

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2012-CP-38-00837

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MAR 22 2019

SC Court of Appeals

Jimmie Aiken, Leila Brown, Veronda Cohen, Carla David, Anthony Sabb,
James Ginn, and Shirley Rice, as named Plaintiffs representing a class of
South Carolina Citizens.....Respondents,

v.

South Carolina Department of RevenueAppellant.

**Appellant's Return to Respondents' Motion
To Take Judicial Notice**

Dana R. Krajack (Bar No. 3608)
Counsel for Litigation P.O. Box 12265
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Attorneys for Appellant
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ARGUMENT

Respondents, putatively by way of Motion, have sought to "...move this Court to notice everything the DOR wants to strike." (Respondents' Motion, p.4). To reiterate, the Appellant, DOR, has by way of Motion sought to strike all averments, attachments, and/or exhibits submitted with or as part of the Respondents' Petition to Transfer that in any way relate to a non-party, Dawn Ridge. As indicated in the Appellant's Motion to Strike, Respondents have sought to include in the record for this appeal at least four items that violate SCACR Rule 210:

- Third Amended Complaint, which was not ruled on by the lower court prior to the initiation of this appeal, and which the lower court has now ruled cannot be filed and served during the pendency of this appeal;
- Affidavits and documents (which were either attached to the Third Amended Complaint, or are now attached to the Petition), which have not been considered or ruled upon by the lower court;
- July 18, 2018 Order of the Court of Appeals denying Respondent's motion to supplement the record, which was not appealed by Respondents; and
- December 19, 2018 Order of the circuit court which that denied Respondents' Motion for Leave to File a Third Amended Complaint, which was entered subsequent to the initiation of this appeal and which was not appealed by Respondents.

To the extent permissible here, and without belaboring the reasons therefor, the Appellant reiterates its Motion to Strike, to the same extent as if repeated verbatim.

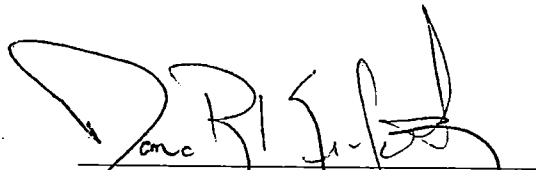
Furthermore, the Appellant would submit that the Respondents in their present Motion to Take Judicial Notice have, once again, attempted to impermissibly bolster the record with matters

that are not in the Record on Appeal. In this regard, the law is clear, an appellant may not use oral argument, and accordingly should not be allowed to argue in its Motion to Take Judicial Notice, issues that are not preserved for appellate review. See *Too Tacky P'ship v. S.C. Dep't of Health and Env'tl. Control*, 386 S.C. 32, 686 S.E. 2d 194 (Ct. App. 2009); *Brochette v. Brochette*, 300 S.C. 109, 386 S.E. 2d 475 (Ct. App. 1989). An appellate court will not consider any fact that does not appear in the record on appeal. SCACR, Rule 210(h).

As to the substance of the Respondents' request for this Court to take judicial notice, "judicial notice takes the place of proof." *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 228 S.E. 2d 109(1976); *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935). Accordingly, as cited in *Master v. Rodgers Dev. Group*, 283 S.C. 21, 321 S.E. 2d 194 Ct. App. 1984), "Appellate Courts should be reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Citing *United States v. Jones*, 580 F.2d 219 (6th Cir.1978). ..Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record.... Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge... For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable." In this regard, the Respondents readily admit that "Petitioners [sic] cannot say that the facts are indisputable." (Respondents' Motion, p.4). Thus, the Court should deny the Respondents' request to take judicial notice of any factual allegations which are, subject to, and are in, dispute.

CONCLUSION

While the Appellant does not oppose the transfer of this case to this Court, which is now pending before the Court of Appeals, the Appellant is opposed to the Respondent's inclusion of any extraneous matters which are not in the Record on Appeal – regardless of the means by which the Respondents have gone to include same. It is readily apparent that the Respondents have stopped at nothing to include these spurious matters. They have sought to include same as a Motion to Supplement the Record before the Court of Appeals; they have sought to include these matters before the circuit court by way of a motion to amend pleadings – both of which were denied (and not appealed by the Respondents). Not to be dissuaded, they have sought yet again to include these matters before this Court by inserting it in its “Statement of the Case” (in its Petition to Transfer); and now, by way of inserting it in their Motion to Take Judicial Notice. It is patently obvious that the Respondents are unwilling to accept the Court of Appeals' decision, the lower court's decision, or the South Carolina Appellate Court Rules – that such matters have not been, and should not be, before any Court at this time – for any reason. Accordingly, Respondents' Motion to Take Judicial Notice should be denied.



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Attorneys for Appellant

March 19, 2019

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APPEAL FROM ORANGEBURG COUNTY
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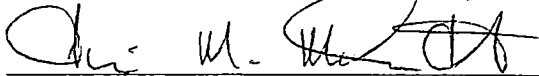
v.

South Carolina Department of Revenue
.....Appellant.

**Appellant's Return to Respondents' Motion
to Take Judicial Notice**

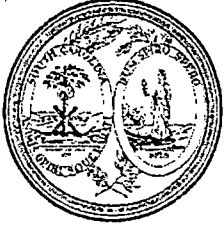
PROOF OF SERVICE

I, as employee for the Appellant, do hereby certify that I have served the Appellant's Return to Respondents' Motion to Take Judicial Notice [and served Jimmie Aiken, Leila Brown, Veronda Cohen, Carla David, Anthony Sabb, James Ginn, and Shirley Rice] by depositing a copy of same in the United States Mail, postage prepaid, on March 5, 2019, addressed to their attorney(s) of record, Robert N. Hill, Esquire, P.O. Box 1323, Lexington, SC, 29071-1323; Mark B. Tinsley, Esquire, Gooding and Gooding, P.O. Box 1000, Allendale, SC 29810; Charles H. Williams, Esquire, Williams & Williams, P.O. Box 1084, Orangeburg, SC 29115; and Daniel W. Williams, Esquire, Bedingfield & Williams, P.O. Box 616, Barnwell, SC 29812.



Tonie M. Miranda, Legal Assistant, S.C. Dept. of Revenue

March 19, 2019



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211-9979

March 19, 2019

South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

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SC Court of Appeals

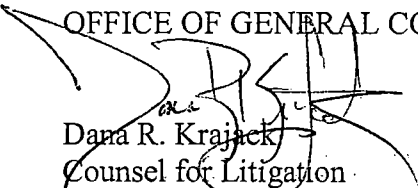
Re: Jimmie Aiken, Leila Brown, Vernonda Cohen, Carla David, Anthony Sabb, James Ginn, and Shirley Rice, as named Plaintiffs representing a class of South Carolina Citizens, Respondent vs. South Carolina Department of Revenue, Appellant
Appellate Case Number: 2017-001790

Dear Clerk of Court:

Enclosed please find the Appellant's, South Carolina Department of Revenue's Return to Respondent's Motion to Take Judicial Notice. I am providing the unbound original and six copies of same. Please further find the Appellant's Certificate of Service for same.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION


Dana R. Krajack
Counsel for Litigation

cc: The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, P.O. Box 11629, Columbia, SC 29211
Robert N. Hill, Esquire, P.O. Box 1323, Lexington, SC, 29071-1323
Mark B. Tinsley, Esquire, Gooding and Gooding, P.O. Box 1000, Allendale, SC 29810
Charles H. Williams, Esquire, Williams & Williams, P.O. Box 1084, Orangeburg, SC 29115
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LEGISLATION - REVENUE

**South Carolina
Department of Revenue
Office of General Counsel**

P.O. Box 12265, Columbia, SC 29211-9979

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SC Court of Appeals

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CLERK OF COURT
SOUTH CAROLINA COURT OF APPEALS
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COLUMBIA SC 29211

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