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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No.: 2017-CP-10-4820 (Consolidated Case Number)

Other case numbers:	2017-CP-10-4906
2017-CP-10-4821	2017-CP-10-4907
2017-CP-10-4822	2017-CP-10-4923
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2017-CP-10-4842	
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2017-CP-10-4899	
2017-CP-10-4900	
2017-CP-10-4901	
2017-CP-10-4903	
2017-CP-10-4904	
2017-CP-10-4905	

Appellate Case Number: 2021-000053

SARAH SHARPER, ET AL..... Appellants,

v.

CITY OF NORTH CHARLESTON, COUNTY OF CHARLESTON,
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, SOUTH
CAROLINA DEPARTMENT OF TRANSPORTATION, BANKS
CONSTRUCTION COMPANY, UNITED CONTRACTORS, INC,
BANKS/UNITED JOINT VENTURE AND HLA, INC, COLEMAN-SNOW
CONSULTANTS, LLC AND ICA ENGINEERING, INC. F/K/A FLORENCE &
HUTCHESON, INC.....Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

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S.C.R.C.P. 56(c).....2
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During the Coronavirus Emergency (As Amended April 22, 2020).....3

In response to the Respondent SCDOT's Reply Brief, Appellants provide additional case law and other authority addressing the issue of timeliness of Appellants' expert affidavit.

STATEMENT OF ISSUES ON APPEAL

1. WHETHER APPELLANTS' AFFIDAVIT CONSTITUTES ADMISSIBLE EVIDENCE.

ARGUMENTS

The Appellants continue to rely on their Initial Brief and the arguments contained therein. In particular, Appellants would briefly reiterate that Respondent failed to participate in discovery despite being put on notice their responses were long overdue. Even though Respondent acknowledges discovery requests were "issued about a year before"¹ and still had not responded by the time of the Summary Judgment hearing, they now attempt to raise a timeliness argument against Appellants.

Respondent argues that "Appellants failed to produce any admissible evidence in opposition to SCDOT's Motion for Summary Judgment"² and in doing so, solely rely on Rule 56(c) of the South Carolina Rules of Civil Procedure which specifies that when filing papers in response to motions for summary judgment, "[t]he adverse party may serve opposing affidavits not later than two days before the hearing."³ Respondent contends that because Appellants' expert affidavit was not produced until the day of the hearing on Respondent's Motion for Summary Judgment, it does not constitute admissible evidence. This logic is flawed for the various reasons as set forth below.

¹ Hearing transcript p. 10, l. 23; (ROA, p. ____).

² Resp. Initial Brief, p. 8.

³ S.C.R.C.P. 56(c).

Deadlines were extended due to the COVID-19 pandemic.

Beginning in March of 2020, the Supreme Court of South Carolina began issuing orders concerning the adjustment and temporary modification of existing court rules and protocol as a result of the COVID-19 pandemic. On the date of the Summary Judgment hearing, the Supreme Court's Operation of the Trial Courts During the Coronavirus Emergency (As Amended April 22, 2020) Order (hereinafter "Order") was in effect. Section 9 of the Order, entitled "Extensions of Time and Forgiveness of Procedural Defaults" provides general guidance on the applicability of standard deadlines during the pandemic. In particular, subsection 9(A) states that "This crisis will increase the need for extensions to be granted" and allows for the extension of deadlines on all trial court filings. While the Order does not specifically address every conceivable deadline to which it applies, it does outline the rules to which the Order does not apply. Subsection 9(D) provides limitations to S.C.R.C.P Rules 50, 52 and 60, but notably does not limit extensions to timeframes established by Rules 6 or 56, which are at issue here. Therefore, based on the aforementioned Order of the Supreme Court, the deadline for Appellants to provide their expert affidavit was extended.

The Court is within its discretion to allow an affidavit, even if received later than two days prior to the hearing.

The Respondent relies on the ruling in *Black* which stated that a trial court may "refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response."⁴ However, what Respondent fails to acknowledge that the court in *Black* refused to consider an affidavit filed on the date of the hearing *because the party failed to assert*

⁴ *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997).

*any good excuse for that failure.*⁵ Similarly, the Court in *West v. Gladney*⁶ reiterated that because the party “failed to present any good cause for his failure to timely file the affidavit... the trial court did not abuse its discretion in ruling the affidavit should not be considered.”⁷

Considering the Supreme Court’s Order extending all deadlines and the other reasons detailed above, Appellants have good cause for not being able to produce their expert’s affidavit a full two days before the hearing. In light of all facts and circumstances in the present matter, it is clear that the decision in *Black* is not authoritative, or even instructional, on the issue of timeliness. Even if, however, the Appellants were unable to show good cause, the two-day rule applies “unless the court allows otherwise.”⁸

The trial court never excluded Appellant’s affidavit.

Most importantly, in order for Respondent’s argument to prevail, the trial court would have had to actually exclude the evidence sought to be introduced. Then, the Appellants would have to prove that the trial court abused its discretion in doing so. Here, although Respondent stated they “don’t believe [the] affidavit is timely,”⁹ the trial court judge never responded to or otherwise ruled on the objection.¹⁰ There is absolutely no indication in the Record that Appellants’ affidavit was ever excluded at the hearing or otherwise.

In fact, the record evidence seems to show the exist opposite. In fact, because the judge allowed Appellants’ counsel to argue the case using the very affidavit Respondent sought to exclude, there is an implicit determination that it was allowed and considered.

⁵ *Id.* (emphasis added)

⁶ *West v. Gladney*, 533 S.E.2d 334, 341 S.C. 127 (S.C. App. 2000).

⁷ *Id.*

⁸ S.C. R. Civ. P. 6(d).

⁹ Hearing transcript, p. 4, l. 22; (ROA, p. ____).

¹⁰ See Hearing transcript, p. 12, l. 25 wherein Judge Price stated he would take the matter under advisement, and the following Form 4 granting Respondent’s Motion for Summary Judgment but making no specific findings (ROA, p. ____).

Appellants' objection to Respondent's hearing evidence is preserved.

Interestingly, Respondent primarily relies on *Black v. Lexington Sch. Dist.*¹¹ to support its contention that Appellants' affidavit was not timely. However, *Black* is not limited to affidavits. The Court in *Black* actually held that a "court may refuse to consider *materials*" (emphasis added) if the opposing party did not have an adequate opportunity to prepare a response.¹² That is exactly what happened in this case, when Respondent displayed satellite images and maps of the relevant location without ever having previously disclosed those materials. Aside from the sheer irony of Respondent's argument, they also allege that Appellants waived their objection by not asserting it at the hearing. That is simply a misstatement of what transpired.

Throughout the Summary Judgment hearing, Appellants objected to the consideration of Respondent's evidence since they had failed to cooperate in discovery and refused to produce any documentation whatsoever.¹³ Although Appellants would agree that generally, an objection is required to preserve an issue for appeal, there is no requirement that a party re-object to every portion of Respondent's argument once an objection has been asserted.

CONCLUSION

Because the trial court had the right to and did accept Appellant's affidavit at the time of the hearing, SCDOT should be precluded from raising any timeliness arguments related to that document. Appellants further rely on their Initial Brief and all arguments and references contained therein in asserting that the dismissal of SCDOT constitutes clear error and should be reversed.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

¹¹ *Supra* FN 4.

¹² *Id.*

¹³ *See generally* Hearing transcript p. 6-7; (ROA, p. ____).

Respectfully submitted,

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CONSULTANTS, LLC AND ICA ENGINEERING, INC. F/K/A FLORENCE &
HUTCHESON, INC.....Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the **Initial Reply Brief of Appellants and Designation of Matter** on the following counsel, by depositing a copy of it in the United States Mail, postage prepaid, on June 17, 2021.

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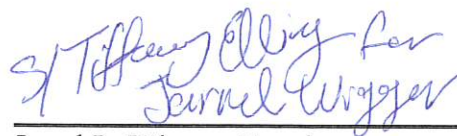
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Dear South Carolina Court of Appeals:

Enclosed you will find an original and one copy of the following documents:

1. Initial Reply Brief of Appellants;
2. Designation of Matter (Already submitted to the court to be included in the record of Appeal); and
3. Proof of Services to Defendants for service of Initial Reply Brief of Appellants.

I would appreciate you filing the originals and returning the filed copy of each to me in the self-addressed stamped envelope provided.

With kindest regards, I am

Yours Very Truly,



Rebeca Powell
Paralegal to Jarrel L. Wigger, Esq.

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Enclosures

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