

THE STATE OF SOUTH CAROLINA  
IN THE SOUTH CAROLINA SUPREME COURT

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MAR 21 2017

S.C. SUPREME COURT

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

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Appellate Case No.: 2017-000555

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MARE BARACCO.....Petitioner,

vs.

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

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner

## 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 Petitioner was subsequently found not guilty of the charge in Port Royal's municipal court. However, 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. **(R. p. 92).**

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." **(R. pp. 101-02).** In this letter, Baracco makes specific reference to S.C. Code §43-3-710 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. 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.

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. **(R. p. 10)**. 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. **(R. pp. 60-89)**. Following that hearing, the Court denied Baracco's motion for a revocation of the notice. **(R. p. 10)**.

On April 10, 2013, Baracco filed a Notice of Appeal to the Circuit Court, appealing the order of March 13, 2013 of Judge Brooks. **(R. p. 122)**. 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. **(R. pp. 38-58, 122)**. 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." **(R. pp. 8-9)**. 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. **(R. pp. 128-29)**. On the same day, she filed in Circuit Court a "Motion for an Order Pursuant to Rule 60, SCRCR." **(R. p. 97)**. 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. **(R. p. 6)**. Judge Dukes heard that Motion Pursuant to Rule 60 and found that there were no grounds under the rule to grant the motion. **(R. pp. 4-5)**. 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. **(R. p. 130)**. The Court of Appeals dismissed in part and affirmed in part pursuant to Rule 220(b), SCACR. Specifically, the Court dismissed Baracco's appeal from the October 16, 2013 order because Baracco

failed to timely serve the notice of appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules. See Rule 203(b)(1), SCACR. Additionally as to the Rule 60 (b) motion, the Court of Appeals found the circuit court did not abuse its discretion. See Tri-Cty. Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). The Petitioner timely served this Petition for a Writ of Certiorari on Beaufort County on March 1, 2017.

### ARGUMENT

- I. **THE COURT OF APPEALS PROPERLY DETERMINED THAT THE APPELLANT'S ARGUMENTS WERE NOT PROPERLY PRESERVED ON APPEAL, THAT THERE WAS NO EVIDENCE SUFFICIENT TO JUSTIFY THE GRANTING OF THE APPELLANTS RULE 60 MOTION, AND THE ISSUES RAISED BY THE PLAINTIFF IN THE RULE 60 MOTION WERE NOT PROPER FOR THAT MOTION.**

Initially, the Court of Appeals dismissed Baracco's appeal from the October 16, 2013 order because Baracco failed to timely serve the notice of appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules. See Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty . . . days after receipt of written notice of entry of the order or judgment."). The time of filing in this matter is not in question. Although Baracco first appealed from the October 16, 2013 order on November 12, 2013, that appeal was dismissed. Baracco served her second appeal from the order on March 25, 2014, along with her appeal from the order denying her Rule 60(b) motion. Because a Rule 60 motion does not toll the time for serving a notice of appeal, Baracco's second appeal from the October 16, 2013 order was untimely served. See Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 5, 518 S.E.2d

56, 59 (Ct. App. 1999)(noting that a Rule 60 motion "d[oes] not toll the time for the filing and service of [a] notice of appeal"); Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207(1985) (explaining service of the notice of appeal is a jurisdictional requirement and the appellate courts have no authority to extend the time in which parties must serve the notice of intent to appeal).

As to Baracco's appeal from the order denying her Rule 60(b) motion, the Court of Appeals properly found the circuit court did not abuse its discretion. See Tri-Cty. Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990) (noting that a Rule 60(b) motion is addressed to the sound discretion of the trial court and this court will not disturb the trial court's decision absent an abuse of discretion). First, a review of the record from that motion shows that Baracco failed to present any evidence of fraud or misconduct by the County. See Rule 60(b) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . fraud, misrepresentation, or other misconduct of an adverse party . . ."); McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) ("A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief."). Second, any other issues Baracco alleges arising out of the order denying her motion are meritless because those issues were not properly suited for a Rule 60(b) motion. Rule 60(b) allows a court to relieve a party from a final judgment only for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud,

misrepresentation, or other misconduct by an adverse party; (4) a void judgment; or (5) satisfaction, release, or discharge, or vacation of the judgment or when the judgment is no longer equitable.

Baracco asserts 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 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. **(R. pp. 8-10, 38-89)**. 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, these issues were never raised to and ruled upon by the magistrate or the circuit court hearing the appeal and were not proper in the context of a Rule 60 motion. 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 and

having never addressed them to the lower court except improperly in the context of a Rule 60 motion.

**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 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. **(R. p. 92)**. 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" where 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.'" **(R. pp. 101-02)**. 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 petition for certiorari as the Court of Appeals correctly determined that the error asserted is not preserved and not proper in the context of a Rule 60 motion.

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March 17, 2017

THE STATE OF SOUTH CAROLINA  
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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY  
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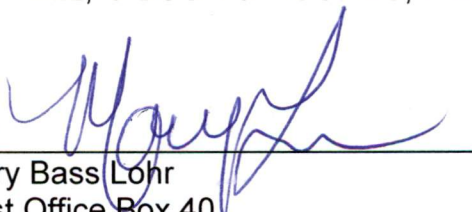
BEAUFORT COUNTY, SOUTH CAROLINA.....Respondent.

PROOF OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Return to Petition for Writ of Certiorari upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 17 day of March, 2017 addressed to the following:

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March 17, 2017