

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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Alex Kinlaw, Jr., Circuit Court Judge FEB 28 2020

Common Pleas Case No. 2018-CP-23-00515 **SC Court of Appeals**

Appellate Case No. 2019-002040

DAVID ROSEN,

Appellant,

v.

JOSEPHINE MIDDLETON,

Respondent.

Reply to Return to Motion to Dismiss Appeal for Lack of Jurisdiction

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Lead Counsel for Respondent

COMES NOW Respondent and would respectfully show the Court as follows in Reply to Appellant's Return to Her Motion to Dismiss Appeal for Lack of Jurisdiction.

Appellant has failed to prove that jurisdiction lies here. Every appellant bears the burden of establishing subject-matter jurisdiction on appeal. *See, e.g., Harkins v. Greenville Cty.*, 340 S.C. 606, 616 (2000) ("The Adult Businesses, as the appellant in this issue, have the burden of presenting this Court with an adequate record. Without the necessary County ordinances, this Court cannot determine the time period between the initial permit application and a final appealable administrative decision."); *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153 (1980) ("When jurisdiction is challenged, the plaintiff has the burden of presenting facts sufficient to establish jurisdiction."). And where, as here, the Record has not been filed, "the parties shall file affidavits and other documents in support of their positions." R. 240(c)(3), SCACR. Appellant's argument, however, is littered with factual assertions with no citation to evidentiary material. Because "[a] court cannot consider facts appearing only in argument of counsel," *Shinn v. Kreul*, 311 S.C. 94, 102 (Ct. App. 1993) (citation omitted), and because Appellant filed no affidavits or other documents with his Return, this Court can and should summarily dismiss the appeal. There is a complete lack of evidence establishing, as a matter of fact, any "substantial right" implicated in the order below.

Even if Appellant had proffered evidence for the Court's consideration, Appellant's claim would still fail as a matter of law. Appellant simply wants to avoid a trial. But "[a]voidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470 (1991) (citation omitted).¹

Dated this 26th day of February, 2020.

JOSEPHINE MIDDLETON



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¹ Respondent obviously disagrees with Appellant's critique of Judge Kinlaw's ruling. Respondent will address that critique, if necessary, in the merits brief.

PROOF OF SERVICE

I, the undersigned, served a copy of the foregoing on the following counsel of record this 26th day of February, 2020, by U.S. Mail, First-Class Postage prepaid:

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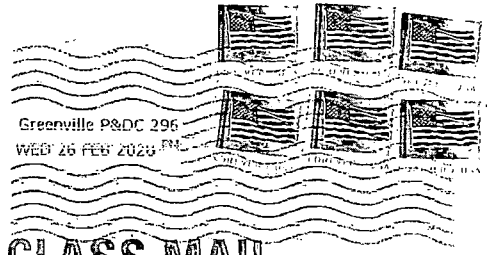
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SC Court of Appeals

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