THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appellate Case Number 2017-000584

Appeal from the Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

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MAY 08 2017
S.C. SUPREME COURT

William J. Montgomery, ... Petitioner,

v.

Spartanburg County Assessor, ... Respondent.

RESPONDENT'S RETURN TO PETITIONER'S MOTION FOR THE COURT TO CONSIDER THE TRANSCRIPT OF THE TESTIMONY OF SANDY HOUCK

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A. BACKGROUND

Sandy Houck, an employee of the South Carolina Department of Revenue, testified in *Dotsy, LLC v. Greenwood County Assessor*, No. 13-ALJ-17-0061-CC (S.C. Admin. Law Ct. 2014). *Dotsy* is similar to the instant case in that both matters address the valuation of farm land and farm structures. While Mr. Houck was a witness in *Dotsy* in a bench-trial, contested case hearing, the instant case was not a bench-trial, contested case hearing. Rather, the dispute at the Administrative Law Court between Petitioner ("Montgomery" or "Taxpayer") and Respondent ("Assessor") was heard on cross-motions for summary judgment with unopposed affidavits—no facts were in dispute, no testimony was taken.

Assessor supported his motion for summary judgment by an affidavit executed by the Assessor (Appendix p. 000157 – 000158) and a second affidavit executed by Mr. Houck. (Appendix p. 000154 – 000155). Mr. Houck's affidavit describes the history of the administrative practice of the Department of Revenue in valuing agricultural use property.

Taxpayer supported his motion for summary judgment by an affidavit describing the activities of the farm. (Appendix p. 000034 – 000037). However, Taxpayer provided no counter-affidavit seeking to show Mr. Houck was in error in his description of the practices and history of the Department of Revenue in valuing agricultural property.

B. TAXPAYER'S BASIS FOR HIS MOTION

Taxpayer's Motion asks the Court to supplement the material for review of Taxpayer's Petition for Writ of Certiorari (which material includes Mr. Houck's affidavit) by adding Mr. Houck's testimony from the *Dotsy* litigation. Taxpayer argues the *Dotsy* testimony is needed because the "Houck testimonial admissions [in *Dotsy*] undermine the assertions in the [Houck] affidavit[]." Petitioner's Motion, p. 2. Thus,

Taxpayer seeks to attack the statements made in Mr. Houck's affidavit by adding material to the record from a prior Administrative Law Court hearing in which neither Taxpayer nor Assessor were parties.

C. Respondent's Arguments Supporting Denial of Petitioner's Motion

Several reasons demonstrate Taxpayer's Motion should be denied.

1. Taxpayer Waived Any Opposition to Houck's Affidavit

First, Taxpayer's actions before the Administrative Law Court in the instant case waived any opposition to the statements in Mr. Houck's affidavit. *Beard v. Banks*, 548 U.S. 521, 527, (2006) establishes the rule for summary judgments:

> [Ronald] Banks (who was represented by counsel throughout) filed no opposition to the Secretary's motion [for summary judgment], but instead filed a cross-motion for summary judgment. Neither that cross-motion nor any other of Banks' filings sought to place any significant fact in dispute, and Banks has never sought a trial to determine the validity of the Policy. Rather, Banks claimed in his cross-motion that the undisputed facts, including those in Dickson's deposition, entitled him to summary judgment. In this way, and by failing specifically to challenge the facts identified in the . . . [Secretary's] statement of undisputed facts, Banks is deemed to have admitted the validity of the facts contained in the Secretary's statement.

Here, as in *Beard*, Taxpayer filed his own Motion for Summary Judgment; (Appendix, p. 000012 - 000032); placed no fact in dispute since he asserted affirmatively "there is no genuine issue of fact" (Appendix, p. 000032); and sought no evidentiary trial to determine the validity of the administrative positions of the Department of Revenue or of the Assessor by asserting "Petitioner is entitled to judgement as a matter of law" (Appendix, p. 000012). Having acted in such a manner, Taxpayer "is deemed to have admitted the validity of the facts contained in the [Houck affidavit.] *Id.* Thus, the motion seeking to add the transcript to the record to challenge Mr. Houck's affidavit should be denied.

2. Taxpayer's Attack on Houck's Affidavit Is Too Late

Second, Taxpayer is far too late to attack Mr. Houck's affidavit. Almost four years after the Taxpayer's July 2013 Motion for Summary Judgment, Taxpayer now raises for the first time the view that Mr. Houck's affidavit is inaccurate. When addressing an opposing party's affidavit alleged to contain statements for which a challenge is needed, a "party may not rest upon mere allegations or denials, but must respond with specific facts showing a genuine issue [of disagreement]." *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994); Rule 56(e), SCRCP ("party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts.").

Here, to prepare for the summary judgment proceedings before the Administrative Law Court, Taxpayer filed no counter-affidavits to that of Mr. Houck's affidavit. Now, almost four years later, it is far too late to attack Mr. Houck's affidavit. *See e.g., Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997) (holding a court in its discretion in a summary judgment matter may "refuse to consider materials that were not timely served.") [1] Therefore, the motion to add the transcript to the record should be denied as untimely.

[1] The "*Dotsy* testimony" of Mr. Houck occurred and was known to Taxpayer through Taxpayer's Counsel on October 13, 2013. Thus, Taxpayer was aware of the Houck testimony when the Taxpayer filed his Initial Brief to the Court of Appeals on May 19, 2014. He was familiar with *Dotsy* to such an extent he was able to discuss the purported similarities of *Dotsy* and the instant case across two pages of that brief. (Appendix 000291 – 000292). Yet, despite such familiarity both with *Dotsy* and Mr. Houck's testimony, Taxpayer took no action to add the testimony to the Record on Appeal before the SC Court of Appeals. But now, in May 2017, before the Supreme Court, Taxpayer seeks to challenge the Houck affidavit. The time to challenge has long passed.

3. Taxpayer's Submission Violates Rule 210(c), SCACR

Third, Taxpayer seeks to submit testimony from a hearing to which neither Montgomery nor the Assessor were parties. Permitting such improperly seeks to insert factual material outside the Record on Appeal in violation of Rule 210(c), SCACR.

Rule 210(c), SCACR, states, "[t]he Record on Appeal . . . shall not . . . include matter which was not presented to the lower court or tribunal." The Houck testimony from *Dotsy* was not presented to the lower court and has never formed part of the materials used by Taxpayer or the Assessor either at the Administrative Law Court or before the Court of Appeals. Adding the material now is improper and the motion should be denied.

4. No Due Process Violation Occurs

Fourth, Taxpayer argues excluding Houck's testimony "would be [a] deni[al of due process . . . [t]he essence of [which] . . . is fundamental fairness." Petitioner's Motion, p. 6. No violation of due process occurs by not including Houck's testimony in the record.

"[T]to prove a denial of substantive due process, a party must show that he was [treated] arbitrarily and capriciously." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). "Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016), reh'g denied (Dec. 7, 2016).* Here, not including the Houck testimony in the record for review is not the result of arbitrary reasons.

On the contrary, the exclusion of such items from the appellate record is rational (and consistent with Rule 210(c)) in prohibiting material not presented to the lower court. Allowing litigants to obtain a decision at the trial level, seek an appeal at the appellate

level, and then place into the record for appellate consideration material which the trial court had no ability to evaluate inherently denigrates both the trial and appellate process.

Such a practice causes the appellate court to become a trier of fact (having to evaluate documents presented for the first time in the litigation process) rather than a court designed to correct errors of law. *Dillard v. Blackman*, 258 S.C. 158, 162, 187 S.E.2d 643, 644–45 (1972) ("In law cases the jurisdiction of this Court extends merely to correction of errors of law and . . . [i]t is not our function to weigh the evidence."). Accordingly, the exclusion of the Houck testimony creates no due process violation. Thus, the motion should be denied.

5. Taxpayer's Motion Improperly Attacks Houck's Credibility and, In all Events, Houck's Testimony Is Consistent With His Affidavit So That No Basis Exists Warranting Adding the Testimony to the Record

Taxpayer asserts "in *Dotsy*, Houck testified in accord with his affidavit, but was subjected to cross examination, during which he made many admissions helpful to the taxpayer [and t]hese **admissions called into question his assertions in his affidavits**." (Emphasis added). Petitioner's Motion, p. 1. Further, Taxpayer's attack on Mr. Houck's affidavit continues with "[t]he Houck testimonial **admissions undermine the assertions in the affidavits**." (Emphasis added) Petitioner's Motion, p. 2. Taxpayer's attack on the veracity and accuracy Mr. Houck's affidavit is prohibited as a matter of law and, if the attack were permitted, is wholly specious.

a. Credibility Judgments Are Prohibited in Summary Judgment Reviews

Credibility judgments and weighing the evidence are prohibited during the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the

drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment.") Thus, in granting summary judgment in the lower court, attacking the credibility of Mr. Houck was forbidden. Now, on a request for certiorari at the appellate level, no basis exists for allowing such an attack since the standard on appeal for a summary judgment review is the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) ("When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c).)" Thus, since Taxpayer's motion seeks to attack the credibility of Mr. Houck at the appellate level, as a matter of law, Taxpayer's motion should be denied.

b. Houck's Testimony Does Not Conflict With His Affidavit

Beyond the legal prohibition of attacking Houck's affidavit, an even more compelling basis of denial is recognizing Houck's affidavit presents no untruths. Indeed, Taxpayer's attacks confirm Mr. Houck's veracity.

Taxpayer cites to a question posed to Mr. Houck asking if he had "written instructions" on valuing farm land and farm structures and adding the two. Petitioner's Motion p. 3. Taxpayer asserts that Houck's "no" answer "undermines the contention of the Respondent." Petitioner's Motion p. 3.

The answer does not undermine the Assessor. Houck's affidavit makes no assertion he prepared written instructions. Hence, Houck's answer is truthful; his answer confirms the veracity of the affidavit.

Similarly, Taxpayer points to a question in which Mr. Houck is asked if he knows of a regulation which states valuing farm property looks first to valuing farm land, then valuing farm structures, and then adding the two. Petitioner's Motion p. 3. Houck

responds by answering, "In those exact words, not to my knowledge." (Transcript p. 46, ln. 21) Taxpayer takes Mr. Houck's response and asserts "[t]his admission also undermines the contention of the Respondent." Petitioner's Motion p. 3.

Again, the answer does not undermine Respondent's position since Houck's affidavit does not assert a regulation contains the valuation method the Department has followed since 1975. Hence, again, Houck's answer supports the veracity and accuracy of his affidavit.

Taxpayer references a line of questions in which Mr. Houck is asked about rollback taxes for farm property. (Petitioner's Motion p. 3,4). The whole series of questions is irrelevant—no issue was before the *Dotsy* court and no issue is before this Court on rollback taxes.

Nonetheless, Taxpayer makes the statement phrased as a question to Mr. Houck, "Then there's no statute that says agricultural real property is to be taxed at fair market value?" In response, Mr. Houck disagrees and explains there is such a statute by stating, "It's being taxed at fair market value for agricultural purposes." His answer is the exact wording of SC Code Ann. §12-43-220(d)(2)(A) defining "[f]air market value for agricultural purposes." Houck's affidavit relies on SC Code Ann. §12-43-220(d)(2)(A) when the affidavit states:

> 9. Thus, under the Department's interpretation, the taxable value of agricultural real property is to be determined by valuing both the agricultural land, pursuant to the methods outline in section 12-43-220(d)(2)(A), and any structures located on the agricultural land. Under the Department's interpretation, the value of any structures located on the agricultural land is added to the value of the agricultural land in order to determine the total taxable value of the agricultural real property.
>
> Appendix p. 000155

Again, Houck answers truthfully, correctly, and consistent with his affidavit. Nothing in his answer supports Taxpayer's accusation that Houck's *Dotsy* testimony has "**called into question his assertions in his affidavits.**" (Emphasis added). Petitioner's Motion, p. 1.

Taxpayer's motion reviews a line of questioning in the *Dotsy* testimony addressing amendments by the General Assembly to the agricultural use statutes in 1975, 1976, and 1979. Petitioner's Motion, p. 4 – 5. From that line of questioning in *Dotsy*, Taxpayer argues in his motion:

> Houck admitted that Act 133 of 1979 amended S.C. Code Ann. § 12-43-220(d)(l)(2) "by **striking the word 'land'** on line 1 and **inserting 'real property'**" Transcript, p. 67, 11. 11-25) (emphasis added). Houck also admitted in 1979, the statutory language changed from agricultural "land" back to agricultural "real property," but the Department policy or methodology simply did not change (Transcript, p. 68, ll. 1-14). This admission supports one of Petitioner's critically important points.
>
> Petitioner's Motion, p. 4 – 5

Houck did admit the change and in doing so made no statement inconsistent with his affidavit. Instead, Houck's testimony in *Dotsy* as to Act 133 answers questions addressing §12-43-220(d)(1)—the statute dealing with the assessment ratio. The questions do not address §12-43-220(d)(2)—the statute dealing with valuation. Thus, the questions asked were irrelevant then and are irrelevant now and have no bearing on Houck's affidavit.

The irrelevance is shown by the language of the amendments. Act 618 of 1976 altered the language of section 12-43-220(d)(1) and changed the words "agricultural real property" to the words "agricultural land." However, Act 133 of 1979 reversed the change—the word "land" was replaced with the words "real property." This change impacted §12-43-220(d)(1) which deals with the ***assessment ratio*** applicable to agricultural real property. Prior to Act 133 of 1979, the plain language of the statute

would have required application of the 4% assessment ratio to ***only agricultural land***. By changing the language of § 12-43-220(d)(1) to "real property," Act 133 made plain that ***all agricultural real property—including both land and structures—must be assessed and taxed at a four percent ratio.*** Thus, Houck's affidavit addresses the valuation issue; the testimony in *Dotsy* referenced in Petitioner's Motion, p. 4 – 5 does not address value, it addresses the classification assessment ratio of 4%. Hence, there is no conflict with Houck's affidavit.

The Court of Appeals understood the difference between statutes setting the ratio classification for property and statutes setting the value for property. It correctly examined the issue before it of how to set the value; it was not addressing any question of how to set the classification ratio. After reviewing the 1975, 1976, and 1979 amendments, the Court of Appeals explained:

> These [amendments to the] statutes, which deal only with the *classification* of agricultural real property, have no bearing on the *valuation method* to be used when determining the owner's property tax liability. (Emphasis in original)
>
> Appendix p. 000328

Finally, Taxpayer's motion asks this Court to consider Mr. Houck's *Dotsy* testimony addressing valuing farm structures under §12-37-930. Petitioner's Motion p. 5 – 6. After listing the questions and answers from the *Dotsy* transcript, Taxpayer does not explain how the testimony discredits Houck's affidavit. Instead, Taxpayer summarily states, "This testimony undermines one of the main arguments of the Respondent." Petitioner's Motion p. 6.

A review of the questions and answers listed by Taxpayer in his motion show no disagreement with Houck's affidavit. Rather, the questions and answers again address

rollback taxes—taxes unrelated to the issue decided by the lower court and by the Court of Appeals.

D. CONCLUSION

The motion to add the partial transcript from the *Dotsy* hearing to the material for consideration of a certiorari petition should be denied for any of five reasons. 1) By Taxpayer himself seeking summary judgment in the lower court, Taxpayer waived any opposition to the statements in Mr. Houck's affidavit. 2) Having waited almost four years after the Taxpayer's July 2013 Motion for Summary Judgment and having made no effort to supplement the Record on Appeal to the Court of Appeals, Taxpayer is now far too late to attack Mr. Houck's affidavit. 3) The *Dotsy* transcript is from a hearing to which neither Montgomery nor the Assessor were parties and permitting the introduction of that partial transcript on appeal violates Rule 210(c), SCACR by introducing material not presented to the lower court. 4) Not including the Houck testimony is not the result of arbitrary reasons and excluding the transcript will create no violation of due process. 5) Attacking the credibility of Mr. Houck's affidavit is forbidden as a matter of law for summary judgment reviews and, in all events, the testimony in *Dotsy* does not contradict Mr. Houck's affidavit. For the reasons as more fully explained above, Taxpayer's motion to include in the record the Houck testimony from the *Dotsy* hearing should be denied.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on May 8, 2017 s/he has caused a copy of the **RESPONDENT'S RETURN TO PETITIONER'S MOTION FOR THE COURT TO CONSIDER THE TRANSCRIPT OF THE TESTIMONY OF SANDY HOUCK** to be served upon all parties of record by delivering a copy of the same by hand delivery as follows:

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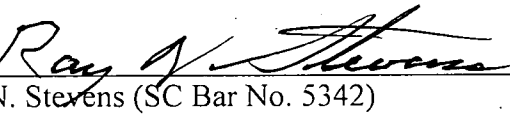

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