Code § 6-29-825.

Walker concedes that violation of impervious surface limitations and storm water runoff by the Ohio, LLC, may affect adjacent property. Legislative intent and express statutory authority recognize a **pre-litigation** stage between parties to the hearing until and unless mediation is unsuccessful. S.C. Code § 6-29-825.

With regard to *Newton*, Walker again misconstrues the case. *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011). The statute, S.C. Code § 6-29-820(B), is designed to encourage **pre-litigation** mediation by **NOT** requiring the filing of a petition until and unless pre-litigation mediation is unsuccessful after the hearing. In *Newton*, the Court made clear, "This procedure does not allow for **issue identification, or even party identification, prior to the filing of a petition** with the circuit court." *Id.*, p. 284 (emphasis supplied). Accordingly, the lower court erred.

6. The substantive rights of the Appellant have been prejudiced and the lower court order should be reversed.

Under these circumstances pursuant to S.C. Code § 6–29–820(B), a party to the BZA hearing has the right to file notice of appeal and request mediation after the hearing. Legislative intent and express statutory authority provide that "mediation must be granted" at the statutory pre-litigation stage. S.C. Code § 6-29-825. Appellant respectfully requests the statutory right to mediation. *See State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). *See Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). *See* S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

CONCLUSION

In support of express legislative intent for mediation and for substantial justice affecting substantial rights, Appellants respectfully request reversal of the lower court orders.

Respectfully submitted,



C. Holmes

PO Box 187

SI, SC 29482

843.883.3010

For Appellant

June 25, 2015

Dr. Cynthia Holmes
Post Office Box 187
2061 Middle Street
Sullivan's Island, SC 29482-0187

Dear Dr. Holmes:

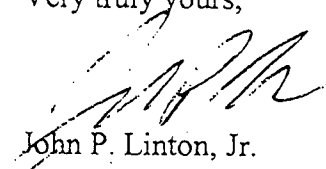
I am in receipt of your two letters to Larry Dodds, Town Attorney for the Town of Sullivan's Island, indicating that you are requesting mediation with respect to the BZA appeal involving permit # 2014-2899. Our firm is currently handling an appeal to the Charleston County Circuit Court which is related to permit # 2014-2899. That appeal was filed by J. Doe and is Civil Action Number 2015-CP-10-0775. That being the case, Mr. Dodds asked that we respond to your letter concerning the same BZA decision.

The BZA held a hearing on the appeal of permit # 2014-2899 on April 10, 2014 and issued a Final Order on May 8, 2014 (mailed May 9, 2014). In response to your request, the BZA held a rehearing on September 11, 2014 and issued a Final Order on the rehearing on January 8, 2015 (mailed January 12, 2015).

Your request for mediation of this matter does not meet the requirements of the applicable South Carolina statute. Under South Carolina Code Section 6-29-820(B), the property owner whose land is the subject of a decision of the board of appeals may appeal a decision of the board of zoning appeal by filing, within thirty days of the mailing of the board of zoning appeals decision, a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with South Carolina code section 6-29-825.

Your letter requests do not comply with the above statute in several ways. For example, it is not timely, it is not filed with court as a notice of appeal accompanied by a request for mediation, and it does not appear to be requested by the owner of the property that was the subject of the BZA. According to the Charleston County records, James P. Walsh, not Dr. Cynthia Holmes, is the owner of the property that was the subject of the permit and BZA (1607 Poe Ave, Sullivan's Island, South Carolina). Therefore, because your requests are not proper under the applicable statute, the Town will not be providing tentative dates and mediators as you request in your letters to Mr. Dodds.

Very truly yours,



John P. Linton, Jr.

JPL/cam

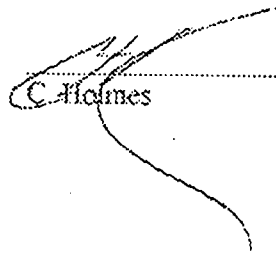
STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

Personally came and appeared before me, Notary Public, C. Holmes, who upon being duly sworn did depose and say the following:

- 1) This affidavit is submitted in support of the attached Rule 59(e), SCRCP, Motion, and I am the plaintiff.
- 2) As owner of the land that is the subject of a decision of the board of appeals, I have statutory standing to appeal. S.C. Code § 6-29-820.
- 3) The attached copy of correspondence dated April 27, 2015, documents there was no required notice in Case No. 2015-CP-10-0775, *Doe v. BZA et al.* Moreover, it establishes that, on or before April 27, 2015, defendants knew or should have known they failed to provide the required notice to the other side. Defendants failed to timely disclose this material fact, thereby wrongfully inducing this Honorable Court to rely on their misrepresentations.
- 4) I received no required notice and no actual notice and was prejudiced thereby.
- 5) Defendants wrongfully induced this Honorable Court to rely on their misrepresentations and to sign ex parte order. On or before April 27, 2015, defendants failed to timely disclose the material fact that they failed their duty to provide required notice. Due in whole or in part to defendants' lack of diligence, ex parte order was signed. It has come to our attention that defendants made misrepresentations and/or material omissions to the Charleston County Clerk of Court as well.
- 6) It is fair to say that defendants would want notice. In what has become business as usual for defendants' counsel, they failed their professional responsibilities to this Honorable Court, to the Charleston County Clerk of Court, to their client, and to the other side. Defendants' motion should be dismissed/stricken.

FURTHER THE AFFIANT SAITH NOT.


C. Holmes

Subscribed and sworn to before me,
Notary Public, this 30th day
of June, 2015.


NOTARY PUBLIC

My commission expires: 6/21/17



April 27, 2015

PO Box 187

The enclosed mail was addressed to John Doe at the Post Office address. However, Pratt-Thomas, Walker, Attorneys At Law instructed me to place these letters into PO box 187.

If you have any questions or concerns, please call the attorney's office.

Sincerely,

A handwritten signature in cursive script that reads "Margie L. Seabrook".

Margie L. Seabrook

Postmaster

2061 Middle St.

Sullivans Island, SC 29482



Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

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John Doe VS Board of Zoning Appeals , defendant, et al

Case Number:	2015CP1000775	Court Agency:	Common Pleas	Filed Date:	02/09/2015
Case Type:	Common Pleas	Case Sub Type:	Zoning Board 970	File Type:	Non-Jury
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Ended by Non Jury	Disposition Date:	04/10/2015	Disposition Judge:	Dennis, R. Markley Jr.
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

[Case Parties](#) [Judgments](#) [Tax Map Information](#) [Associated Cases](#) [Actions](#) [Financials](#)

Click the  icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
 Board of Zoning Appeals					Defendant		02/09/2015
 BZA					Defendant		02/10/2015
 Doe, John	PO Box 187 Sullivans Island SC 294820187				Plaintiff Pro Se		04/30/2015
 Doe, John					Plaintiff		04/14/2015
 Linton, John Phillips Jr.	PO Drawer 22247 Charleston SC 29413				Defendant Attorney		03/09/2015
 S I					Defendant		02/10/2015
 S I Building Dept					Defendant		02/10/2015
 S I Zoning Administrator					Defendant		02/10/2015
 Sullivans Island Town of					Defendant		03/09/2015

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
John Doe,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 15-CP-10-0775
	)	
Board of Zoning Appeals,	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on April 7, 2015, before The Honorable R. Markley Dennis, Jr., in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

John P. Linton, Esq.

Treholm Walker, Esq.

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
P O Box 901
Johns Island, South Carolina 29457
dgarrison@sccourts.org

John Doe v Board of Zoning Appeals
Case No. 15-CP-10-0775
Hearing of April 17, 2015
Before The Honorable R. Markley Dennis, Jr.

2

1 THE COURT: Doe versus Board of
2 Zoning Appeals. Y'all are back? Is this
3 Sullivans Island?

4 MR. LINTON: Yes, Your Honor.

5 THE COURT: Okay. Who is ----

6 MR. WALKER: Jane Doe d/b/a (sic)
7 John Doe does not appear to be here.

8 THE COURT: Have they proceeded
9 always as "Doe", "the Does"?

10 MR. LINTON: Yes, Your Honor. All
11 they've filed is a Notice of Appeal as John
12 Doe, and we've filed a Motion to dismiss that
13 appeal.

14 THE COURT: Did they have an
15 address where the Does live?

16 MR. LINTON: Yes.

17 THE COURT: Now we know the Does.
18 They were sent notice of that, Miss Caroline?

19 CAROLINE LEONARD: Your Honor, notice
20 was sent to 2061 Middle Street on Sullivans
21 Island, South Carolina.

22 THE COURT: Is that the address
23 that you have?

24 MR. LINTON: Your Honor, it is. I
25 believe -- was the zip code on there? 29482-

1 187?

2 CAROLINE LEONARD: That's correct.

3 MR. LINTON: That's the same.

4 THE COURT: Very well.

5 MR. WALKER: And that is the
6 subject property, too.

7 THE COURT: Okay. Then --

8 MR. LINTON: Your Honor, it is not
9 the subject property. We believe that's the
10 United States Post Office on Sullivans
11 Island.

12 THE COURT: You briefed it?

13 MR. LINTON: Yes, Your Honor.

14 THE COURT: Your Motion is
15 granted. Thank you, sir. If you (Mr.
16 Linton) want to prepare an Order, I will be
17 happy to sign it. A Motion to Dismiss is
18 what you're asking for?

19 MR. LINTON: Yes, Your Honor.
20 We've briefed it. We have not filed the
21 brief but ---

22 THE COURT: File the brief. For
23 the record, I am relying on your position
24 stated in the brief -- and the fact that they
25 are not here, but primarily the position

1 stated in your brief, which I have seen.

2 (HEARING CONCLUDED)

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John Doe v Board of Zoning Appeals

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Case No. 15-CP-10-0775

Hearing of April 17, 2015

Before The Honorable R. Markley Dennis, Jr.

1 STATE OF SOUTH CAROLINA)

2

)

CERTIFICATE

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COUNTY OF CHARLESTON)

RECEIVED

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APR 28 2016

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SC Court of Appeals

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I, the undersigned Deborah Garrison, Circuit

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Court Reporter for the 9th Judicial Circuit, hereby

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certify that the foregoing is a complete and

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accurate transcript of the hearing held in the

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within action heard on April 7, 2015, before The

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Honorable R. Markley Dennis, Jr.;

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I further certify that I am neither kin nor

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counsel to any of the parties and have no interest

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in the outcome of this action.

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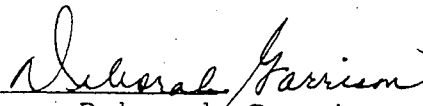
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Charleston, South Carolina

September 1, 2015


Deborah Garrison

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 28 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015-002297

John Doe,

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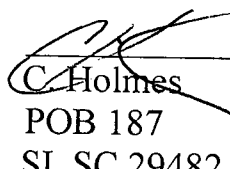
Respondents.

CERTIFICATE

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APR 28 2016
SC Court of Appeals

I certify that I have served a copy of the foregoing on the Respondents by depositing a copy in the United States Mail, postage prepaid, addressed to Respondents' counsel (843.727.2200) on this date at 16 Charlotte St., Chas., SC 29403. I certify the foregoing is the same as previously served with no substantive changes in compliance with Rule 211(b), SCACR. All parties required to be served have been served.

Dated 4/26/16


C. Holmes

POB 187

SI, SC 29482-0187

843.883.3010