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Sep 15 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2018-001423
Case No. 2017-CP-39-0428

John M. Burgess,..... Appellant,

v.

Katherine C. Hunter, Respondent.

**RESPONDENT'S RETURN IN OPPOSITION TO
APPELLANT'S MOTION SEEKING JUDICIAL NOTICE AND
MOTION FOR LEAVE TO SUPPLEMENT RECORD**

On the eve of oral argument, the Appellant John M. Burgess has filed a Motion Seeking Judicial Notice and Motion for Leave to Supplement the Record. The Appellant requests that the Court take judicial notice or otherwise supplement the appellate record with a copy of the testimony of Circuit Court Judge Edward W. Miller before the Judicial Merit Selection Commission at a hearing held on

November 18, 2020, which was more than two years after this case was tried. The Respondent Katherine C. Hunter opposes that motion on numerous grounds.

First, Rule 210(c), SCACR, provides that "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." Clearly, the testimony of Judge Miller before the Judicial Merit Selection Commission in November 2020 does not comply with Rule 210(c). Not only was that testimony not presented to the trial court at the time of trial, it is collateral and extraneous to the trial itself. Additionally, final briefs in this case were filed in December 2019, and as a result, the judge's testimony was not part of the record or available to the parties at the time of the briefing of the issues on appeal. The Appellate Court Rules, and specifically Rule 211, SCACR, is not designed to be an appellate equivalent of Rule 60(b) which allows the record to be supplemented with after-discovered evidence (that is, even assuming that a judge's testimony before the Judicial Merit Selection Commission even qualifies as admissible, probative evidence which is denied). Instead, Rule 212 is designed to supplement the *appellate* record with materials presented to the lower court but for whatever reasons had been left out of the appellate record.

Second, the Appellant's reliance on judicial notice is misplaced. This Court has held that "[a] fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available

sources of indisputable reliability." *Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667, 674 (Ct. App. 2012). Clearly, the testimony of Judge Miller is not fact that is subject to judicial notice. Indeed, the testimony may be accurately characterized as subjective and opinion – not facts that are common knowledge or ascertainable by reference to sources that cannot be reasonably questioned. This Court further explained that "[a] trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof." *Id.* The Appellant is misusing the doctrine of judicial notice. He is actually asking the Court to accept Judge Miller's testimony as the proof itself, not as a judicially noticed fact. However, that testimony is collateral and extraneous to the case at bar. There is, in fact, no link established between Judge Miller's testimony and the trial in this case. Moreover, that testimony also lacks due process guarantees. Obviously, the Respondent was not a party to the proceeding before the Judicial Merit Selection Commission and was not afforded the opportunity to question or cross-examine the witness. It should also be noted that the Supreme Court in *Goss v. State*, 425 S.C. 101, 820 S.E.2d 373 (2018), ruled that the court may not take judicial notice of witnesses' testimony from another proceeding. That is precisely what the Appellant seeks with his current motion.

Third, the Appellant's argument that Judge Miller's testimony is hearsay that falls within an exception is also incorrect. The Appellant argues that the testimony, while an out-of-court statement offered for the truth of the matter asserted, is allowed

as an exception to the hearsay rule under Rule 803(8), SCRE. The Respondent disputes whether Judge Miller's testimony is a statement or report of an activity of a public office, but even if it qualifies as such, Rule 803(8), SCRE, expressly excludes "opinions, judgments, or conclusions [as being] outside the scope of Rule 803(8)'s public records exception." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249, 253 (Ct. App. 2014). As mentioned above, Judge Miller's testimony is properly characterized as opinion and conclusions; his testimony regarding his judicial temperament is inherently subjective.

In sum, the request for this Court to consider the testimony of Judge Miller before the Judicial Merit Selection Commission presents a dangerous precedent and one that significantly impacts public policy concerns. If the Court accepts Judge Miller's testimony as fact, then the parties should have the right to examine Judge Miller about his comments. Of course, subjecting judges to depositions and discovery in civil cases, particularly to explore issues related to their judicial conduct, temperament, and thought processes, should not be permitted. The Courts already recognize that a legislative privilege applies for the actions and decision-making of legislators. Similarly, the testimony of judges should not be allowed as well. However, in fairness, if this Court considers Judge's Miller's testimony as evidence in this case, due process attaches to that evidence, and the Respondent should not be denied the opportunity to probe the judge's responses. To be clear, the Respondent is not asking for that opportunity but rather makes that point to emphasize that there is

no basis in law or the public policy of this State for the testimony of a judge before the Judicial Merit Selection Commission to be used for any purpose other than that for which it was taken – to determine if the judge merits reappointment.

Based on the foregoing, the Respondent respectfully requests that the Court deny the Appellant's motion.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

*Counsel for Respondent
Katherine C. Hunter*

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondent, does hereby certify that service of the **Respondent's Return to Appellant's Motion Seeking Judicial Notice and Motion For Leave to Supplement Record** was made upon Appellant's counsel by email only this the 15th day of September 2021 as follows:

Stephen N. Garcia, Esquire
Garcia Law, LLC
Email: stephen@scgarcialaw.com

s/ Andrew F. Lindemann



Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

September 15, 2021

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldlawsc.com

JAMES M. DAVIS, JR.†
Direct Dial: (803) 881-8922
Email: jim@ldlawsc.com

*Also Admitted in North Carolina
†Certified Mediator

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: John M. Burgess v. Katherine Hunter
Appellate Case Number: 2018-001423
Civil Action Number: 2017-CP-39-0428
Claim Number: 21379503
Our File Number: 307.20053

Dear Ms. Kitchings:

Pursuant to Section (b)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), please find enclosed for filing the **Respondent's Return to Appellant's Motion Seeking Judicial Notice and Motion For Leave to Supplement Record** in the above referenced matter. By copy of this letter, I am serving a copy on Appellant's counsel by email only pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021).

If you have any questions, please advise. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Stephen N. Garcia, Esquire (w/ Enclosure, Via Email Only)

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