

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

Ashely Suzanne Griffith,  
Moore Taylor Law Firm, P.A.,  
Vance Stricklin, and Amber  
Fulmer,

Respondents.

**RECEIVED**  
JAN 08 2020  
SC Court of Appeals

**MOTION TO RECONSIDER AND AMEND ORDER DENYING  
APPELLANT'S MOTION TO PROCEED IN FORMA PAUPERIS**

**-AND-**

**REQUEST FOR REASONABLE ACCOMODATION RE SUPPORTING  
MEMORANDUM AND SUPPORTING AFFIDAVIT FILING DEADLINE  
PURSUANT TO THE AMERICANS WITH DISABILITIES ACT**

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**MOTION TO RECONSIDER AND AMEND ORDER DENYING  
APPELLANT'S MOTION TO PROCEED IN FORMA PAUPERIS**

Appellant respectfully submits this motion for reconsideration of the order denying Appellant's motion to proceed in forma pauperis dated December 6, 2019. Appellant first received notice of entry of the order on December 24, 2019. The grounds for the motion are as follows:

1. The order states the time for compliance is fifteen days from the date of the order rather than fifteen days from the date Appellant received notice of entry of the order. The order was misdelivered by the U.S. Postal Service to 214 Jones Avenue rather than 216 Jones Avenue, as explained in separate correspondence with the Court from Appellant dated December 24, 2019 (which is incorporated herein by reference), an error Appellant did not become aware of until the morning of December 24, 2019, which precluded Appellant from complying with the fifteen day deadline, which expired on December 23, 2019. Based on these facts and constitutional due process considerations, together with the obvious intention of the Court to give Appellant reasonable time to comply with the order requiring payment of the filing fee, Appellant respectfully requests the Court amend the order of December 6, 2019 to change the compliance deadline from "fifteen days of the date of the this order" to "fifteen days from the date Appellant receives notice of entry of the order."

2. The order relies solely on obiter dicta in a South Carolina Supreme Court case, Ex parte Martin, 321 S.C. 533, 471 S.E.2d 134 (1995), in denying Appellant's motion for leave to proceed in forma pauperis, apparently because the

Court has concluded that the relevant portions of Ex parte Martin are binding precedent from the South Carolina Supreme Court with respect to in forma pauperis issues. Appellant respectfully submits this is error because none of the language in Ex parte Martin relating to in forma pauperis matters constitutes binding precedent and cannot be relied upon as such by this Court or lower South Carolina courts. The material in Ex parte Martin relating to in forma pauperis matters is a mere advisory opinion from the South Carolina Supreme Court, as the opinion itself indicates, and therefore cannot be relied upon as precedent, binding or otherwise, in these proceedings or any other.

3. Even if Ex parte Martin were binding precedent, that does not fully adjudicate Appellant's motion for leave to proceed in forma pauperis. Appellant's supporting memorandum presents argument that the South Carolina Appellate Court Rules empower South Carolina appellate courts to relieve parties of filing fees in any "extraordinary" situation, and the South Carolina Appellate Court Rules have the force and effect of statutes of South Carolina where there is no conflicting statute. Appellant reasonably contends that the indigency of a party to a non-frivolous appeal is an extraordinary situation and, therefore, that an enactment having the force of statute authorizes (and, in fact, requires) the South Carolina Court of Appeals to relieve Appellant of the obligation to pay filing fees in this case. This renders Martin inapplicable, since Martin's "holding" (which Appellant contends is mere obiter dicta) is that South Carolina courts cannot relieve parties of filing fees without a pre-existing legal basis to do so. The South Carolina Appellate Court Rules provide that legal basis, and since indigency of an

appellate party is clearly an “extraordinary” circumstance, Appellant respectfully contends that the Court erred by relying on Martin to deny Appellant’s motion.

4. Further, even if Martin is binding precedent, Appellant has submitted multiple arguments that the right to proceed in forma pauperis is protected in this particular case by the United States Constitution and the South Carolina Constitution. Appellant’s submission—which was unopposed by opposing counsel—makes clear that the circuit court in this case failed to rule on numerous critically important and potentially outcome dispositive matters that were timely raised and presented to the circuit court by Appellant, including but not limited to Appellant’s contention that Respondents made improper submissions in the context of a Rule 12(b)(6) motion, including an untimely supporting affidavit (which is generally improper in the Rule 12(b)(6) context) and a memorandum of law that addressed numerous grounds for dismissal that were not raised by Appellant’s motion itself. The circuit court also failed to rule on Appellant’s timely motion for recusal based on the circuit court’s apparent familiarity and reliance on allegations of fact arising from matters that were not presented to the circuit court by either party and which required the circuit court to do some form of improper outside research into the overall dispute between the parties which goes far beyond the matters properly before the court in the context of this particular case. The circuit court also relied on court orders from other cases between the parties that were improperly presented to the circuit court after the hearing without notice to Appellant, and Appellant’s objections to such presentation were ignored and never ruled on by the circuit court. The circuit

court also refused and failed to rule on Appellant's motion for leave to submit an amended complaint addressing the matters raised by Respondents in their Rule 12(b)(6) motion. Appellant reasonably contends, based on cases from the United States Supreme Court, that an appeal from the circuit court's failure to rule on these various objections and arguments submitted by Appellant must be heard in forma pauperis because any other outcome would violate Appellant's basic constitutional due process rights to a ruling on potentially outcome determinative objections and requests (such as the motion for leave to amend). The order of December 6, 2019 does not address any of these matters, and it is clear that Martin does not preclude a motion for leave to proceed in forma pauperis on these grounds. Appellant respectfully submits that this is error and asks the Court to reconsider its order of December 6, 2019 on this basis and rule on these matters. Appellant obviously hopes the ruling will be favorable but at least some form of ruling is required by due process because the order of December 6, 2019 does not address these issues at all.

5. Appellant also contends the Court of Appeals erred by failing to address Appellant's argument that the amount of the filing fee—\$250—is unconstitutionally disproportionate. The filing fee for circuit court lawsuits in South Carolina is \$150, and appeals are necessarily abbreviated proceedings compared to trials in circuit court. Appellant respectfully submits that any filing fee in excess of \$150 or even equivalent to \$100 for appeals is constitutionally disproportionate and its purpose, or at least its effect, is to discourage legitimate appeals. Appellate respectfully submits that the former appellate filing fee of \$100

was constitutionally permissible, since an appellate proceeding is somewhat more complex than a typical circuit court motion (whose filing fee is \$25) but is generally less complex than a typical circuit court trial (whose filing fee is \$150). A filing fee between \$25 and \$150 for appeals is constitutionally appropriate in general, and Appellant respectfully requests the Court rule on this contention of Appellant and determine that the order establishing a \$250 filing fee for appeals is unconstitutional on its face, or at least as applied to this case, and that the former \$100 filing fee for appeals is constitutionally mandated so long as the filing fee for circuit court trials is \$150 and the filing fee for circuit court motions is \$25.

6. Appellant respectfully contends that the process by which the Court of Appeals ruled on the motion for leave to proceed in forma pauperis violates the United States Constitution and, more particularly, the South Carolina Constitution because the Court ruled adverse to appellant in the absence of any objection by an opposing party with standing to represent the government of South Carolina with respect to collection of revenue. This violates the separation of powers doctrine. The Executive Branch of the government of the State of South Carolina is the only entity with constitutional standing to oppose motions for leave to proceed in forma pauperis because the collection of court filing fees is an executive function—not a judicial function—because it is the collection of government revenue. Separation of powers (and due process) prohibits judges from acting as both advocate for the government and adjudicator of the motion for leave to proceed in forma pauperis, which is what happened in this case. Appellant filed a motion for leave to proceed in forma pauperis which was not opposed by the

opposing party, a private party who has no stake in the question of whether Appellant pays filing fees, nor was it opposed by any duly authorized representative of the executive branch. Appellant respectfully contends that before a South Carolina court may deny a motion to proceed in forma pauperis, the Court must direct an appropriate executive branch official—the Attorney General or a circuit solicitor would seem to be the correct personnel—to either interpose an objection or waive the right to oppose, a right held exclusively by the Executive Branch. Any other outcome leads to a separation-of-powers violation and places judges in the constitutionally impermissible position of both opposing the motion to proceed in forma pauperis and also ruling on their own objection, as happened in this case. Appellant respectfully contends that this violates due process generally, pursuant to both the federal and state constitutions, and also violates the South Carolina Constitution’s specific guarantee that an adjudicatory officer in any judicial or quasi-judicial proceeding cannot also represent the government’s position in the matter because no man may be both advocate and judge in the same case. For the foregoing reasons, Appellant respectfully the Court order the Attorney General or some other appropriate executive branch officer to either intervene in this case in opposition to Appellant’s motion for leave to proceed in forma pauperis or grant the motion on reconsideration. Any other outcome violates Appellant’s constitutional right to avoid a situation where a judge is also an opposing advocate and to avoid the violation of separation of powers inherent in a situation where a judge is called on to be both a revenue-raising and revenue-collecting officer of the executive branch while also serving as an officer of the

judicial branch on the particular question of whether the revenue may be constitutionally or otherwise properly collected in a given case.

7. Finally, related to the previous grounds upon which this motion is based, Appellant respectfully requests the Court rule on the question of whether the United States Constitution and South Carolina Constitution vest South Carolina courts with the inherent power to allow indigent litigants to proceed in forma pauperis in non-frivolous private disputes even if the South Carolina court rules and statutes contain no such authorization. Appellant respectfully contends that rules barring indigent litigants from filing non-frivolous lawsuits seeking adjudication of private disputes and fully litigating those disputes in the appellate courts if necessary are unconstitutional under both the federal and state constitutions. The provision of justice cannot, consistent with due process, be conditioned on a party's ability to pay a filing fee. Appellant will submit further argument in support of this ground (and the other grounds raised, where necessary) in his supporting memorandum.

**REQUEST FOR REASONABLE ACCOMODATION RE SUPPORTING  
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Appellate also respectfully requests the Court extend the time required for Appellant to file a memorandum in support of this motion and the grounds articulated herein and supporting affidavits verifying the factual assertions in the motion. Appellant requests an extension of fifteen days. This request is made as a reasonable accommodation request pursuant to the Americans with Disabilities Act on the grounds that Appellant suffers from psychological limitations, including but not limited to untreatable attention deficit disorder, bipolar disorder, and other maladies that Appellant respectfully requests to submit to the Court under seal if necessary, that necessitate reasonable extensions of court deadlines in order to give Appellant a full and fair opportunity to prepare materials for filing and be heard in full on matters in litigation. In most cases, Appellant requires approximately two and a half times as many days to handle litigation matters as an ordinary litigant without disabilities would (and sometimes longer in situations where other litigation demands also exist and serve as a distraction), and, accordingly, Appellant respectfully requests the Court extend the deadline for preparing and submitting supporting materials for this motion—a supporting memorandum and supporting affidavits—by fifteen days.

Appellant will be happy to submit supporting documentation as requested by the Court if necessary, but Appellant respectfully requests—to protect his medical privacy—that any requirement to submit additional supporting materials regarding his medical status be accompanied by an order sealing such filings and

proceedings related to them. Appellant respectfully submits that it is the general practice of South Carolina courts to seal materials in situations of this nature, where an Appellant's psychiatric condition is at issue, and Appellant makes this request on these grounds together with his federal and state constitutional and statutory rights to medical privacy.

**NOTE REGARDING MOTIONS FOR  
RECONSIDERATION IN APPELLATE PROCEEDINGS**

Appellant is aware of the provisions of the South Carolina Appellate Court Rules prohibiting motions for reconsideration of appellate court orders that are not outcome determinative. Appellate respectfully submits that these provisions are unconstitutional as applied both under the South Carolina Constitution and the United States Constitution in this particular situation, where a party asks an appellate court in good faith to correct actual errors in a non-dispositive order. The provisions of the appellate court rules that prohibit motions for reconsideration improperly and unconstitutionally assume that non-dispositive appellate court orders cannot possibly contain errors, and the due process and right-to-petition clauses of the United States Constitution and the South Carolina Constitution plainly bar application of the rules at issue where a party has a good faith basis to believe that a non-dispositive appellate court order contains errors and moves for reconsideration in good faith seeking to correct those errors. Further, the United States Constitution and the South Carolina Constitution both protect the right of judges to timely correct errors in orders that they have issued. Judges are not perfect, and the appellate court rules improperly and unconstitutionally presume that it is impossible for a South Carolina appellate court to err in a non-dispositive order. Further, and perhaps most importantly, the fundamental state and federal constitutional right to petition the government for redress of grievances encompasses the right of a South Carolina appellate party to petition a South Carolina appellate court for redress that party has a good faith

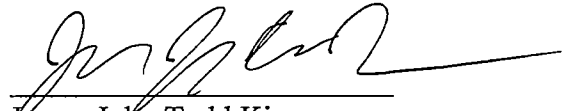
basis to believe a non-dispositive appellate court order contains a non-trivial error. Appellant respectfully requests the Court consider this motion, despite the prohibition of consideration in the appellate court rules, on these grounds—otherwise, Appellant’s fundamental constitutional right to petition the government for redress of grievances (and, likely, the right to due process which inherently protects a party’s right to seek, once, reconsideration of an erroneous court order) will be improperly denied.

**CONCLUSION**

Appellant respectfully requests the foregoing relief.

Respectfully submitted,

January 3, 2020



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**CERTIFICATE OF SERVICE**

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The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing on opposing counsel at the address submitted by opposing counsel to the Court for service in this case.

January 3, 2020

  
\_\_\_\_\_  
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