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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 20-CP-22-00930; CASE NO. 20-CP-22-00931; CASE NO. 20-CP-22-00932

M. Baron Stanton,Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie
Preservation Trust,Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Sunset Lodge, LLC,Appellant,

v.

Town of Pawleys Island,.....Respondent.

APPELLANTS' PETITION FOR REHEARING

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I. THE RELIEF REQUESTED

A. Regardless of the outcome, the Landowners (Appellants Sunset, Beattie and Stanton) respectfully request that the Court of Appeals issue a decision which is published, and full, after fully rehearing and reconsidering the appeal.

B. The Landowners request that the revised opinion sufficiently describe the twenty-six (26) fact-intensive issues in the manner actually presented on appeal, by including the factual components of the stated issues, and further state the pertinent facts giving rise to the appeal, including the material circumstances and consequences set forth hereinafter.

C. The Landowners request that the Court decide the approximately twenty-one (21) remaining material and potentially dispositive issues not ruled upon in the unpublished opinion, as described and listed hereinafter.

D. The Landowners also request that, in addition to ruling on the numerous germane and potentially dispositive issues not ruled upon, the Court of Appeals change this Court's abbreviated, erroneous summary rulings on the roughly four (4) issues the Court did rule upon. On those points, the Court of Appeals should reverse its decision, as further explained herein and as will be explained in any further briefing or oral argument the Court may direct.

II. SHORT, GENERAL, MEMORANDUM OF GROUNDS AND ARGUMENTS

The general grounds for this request are that the Court erred in issuing its per curiam opinion in truncated form and consequently overlooked numerous facts, legal principles, and requirements. Because much of the oversight involves not recounting at all, the facts of the matter, and not ruling at all, on large parts of the appeal, it is difficult to know all points overlooked by the Court of Appeals, and setting forth the points overlooked by the Court of Appeals would require repeating whole portions of the appellate briefs already on file.

This fact makes even this abbreviated synopsis much longer than a request for reconsideration of a normal opinion, and this synopsis still may not capture all arguments the Court of Appeals missed. Setting forth the detailed and necessary factual background, and extended legal argument on the few points only grossly decided would also be lengthy and largely repetitive of the Appellants' Brief and Appellants' Reply Brief. The most efficient course would be for the Court of Appeals to review the points herein, and then literally reconsider the briefs. The Court of Appeals is directed to those papers for fuller arguments, cases and other authorities on the points overlooked as detailed more briefly herein.

Among other points overlooked, are the following:

(i) In this case involving demonstrated municipal abuse of condemnation powers before suing the Landowners, and then the Town's continuing that abuse beyond the two (2) failed lawsuits by the Town, the Court of Appeals overlooked that the Landowners presented twenty-six (26) issues on appeal. The Court of Appeals overlooked the fact that in the opinion it issued, the Court of Appeals mistakenly did not rule on a substantial number of dispositive issues presented. The Court of Appeals overlooked that it issued a factually denuded opinion as to the four (4) issues it did decide, stating these few issues largely only in the abstract, in a manner not presented by the Landowners, with no statement of the case, and virtually no discussion of the germane facts, and consequently erroneously decided its whole partial list of fact-intensive issues because of legal mistake or misapprehending or not knowing the facts of the case.

(ii) The Court of Appeals overlooked that it is required by statute and rule (discussed herein) to decide all the dispositive issues presented on appeal and that its opinion did not do so.

(iii) The Court of Appeals overlooked that the Court of Appeals is required by statute and rule (discussed herein) to issue an opinion which sets forth the relevant reasoning, including the facts necessary for understanding such reasoning, and that its opinion did not do so.

(iv) The Court of Appeals overlooked that it is required by statute and rule (discussed herein) to publish its decision, and do so in a form suitable for citation as precedent and further review, and that its opinion was designated as unpublished.

(v) The Court of Appeals overlooked that the standard of decision for the lower court under Rule 12(c), SCRPC (and consequent standard of review for the Court of Appeals) requires the facts to be taken from the Landowners' Amended Complaint and be treated as true (including the many facts integral to, and forming a part of, the actual issues presented), and that this was an issue presented on appeal (Issue no. 2), and the Court of Appeals neither ruled on this issue presented, nor set forth any of the highly germane facts, and it is therefore impossible to determine whether the Court of Appeals followed this rule, except in instances where it appears the Court of Appeals clearly did not.

(vi) On the basis of the unstated and unsupported assumption that the Town had not "entered upon" the property, the Court of Appeals did rule that no landowner consent to the Town's purported "abandonment" of its condemnation was required, but, to the contrary, the Town not only "entered upon,"¹ but had actually altered the property in 2019-2020 before purporting to "abandon" its condemnation "without prejudice" in 2021 without landowner permission,

¹ Compare Jennings v. Sawyer, 182 S.C. 427, 189 S.E. 746 (1937), relied upon by the Court of Appeals for the proposition that the condemnor has a right to "abandon" the property as long as the condemnor has not entered upon the property. The Amended Complaint fully recounted the Town's deposit of 1.1 million cubic yards of sand and alteration of the property before purporting to "abandon" the condemnation.

(vii) In ruling on the issue of “mootness” and other matters, the Court of Appeals overlooked the dispositive significance of the fact that the Landowners did not consent to what the Town asserted was only a temporary “abandonment” of condemnation, viz., did not consent to the Town dropping its suit while affirming intent to sue again (for a third time) for the same thing,

(viii) The Court of Appeals did not realize that the governing statute, the EDPA, contained an additional restriction on “abandonment” of condemnation without landowner consent, that this fact was dispositive of large parts of the appeal, and that the EDPA was enacted in 1987, and therefore did not exist at the time of the 1937 case² relied upon by the Court of

² In the instant, case, the Court of Appeals cited the Jennings case for the proposition, “[I]n the absence of statutory authority, the condemnor may abandon the property condemned at any time before taking actual possession and entering thereupon.” (Emphasis added.)

Jennings was not decided under the EDPA, but rather, was decided in 1937 under the 1932 South Carolina Code, which at that time provided for the Highway Commission to select a board of commissioners from a list of eligible people appointed by the Governor, for the board to determine the property taken and the compensation to be paid, and for de novo determination of the award to be available thereafter by jury trial in the Circuit Court. The law has changed since 1937.

As noted, contrary to even the 1937 condition mentioned in Jennings, the Town had actually altered the property, and the alterations remained. More importantly, there is no “absence of statutory authority” for any other restriction on abandonment, as described in Jennings. The Court of Appeals overlooked the stay imposed by the EDPA, which is a statute which requires landowner consent for an exception to the stay. This was an express dispositive issue on appeal (Issue No. 20) not addressed by the Court of Appeals.

The Court of Appeals cited Jennings in its unpublished decision with no discussion of applicable facts, and without defining what the Court of Appeals meant by “abandon.” How “abandon” is legally defined – and whether it means permanent or temporary – is also a highly dispositive issue on appeal (Issue Nos. 17,18, and 22) which the Court of Appeals did not address.

Jennings discusses “abandonment” as abandoning the property, not merely abandoning the notice with intent to continue pursuing the property by serving another notice and starting yet a third lawsuit. With regard to this additional overlooked issue on appeal – the definition, or the judicial imposition, of what it means to “abandon” -- the cases relied on by Jennings regarding the right to “abandon” all discuss the right in terms of “the right of the condemnor to discontinue the proceedings and reject the property sought,” in the sense of not intending to pursue the property ever again. See S.C. State Highway Dept. v. Bobotes et al., 180 S.C. 183, 185 S.E. 165 (1936), and see Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55 (1922). Neither the Town

Appeals for the proposition that “in the absence of statutory authority” to the contrary, the condemnor may “abandon” the property at any time before entering upon the property.

(ix) The Court of Appeals did not realize that the EDPA provides a stay of “all proceedings” in the condemnation action until a separate challenge action is concluded, and imposes a consequent statutory requirement of landowner consent to abandonment of the condemnation action during the stay.

(x) In ruling of the consequences of “abandonment” without defining the term, the Court of Appeals did not realize that the definition of the term was potentially dispositive of large parts of the appeal and did not rule on this discrete issue presented, namely, that – both literally and logically -- to “abandon” (particularly when the act is held to render an entire related challenge moot and justify the drastic remedy of dismissal of the landowner’s entire independent suit on the subject matter) means to permanently relinquish and quit the pursuit of the object of the abandonment, rather than only to temporarily desist. (Issue No. 18.)

(xi) The Court of Appeals did not rule upon the largely dispositive argument that, regardless of any fixed definition of “abandon,” before a court of law or equity were to accept the Town’s argument that the “abandonment” caused an entire independent action to be incurably moot and entitled the Town to the drastic remedy of involuntary dismissal, the court should have made inquiry of the parties, and then ordered the abandonment to be permanent. (Issue Nos. 17 and 22, and see Nos. 7, 9, 11 and 18.)

nor the Court of Appeals has discussed a single case providing a “right” to “abandon” concurrently with a declaration of the condemnor of a resolve to continue trying to condemn the same interest in property.

(xi) The Court of Appeals did not realize that the Seabrook³ case chiefly relied upon by the Court of Appeals has no factual parallel or similarity whatsoever to the circumstances of the instant case and is completely inapposite authority for an erroneous determination of “mootness,” and because the Court of Appeals did not set forth any of the highly germane facts of the instant case (discussed herein), it is impossible to determine whether the Court of Appeals understood any difference, except that it appears the Court of Appeals clearly did not.

(xii) The Court of Appeals, in focusing on the question of precluding “prospective” acts of the Town, misapprehended the fact that neither the controversy nor the damage is only prospective; the Landowners were and are suffering current, present damage from a reasonably well-defined controversy that is far from hypothetical after being the subject of pre-suit threats, two unsuccessful suits by the Town, and a stated intention of the Town to commence a third suit, and because the Court of Appeals did not set forth any of the highly germane facts of the instant case, it is impossible to determine whether the Court of Appeals realized any part of this fact, except that it appears the Court of Appeals clearly did not.

III. PROCEDURAL AND OTHER FACTUAL CONTEXT FOR THE RELIEF REQUESTED, AND FURTHER IDENTIFICATION OF THE ACTUAL ISSUES PRESENTED AND THE MATTERS OVERLOOKED

A. Partial initial background

³ Seabrook v. City of Folly Beach, 337 S.C. 304, 523 S.E.2d 462 (1999), is the case chiefly relied upon by the Court of Appeals for its gross determination of mootness. In Seabrook, the defendant city permanently withdrew and reversed the conditions and actions complained of by the plaintiffs, the plaintiffs then went ahead with the plans the city had thwarted – thus cementing the fact that it was impossible for the things complained of to recur – and, although this still left a retrospective claim by the plaintiffs for the things that had already occurred, the plaintiffs withdrew any remaining claim, acknowledging that it was not viable for reasons having nothing to do with mootness. The appellate court did not declare the remaining claim moot in order to get rid of the claim or the case; the plaintiffs withdrew the claim, leaving no claim

The undisputed,⁴ repetitive, abusive, dishonest, and presently-still-damaging, acts of the Town in case at bar are such as would seem likely to arouse grave concern and alarm of the courts, any citizen, the legislature, and the media. Yet, the facts and implications of the case have thus far been overlooked. The treatment of the case thus far has been to dispose of it with as little mention of these matters as possible, and provide as little relief to the Landowners as possible. This treatment cannot be based on a courtesy, or some unspoken municipal privilege for the Town to behave as it has behaved, at tremendous expense and damage to the Landowners. It would appear, rather, that from oversights, there must be some erroneous uncertainty or unawareness as to whether these clearly established things have occurred and are occurring. They have and they are.

The Landowners are currently suffering uninvited, unprovoked, real, present-day, irreparable, damage that is not in any sense moot or unripe. This is caused by a continuing three-year cloud on their land titles, and by other matters described both in the Amended Complaint and in the Appellants' undisputed Statement of the Case. These matters are not merely alleged in the Amended Complaint; they are matters which must be accepted as true under the standard of decision overlooked by both the Circuit Court and the Court of Appeals. Most are also

whatsoever, and then the appellate court declared the matter moot. Here, the Landowners withdrew nothing.

⁴ The vehicle for decision by the Circuit Court was Rule 12(c), SCRCP, and the standard of decision under that rule required the Circuit Court, and requires the Court of Appeals, to treat all of the allegations of the Amended Complaint as true. This standard was briefed to the court below and was briefed to the Court of Appeals both as the standard of review and as part of an error of the Circuit Court presented as an issue on appeal (Issue No. 2, and see, e.g., Nos. 4, 5, 7, and 11). The Court of Appeals did not rule upon, mention, or apply the standard of decision in its unpublished opinion. Many of the facts informing the issues presented herein were also previously judicially established as undisputed in the Town's previous actions brought unsuccessfully on the same subject by the Town.

There is thus nothing tentative about the facts which are a necessary part of the issues presented to the Court of Appeals, and there is no reason to shy from them.

established by prior unappealed order in the first case, which the Town lost. There, a different judge of the Circuit Court set forth six (6) pages of undisputed facts.

This controversy does not involve only one conflict between the Town and only one party. It involves conflicts in which, before commencing its first three lawsuits (hereinafter sometimes referred to as the first lawsuit), the Town threatened each of three landowners on the same subject. The parties had plenty of time to define, admit, or disavow the subjects of the controversies. Each of the three Landowners had a substantially similar objection to what the Town attempted to coerce, and substantially similar objection to the Town's basis for the threats and attempts at coercion. The three controversies on the same subject began over three years ago.

The Town has now sued each of the Landowners twice. Each time, the Town has sought to take unreasonable, dishonestly described easements which are described in detail in the Amended Complaint. This fact is highly material to the fact-intensive consideration of mootness, and certainly, of ripeness. Yet, this fact was not mentioned by the Court of Appeals. The Court of Appeals provided virtually no analysis in stating the issues or in deciding the fact-intensive issue of the mootness of the controversy the Landowners have sought to resolve.

In suing twice on the same subject, the Town has tried to transform the Landowners' property interests in a fundamental way. Each time the Town has sued, the Town has based its efforts on public announcements that were indisputably false, on a Town Council meeting that was indisputably a sham including falsely stated premises, on an appraisal that was indisputably based on false information and concealment, and on condemnation pleadings with indisputably false statements and false certifications.

Both times, the Town attempted to take oceanfront easements that not only had unnecessary individual included features, but that were unnecessary overall. Among other relief,

the Landowners sought – and are still seeking -- to remove this cloud on title which, as of early 2023, was created by the Town about three years ago, and which remains to this day. Without present court intervention, this cloud will remain on the properties and continue to irreparably damage the Landowners.

Both suits by the Town were on the same subject. Both have been unsuccessful. The Town lost the first one on summary judgment, which established the true meaning of the easement sought and the Town’s dishonest presentation of it. The Town has nevertheless not acknowledged the true meaning of the easement, nor the dishonesty of its acts, which have been repeated.

The Town purported to “abandon” the second suit. However, the Town has confirmed to the Circuit Court, and has made public announcements, that the Town intends to sue the Landowners again regarding their properties on the same subject, referred to by the Town as “these” easements.

Based sheerly on the Town’s putative “abandonment” of its second suit, the Circuit Court dismissed the Landowners’ entire independent, freestanding, countersuit as entirely “moot.” The Circuit Court thusly also granted a pending request by the Town that it not be required to comply with discovery sought by the Landowners.

B. The appeal, the issues presented, and the issues overlooked

The Landowners conscientiously and explicitly presented to the Court of Appeals, twenty-six (26) assignments of error as issues on appeal. Of these, the Court of Appeals addressed roughly four (4).

These four, however, were not couched in the facts in the way they were framed by the Landowners. The issues were framed by the Court of Appeals with virtually no facts at all. The Court of Appeals answered its own abstractly framed issues with effectually no more than a

“yes” or “no” and a citation of generic authorities. Many more than four (4) of the 26 issues presented were potentially dispositive of the appeal, or large parts of it – and were overlooked.

The issues presented on appeal included the following:

(i) In dismissing the Landowners’ separate action as moot, the Circuit Court failed to apply the standard of decision required under Rule 12(c), SCRC, that all allegations of the Amended Complaint be taken as true for purposes of the motion before the court.

The Court of Appeals did not mention or rule on the issue, and included virtually no facts in its opinion. (See Issue No. 2, and see also Nos. 4, 5, 6, 7, 9, 10, 11, 12, 13, 24, and 25.)

These included allegations (A) of the Town’s repetitive explicit dishonesty regarding the contents of the easement, persistent dishonesty regarding the need for the easement, and continuing dishonesty regarding the easements offered by the Landowners, (B) of the threats of the Town before bringing its first suit, (C) of the first suit by the Town, (D) of the disregard of procedure by the Town and the Town bringing an additional, repetitive, suit at the same time as the prior suit, (E) of the irreparable damage being done on a continuing basis by the Town, (F) of the lack of overall necessity of the easement sought by the Town, and (G) of the lack of necessity of elements of the easement sought by the Town. These, and the undisputed Record fact (H) of the open public announcement of intent of the Town to sue again for the same thing, are an integral part of the issue of mootness. If these facts were considered by the Court of Appeals in deciding the issue, they certainly require disclosure in the opinion and explanation of its reasoning so that the decision may be reviewed.

(ii) The governing statute prohibited “abandonment” during a stay without landowner consent, the “abandonment” was therefore ineffective, and the “abandonment” was therefore incapable of rendering anything moot.

As discussed herein, the Court of Appeals overlooked both facts and law and erred. A statutory stay of all proceedings in the Town’s condemnation action prohibited the service of the

Town's notice of "abandonment," and rendered the "abandonment" void without the Landowners' consent. Since the erroneous ruling of mootness was based entirely on the notice of "abandonment," the ruling of mootness and the dismissal were error. Dismissal would have been error even if the notice had been valid, but the invalidity of the notice is an additionally sufficient for reversal of the Circuit Court.

The Court of Appeals did not realize there was a stay, and did not address it, and so missed this issue. Additionally, the Town had actually entered upon the property and altered it, and the Court of Appeals apparently (without stating facts) based its ruling on a contrary assumption which is dispelled by the Record.

(iii) Even if the abandonment was effective, the Landowners were still entitled to a present declaration of the permanent nature of the abandonment.

Viz., if the abandonment were to be regarded as rendering a large part of their independent suit moot, they were entitled to a declaration that the abandonment was not temporary, but permanent, to wit, it was with prejudice to future attempts to condemn the same or a substantially similar interest in land.

This issue was potentially dispositive of large parts of the appeal, but the Court of Appeals did not rule on the issue, other than obliquely and grossly stating that the case, or the appeal,⁵ was moot.

(iv) Regardless of whether the abandonment was permitted and was temporary, the Landowners were still entitled to a present declaration of the lasting collateral estoppel effects of the previous summary judgment order against the Town.

⁵ Although the need for distinction was pointed out on appeal, the Court of Appeals does not distinguish between mootness when a case is in the trial-level court and is extraordinarily ruled to be moot there, and mootness when a case is at the appellate level and is rendered moot by events occurring after the case leaves the trial-level court. The Court of Appeals did not discuss the focus of mootness analysis on whether there is anything left before the court on which the court could possibly provide any relief to one of the two parties to the controversy. The Court of Appeals did not discuss any aspect of this issue, and simply cited cases, such as Seabrook, concerning mootness occurring at the appellate level.

The Court of Appeals never mentioned the Town's prior unsuccessful action on the same subject or the ruling in it.

In light of this prior order against the Town and the Town's attempt to dismiss its second suit while expressly stating the intent to sue again on the same subject, the Landowners were entitled to declaratory relief on such subjects as (A) the unlimited meaning of "public access and use" in the easement which was sought, (B) the requirement that an appraisal be an appraisal of the thing that is condemned, rather than of something different from the thing that is condemned, and (C) the requirement that Town Council deliberate publicly on the necessity of the actual easement and on the necessity of the actual elements of the easement, including deliberating on relative burdens and reasonable alternatives, rather than conduct a sham public meeting about a falsely described easement, a falsely described need, and falsely stated circumstances of landowner noncooperation.

In moving to dismiss the Landowners' action as moot, the Town did not acknowledge being bound by a single thing in the summary judgment order dismissing the Town's prior suit on the same subject. The briefs below show that the Town in fact made every effort to argue that the unappealed order only established what the Town murkily identified as only "procedural" missteps, without identifying what these "procedural" things were and without acknowledging that they would not be repeated.

The Court of Appeals did not address declaratory relief as such, whether it concerned issues of collateral estoppel or anything else, and simply ruled obliquely that all "prospective relief" was moot and unripe, without recounting the facts. This was error.

(v) Regardless of collateral estoppel of the Town (or any disagreement about it), the Landowners were entitled to "prove" again, certain facts which had been determined to be undisputed in the final judgment in the previous challenge action and obtain a present declaration of facts and strictures on the Town.

The Court of Appeals did not rule on the issue, other than obliquely and grossly ruling that everything was moot and unripe.

In light of the Town's argument against -- and lack of any acknowledgement of -- being bound by the things determined in the order dismissing the Town's prior suit, declaratory relief on these issues was in order even without a collateral estoppel determination. For example, previously proven, but now unacknowledged, facts included such things as the meaning of provisions granting unlimited "public access and use" of the Landowners' property, the occurrence of acts of dishonesty and concealment, the lack of necessity of certain elements of the easement, the Town's declaration of lack of necessity of the easement altogether before pumping sand onto the property, and the Town's data supporting its later reaffirmance of the lack of long-term need for the easement overall.

The declaratory relief -- the precise form of which would be determined after proof of facts, and after examination of applicable law, and not at the mere pleading stage -- would include establishing facts and certain elements and requirements for any further condemnation attempts.

For example, the Town contended that it had not entered, but wanted to enter, a relationship with the Corps of Engineers and that this affected the easement terms and the fact that the terms were foisted only upon the south end owners, and not upon the mid-island owners or any of the five Town Council members. The legitimacy and contradictory details of the highly unusual relationship and private agreements or "understandings" of the Town with the Corps of Engineers, which never entered an appearance in the matter and never took a meeting, would be subject to discovery.

The requirements for honesty in fact in describing, and performing the statutorily required appraisal of, the embarrassing easement could be established, and at least certain unnecessary elements of the easement on which the Town or others have been inconsistent or have vacillated could be established as not necessary. For example, it is unnecessary to impose the easement (including the ability to destroy improvements and an unlimited grant of public access) on the entire lot, driveway, living room, porches and other improvements, and it is unnecessary to locate a bounded easement in the middle of landowner improvements and only two feet from the supports of the house, and it is unnecessary to appropriate the right to exclude the landowner from his own land on an unspecified future basis.

Without relief now, the Landowners hold property which the Town has publicly declared that the Town intends to assault in this manner again. For about three years as of this writing, the Landowners have had to include this fact in determining whether to make changes to the property, conduct maintenance or repairs to the property, make improvements to property, or invest in the property in other ways. They will also have to include this fact in considering whether they wish to sell the property or involve it in financing. The Landowners had a right to redress the present controversy and present damage.

(vi) The putative “temporary abandonment” did not moot other potential relief, none of which was ruled on or mentioned by the Court of Appeals.

Other relief could be afforded to the Landowners under the facts alleged in the Amended Complaint. For example, other relief for both past completed acts and future acts could be afforded under the Tort Claims Act or 42 U.S.C. §1983. The Court of Appeals did not rule at all upon how abandonment of a condemnation attempt would moot all potential relief afforded under the allegations because the Court of Appeals overlooked the allegations.

Dismissal “without prejudice” would prejudice the right to such relief, e.g., by

implicating a statute of limitations. This issue was explicitly appealed, but the Court of Appeals did not rule upon this at all.

In determining mootness, there is a distinction between whether the matter is in a trial-level court or an appellate court. Because the dismissal was in a trial court at the pleadings stage, and not in an appellate court, the Landowners were at the time of the erroneous dismissal, entitled to pursue in a trial court, any relief that was afforded, or might be afforded, by the facts in the Amended Complaint, all taken as true. See, e.g., the traditional standards (briefed) for decisions under Rules 12(b)(6) and 12(c), SCRPC and the explicit text of Rule 54(c). This issue was explicitly raised and explained, but the Court of Appeals did not rule upon this legal principle at all, nor apply it. The Circuit Court ruling has the absurd implication that the temporary abandonment moots all relief in the world for every transgression in the world.

C. The factually nude, unpublished opinion, what it omitted, what it ostensibly ruled upon, whom it affects, and its implications

Without oral argument of the above issues, the Court of Appeals issued a per curiam,⁶ unpublished, putative⁷ “memorandum opinion.” The February 8, 2023 opinion is No. 2023-UP-055.

⁶ The term “per curiam,” literally, “by the court,” has come to have almost no consistent meaning, other than that it denotes anonymity of the author. For an interesting history of the use of the term and how it has been viewed by Thomas Jefferson, Ruth Bader Ginsburg, and Richard Posner, see Ira P. Robins, Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions, Tulane Law Review, Vol. 86, 2012.

⁷ The term “memorandum opinion” is qualified as putative, because the Court of Appeals did not use the term, but, as discussed later herein, the opinion is designated as unpublished. In order to be unpublished, an opinion must be a memorandum opinion. All other opinions must be published.

The Court of Appeals is not allowed to issue memorandum opinions, and therefore is not allowed to issue any unpublished opinions. This is the case whether the opinion is in the form of a putative “memorandum opinion” or not. The subject of the instant opinion, however, is also not one of the subjects amenable to decision by memorandum opinion, and even raises and summarily decides an issue not presented on appeal.

In two pages of total text, the opinion recounts almost no factual circumstances whatsoever for a proper understanding of the fact-intensive issues which were presented and which are being decided concerning the drastic remedy of dismissal. The opinion states the issues almost completely in the abstract and without context, and decides them only with citation of authority that a third-party reader could never judge the clear inapplicability of without reading the issues as actually stated in the briefs. In this fashion, the opinion sets forth in four (4) numbered paragraphs, the Court of Appeals' disposition of the appeal.

The anonymous per curiam author thusly affirmed the Circuit Court's dismissal of the Landowners' action, on the basis that every single thing in the Landowners' independent civil action concerning the continuing illegal conspiracy to take their property was, and is, "moot."

In ruling on the highly fact-intensive questions, the Court of Appeals summarily ruled, while omitting the facts herein, (i) that the "abandonment" was permitted, (ii) that the entire independent countersuit was mooted by the abandonment, and (iii) that because the curtailment of general discovery was based on curtailment of the case, curtailment of discovery was proper.

One of the four paragraphs, however, was not devoted to any of the 26 issues on appeal. Paragraph (3) was devoted to a ground of "unripeness." This issue was not raised to, identified by, or relied upon by, the Circuit Judge, was not an issue briefed by either party on appeal or entertained in an oral argument, and was singularly unfit for consideration, much worse, for inclusion in a summary unpublished opinion. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (observing that it is "unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal").

Only the Supreme Court is allowed to issue memorandum opinions, and may only do so in prescribed circumstances, which are not present here.

The three-judge panel of Judges Williams, Vinson and Lockemy merely “concurred” in the opinion of the per curiam author.

Along with being designated as unpublished, the decision bears the all-capitals, bold-face header, “**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**”

That is, by fiat of the per curiam author, the harmful effects of any error or gross omission by the per curiam author is only harmful to the appealing parties, and the erroneous disposition of the matter will not be treated as the law of this state with respect to similar controversies among other people.

It also will not subject the opinion, the Court, or the author, to any critical review. It should be noted that where, as here, further litigation between the parties is assured, an opinion which does not apply to other citizens, but which is still enforceable between the parties, is of little guidance even to the parties or future courts hearing them if the unpublished opinion inadequately recounts the factual basis for the various points decided and omits decision of other germane issues presented for decision. The opinion may actually create new disagreements and controversies.

D. What is missing from the ostensible issues ostensibly ruled on without framing the issues with the facts integral to them

The issues the Court did rule upon, but ruled upon without realizing some of the legal and factual context stated, are covered generally above in the discussion of the issues presented on appeal. They are identified here discretely with further comment. These are numbered in the order numbered by the Court of Appeals in its unpublished opinion:

1. Whether the Town’s “abandonment” of its condemnation attempt without landowner consent was permitted under the circumstances.

The Court of Appeals misunderstood the circumstances. The Court of Appeals ruled that because there was no apparent statutory or common-law requirement of landowner consent in 1937, there must not be any today, and the modern-day EDPA therefore still only requires landowner consent when the condemnor had already “entered upon” the property.

The actual circumstances, not fully appreciated or recounted by the Court of Appeals, included (i) the fact that the Town had already done work on the land in late 2019 and early 2020 and had dumped, and left, well over 30 dump truck loads of earth on it,⁸ (ii) the fact that a stay was still in effect under the governing statute⁹ for all proceedings (including issuance of notice of abandonment) in the action the Town had commenced, and (iii) the fact that there was no landowner consent to a withdrawal of the condemnation attempt “without prejudice” while the independent challenge action of the Landowners was still pending and the stay was still in effect.

The Court of Appeals’s ruling is therefore erroneous.

2. Whether the Town’s “abandonment” of the Town’s action rendered the Landowners’ action against the Town “moot” under the circumstances.

The Court of Appeals did not state the circumstances. The Court of Appeals therefore did not actually rule on the fact-dependent mootness issue presented, because the Court of Appeals overlooked all the circumstances and cited only authority which was clearly inapposite to the actual circumstances.

⁸ The Amended Complaint describes the 1.1 million cubic yards of sand the Town pumped onto the beach, including on the part owned by the Landowners. Nominally, for purposes only of underestimated illustration, a sixty foot long “dune” only six feet above other fill, being only twenty feet wide and having slopes accounting for the equivalent of only another 10 feet of width, would involve about 400 cubic yards of earth, requiring about 30 loads of about 13 yards per truckload, as follows: $60 \times 6 \times 30 \div 27$ cubic feet per cubic yard \div 13 yards per truck = 30.76 truckloads.

⁹ As noted in a previous footnote, the governing statute, 1987 Act No. 173 – which was enacted long after the 1937 case cited by the Court -- changed prior law in numerous respects,

Those circumstances, not fully appreciated or recounted by the Court, included:

- (i) the fact that before the Town sued the Landowners the first time, the issues were known to the parties and the Town publicly threatened suit;
- (ii) the fact that the action the Town “abandoned” was already the Town’s second unsuccessful action on the same subject,
- (iii) the fact that both the first and the second unsuccessful attempts were based on undisputed dishonest acts and concealment by the Town at virtually all levels of its personnel,
- (iv) the fact that the Town unilaterally declared the allegedly “mooting” “abandonment” not to be permanent, but, rather, to be “without prejudice,”
- (v) the fact that – unlike the facts in Seabrook¹⁰ -- the Town announced the “abandonment” almost simultaneously with announcing intent to sue again on the same subject,
- (vi) the fact that – unlike the facts in Seabrook – the Landowners did not then, or at any time subsequently, withdraw and dismiss any and all remaining contentions or claims,
- (vii) the fact that that the thing the Town contended was rendered “moot” by the “temporary abandonment without prejudice” was not one discretely defined claim requesting that only the present attempt of the Town be curtailed, but an entire multi-count, independent civil

including providing an automatic statutory stay for the duration of any pending independent challenge action.

¹⁰ As noted in a previous footnote, Seabrook is the case chiefly relied upon by the Court of Appeals for its gross determination of mootness. In Seabrook, the controversy was partially curtailed by the defendant permanently withdrawing the conditions objected to and affirmatively allowing the plaintiffs to do the thing they sought to do, permanently free of the conditions complained of. The change by the defendant was of such a nature that it was permanent with respect to the plaintiffs and the controversy with respect to the plaintiffs was impossible to repeat. Even these circumstances would not have mooted the matter, except that the plaintiffs then, for reasons having nothing to do with mootness, withdrew a still pending part of their claim voluntarily, leaving nothing whatsoever for an appellate court to do for either party. The court noted that the matter certainly would not have been moot if both parties had not withdrawn all of their positions in the controversy.

action (governed by the South Carolina Rules of Civil Procedure) brought by the Landowners against the Town,

(viii) the fact that the Circuit Court’s determination of incurable “mootness” was made at a stage which was highly flexible as a matter of law – namely, at the mere pleadings stage of a civil case at the trial-level court, before discovery and before any hearing of the merits, and the Circuit Court offered no opportunity to amend to add any prayer or any allegation deemed to be missing, see Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019)(discussing rationale for practice of automatically granting leave to amend under Rule 12(b)(6)), and

(ix) the fact that – unlike the facts in Seabrook -- at the time of the mootness ruling in 2021, the Town’s past and promised future actions created a present cloud on the title to the Landowners’ properties and the cloud continues to the day of this writing in early 2023.

3. Whether the portion of the Landowners’ action which sought injunction, declaration of collateral estoppel effects, declaration of unnecessary elements, or other prospective relief was “unripe” for decision by an appellate court under the circumstances.

The Court of Appeals again did not state the circumstances it considered to be part of the issue, and in fact referred to only to all “prospective relief” generically and categorically. The Court of Appeals raised this issue of unripeness on its own, without opportunity of the parties to argue it. Again, the Court of Appeals ruled on a fact-intensive issue while overlooking – and not applying -- the actual facts needed in order to understand and decide the issue.

The circumstances not fully appreciated or recounted by the Court of Appeals included:

(i) the fact that the Landowners were not complaining to the appellate court that the lower court should be reversed for not granting present and prospective relief on the merits, were not asking the appellate court to grant certain forms of relief, and were not asking the appellate court to decide that certain forms of relief would probably be granted on a certain and

static state of facts; they were asking the appellate court to reverse a circuit court's drastic decision to close the doors to the courthouse and to preclude any possibility of present and prospective relief by not even allowing the Landowners to allege entitlement to it, present evidence on it, and then ask for it,

(ii) the fact that, while the Landowners also sought to avert future damage, the Landowners sought a remedy to remove a present-day cloud on the title to the Landowners' properties,

(iii) the fact that a non-vague, non-hypothetical "controversy" was already extant and ripe between the parties before the first lawsuit, and had further gelled to the point of (A) being able to be concretely placed in a first, actual, lawsuit by the Town with a definite object and a definite request for relief, (B) being the subject of the filing, prosecution, and conclusion of a challenge action by the Landowners with definite, discrete allegations, (C) being included in the second, actual, lawsuit commenced by the Town, (D) being the subject of the allegations of the second challenge action by the Landowners (none of which was disproved in any way), and (E) being the subject of a public announcement of the mayor (Henry) that the Town would continue, and being the subject of a statement by the Town's counsel on the record with respect to further litigation, that the Town still wanted to get – to use his words -- "these easements," which were the subject of the four sets of lawsuits,

(iv) the fact that the question of whether there was a present "controversy" between the parties was not being posed in a merits hearing after discovery and a possible narrowing – or expansion -- of issues by the parties, was therefore not yet up for decision by the Circuit Court, and was therefore, at a minimum, more premature than most 12(b)(6) or 12(c) motions, i.e., the only thing not ripe for presentation or argument at the pleadings stage in trial-level court was the issue of ripeness itself, which was completely inapposite at that point,

(v) the fact that the question of whether there was a present controversy was still at the mere pleading stage in a trial-level court in which the question was only to be judged on the face of the Amended Complaint, taken as all true, and

(vi) the fact that the Amended Complaint clearly stated that the Landowners were then, presently, suffering existing and continuing damage from an identifiable controversy.

4. Whether discovery, other than as related to the Landowners' request for attorney's fees, should be curtailed on the basis that all other parts of the case were dismissed as "moot."

The Court of Appeals erred in determination of this issue because the case should not have been dismissed.

E. The issues completely overlooked and not even ostensibly ruled upon

The remaining potentially dispositive issues which were presented on appeal, but which were not addressed by the Court of Appeals, are largely discussed above in the factual account of what the Landowners argued on appeal and the response or lack of response of the Court of Appeals. These of course were also included in the express list of issues in the Appellants' Brief, under "Issues Presented."¹¹

¹¹ The following are numbered as numbered in the Appellants' Brief, and many were clearly couched there in terms of the factual or legal circumstances that define the actual issue. Omitted are the issues of permission, mootness and discovery curtailment which were ostensibly and abstractly addressed in the Court of Appeals's opinion and are discussed above. Not omitted are issues which are integrated with these three issues, but which the Court of Appeals did not fairly and accurately state as a discrete issues or did not decide:

2. Did the Circuit Court err in overlooking the standard of decision of a motion for judgment on the pleadings?

3. Did the Circuit Court err in ruling the case was moot at the trial court level, as opposed to at the appellate level, by failing to appreciate that when a case is at the trial court level, the pleadings are liberally construed, amendment is freely granted, and the rules require the court to grant all relief to which a party is entitled, regardless of whether prayed for in the complaint?

4. Did the Circuit Court err in overlooking that the facts of the sole pleading to be considered by the Circuit Court -- the Amended Complaint -- amply show that there is more than a possibility of repetition of the alleged acts, issues and controversies, and more than a prospect

of multiple or repetitive litigation created by the actual and threatened acts that the suit addresses?

5. Did the Circuit Court err in overlooking that the Amended Complaint demonstrates the antithesis of “abandonment” by the Town of the matters complained of, and the antithesis of mootness – namely, that the Town is already on its second suit persisting in the matters complained of and that, further, the declarations of the Town in public e-mails, in its briefs, and at hearing, demonstrate a specific intent to repeat these matters in a third suit or subsequent suits?

6. Did the Circuit Court err in accepting the Town’s assertion that the 375-paragraph Amended Complaint states a “single cause of action”?

7. Did the Circuit Court err in overlooking the fact that the allegations of fact in the Amended Complaint entitle Plaintiff to relief which is not confined to dismissing the Town’s second unsuccessful condemnation “without prejudice”?

9. Did the Circuit Court err in overlooking the fact that in the instant case, Plaintiff did not plead or request that the overall relief sought by Plaintiff be “without prejudice”?

10. Did the Circuit Court err in overlooking the fact that the allegations of fact in the Amended Complaint entitle Plaintiff to relief not confined to determining that the one particular notice used to commence the Town’s second unsuccessful action is merely “procedurally deficient”?

11. Did the Circuit Court err in overlooking that the facts pled in the Amended Complaint support declaratory relief and permanent injunctive relief beyond stopping only the present action and quashing the present condemnation notice?

12. Did the Circuit Court err in overlooking that the facts pled either support, or could be amended to support, other relief beyond stopping only the present action and quashing the present condemnation notice, such as damages for defamation, violation of 42 U.S.C. §1983, malicious prosecution, trespass, and other torts which may be better considered after discovery?

13. Did the Circuit Court err in overlooking that the Amended Complaint challenges condemnation not only presently, but also prospectively, and challenges not only the proposed condemnation in its entirety but also various proposed unnecessary features of the condemnation?

14. Did the Circuit Court err in overlooking the prudential concern that dismissal of the landowner-plaintiff’s challenge action as moot at the Town’s behest could prejudice the landowner-plaintiff with respect to not only loss of sunk litigation expense, repeated additional litigation expense, delay, and loss of evidence, but also statutes of limitation, including the short statute of limitations under the Tort Claims Act, in addition to subjecting the landowner-plaintiff to a continuing cloud on the landowner-plaintiff’s title, continuation of uncorrected public misrepresentations and omissions of the Town, and suspension of personal and professional planning and scheduling with respect to the subject property?

15. Did the Circuit Court err in overlooking the prudential concern that dismissing the suit “without prejudice” does not protect the landowner-plaintiff or afford the landowner-plaintiff relief even if to do so allows the landowner-plaintiff to immediately re-file a similar suit for permanent injunctive relief and other remedies, in that there might be a question whether the re-filed suit would stay a third condemnation suit by the Town, such that if the Town did thereafter file a third condemnation suit, the landowner-plaintiff would then have to file a similar challenge suit a fourth time in order to stay the condemnation until the challenge were resolved?

IV. FURTHER DISCUSSION OF THE LACK OF AUTHORITY OF AN INTERMEDIATE APPELLATE COURT TO ISSUE SUMMARY UNPUBLISHED UNCITABLE DECISIONS, PARTICULARLY ON NONREPETITIVE NONROUTINE ISSUES.

The foregoing discusses some, but not all, of the novel, nonroutine and important issues which are unfit for an unpublished decision and which should have been fully addressed by decision of the Court of Appeals. The sweeping sequence of errors by the Circuit Court on distinct and important legal principles of public importance presents an acute reason for not designating the Court of Appeals's opinion as "unpublished." This is particularly important when something as vital as preserving a family home is involved. The further law governing the form and publication of the opinion follows.

16. Does the Circuit Court's ruling err in presupposing that Plaintiff can simply keep spending money on filing fees and discovery again in a third or fourth action in an attempt, after great delay, loss of evidence, and attorney time, only to get back to the same procedural stage as the instant suit?

17. If the Town's stated "abandonment" was to be given effect as a true abandonment, was it error for the Circuit Court not to make a ruling that the effect of the abandonment was to preclude the ability of the Town to sue for a third time for condemnation of the same or a substantially similar interest in property?

18. Was the Town's stated "abandonment" a true abandonment, thus precluding the ability of the Town to sue for a third time for condemnation of the same or a substantially similar interest in property?

20. Was it error for the Circuit Court to allow the Town to temporarily abandon the condemnation on terms designated by the Town in violation of the stay imposed by S.C. Code Ann. §28-2-470, without the consent of the landowner-plaintiff?

22. If the Circuit Court's ruling that the challenge case was moot was based on the Town's unilaterally declared "abandonment" of the challenged condemnation, was it error for the Circuit Court not to rule that the abandonment was permanent with respect to future condemnations on the same subject matter for purposes of res judicata effect, law-of-the-case effect, or judicial estoppel effect in any future actions?

24. Did the Circuit Court, in granting "judgment on the pleadings," err in not ruling on what, if any, allegation or lack of allegation in the Amended Complaint caused the case to be moot, and in not providing leave to amend to remove, change, or add such allegation?

25. If the Circuit Court based judgment on the pleadings on a perception that the Amended Complaint did not contain a separate allegation and prayer that permanent injunction be granted against all or stated attributes of the Town's present or future condemnation attempts, did the Circuit Court err in not allowing the landowner-plaintiff to supply that allegation and prayer?

A. The intermediate appellate court's issuing a two-page, unpublished nonmemorandum decision, in a case with twenty-six (26) issues on appeal, and thus commanding that the decision be uncitable and without precedential value, was unconstitutional or contrary to the basic requirements for public confidence in the judicial system and in the judicial branch of South Carolina government, and violated statutes enacted by the General Assembly, and violated the South Carolina Appellate Court Rules and violated an order of the Supreme Court.

1. Error for the Court of Appeals to designate the opinion as unpublished and uncitable.

The Court of Appeals is not allowed by statute or rule to issue an unpublished, uncitable decision, and is in fact required by statute and rule to issue opinions on all issues, set forth the reasoning on each, publish the opinion, and be prepared to stand by it in other cases.

Providing for the publication of Supreme Court and Court of Appeals decisions is vested by the state constitution in the General Assembly. S.C. Const. (1895) Art. V, § 25.

By statute, South Carolina adopted and continued “in full force and effect,” “[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State” in the same manner as before this adoption. S.C. Code Ann. §14-1-50 (1976). Stare decisis -- “letting the decision stand,” and following it as precedent in future cases -- has clearly been part of the English common law for centuries. See, e.g., Bradley Stewart Chilton, “Star Trek” and Stare Decisis: Legal Reasoning and Information Technology, 8(1) Journal of Criminal Justice and Popular Culture, 25-36 (2001).

Stare decisis is not merely part of the common law. Rather, stare decisis gave birth to the common law. It was stare decisis which built, reconciled and recorded the common law and distinguished the common law from Roman codes and civil law starting after the Norman Conquest in 1066. These developments were in fact later aided by publication. Without stare decisis, the common law itself breaks down, along with all confidence in it, and in the courts.

The South Carolina Constitution and political custom recognize legal and judicial

tradition based on precedent, equal application of laws, and limits on judicial lawmaking or abrogation of law. The state Constitution specifically contemplates the publication of the decisions of the Supreme Court and Court of Appeals. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9), S.C. Const. Art. I, § 3, S.C. Const. Art. I, § 23, *id.*, Art. I, § 9, *id.*, Art. I, § 8, *id.*, Art. I, § 7, and *id.*, Art. V, § 25.

Pursuant to the state Constitution, the General Assembly prescribed laws pertaining to the issuance and publication of decisions, and pertaining to rulemaking and lawmaking by the Supreme Court. See S.C. Code Ann. § 14-3-810 (implying presumption of General Assembly that all opinions will be published), S.C. Code Ann. § 14-3-820 (same), S.C. Code Ann. § 14-3-830 (same), S.C. Code Ann. § 14-3-940 (manner of establishing court rules with approval of General Assembly), S.C. Code Ann. § 14-3-950 (same), S.C. Code Ann. § 14-8-250 (points stated in the case to be stated in opinion and decided with reasons being stated), and S.C. Code Ann. § 18-9-280 (points stated in the case to be stated in the appellate opinion and decided with reasoning stated; memorandum decisions allowed only when certain determinations are unanimously made).

Rule 220, SCACR was established pursuant to the procedure of S.C. Code §§ 14-3-940 and 14-3-950. Rule 220 is partly repetitive of state statutes, S.C. Code §§ 14-8-250 and 18-9-280. Neither statute has been repealed.

Only memorandum opinions can be unpublished opinions. Rule 220(a), SCACR.¹² In turn, only unpublished opinions are declared by rule to be without precedential value. Rule

¹² “The appellate court shall make its decisions in writing by published opinions or memorandum opinions.” Rule 220(a) (emphasis added). An “unpublished” decision can be defined as a memorandum decision which, while possibly available on the internet, is not published in “the Official Reports” or designated for inclusion in a hard-bound volume. See Rule 220(a), SCACR, and S.C. Code Ann. §§ 14-3-810, 820 and 830.

Rule 220(a), SCACR uses the term “memorandum opinion” in literal contradistinction

220(b)(1), SCACR; Rule 268(d)(2), SCACR. Additionally, only unpublished opinions are declared by rule to be uncitable – that is, forbidden to be cited or argued by counsel. Rule 268(d)(2), SCACR. Therefore, only memorandum opinions can be declared to be without precedential value and declared to be uncitable.

The Court of Appeals is not allowed to issue a memorandum decision. A “memorandum opinion” is defined by Rule 220(b)(1). It is defined as a decision that qualifies under Rule 220(b)(1) for exception to the rule that the decision state in writing, and decide, and state the reason for, “every point distinctly stated in the case” by the appellant. Rule 220(b), SCACR.

Under the express terms of Rule 220(b)(1), to be a memorandum opinion, (i) the opinion must be an opinion issued by the Supreme Court,¹³ (ii) the opinion must be determined in unanimous decision of the Supreme Court to be covered by a circumstance that “is dispositive of the issues submitted to the Court for decision,” (iii) the opinion must be determined by all members of the Supreme Court to involve, while being dispositive of all issues, one of the four circumstances reserved for memorandum opinions, and (iv) the opinion must be determined by all five justices of the Supreme Court to be an opinion that, if published “would have no precedential value.”¹⁴

from the term “published opinion,” making clear that all opinions are published decisions unless they are memorandum decisions.

¹³ By its own wise convention, in 1993, even the Supreme Court issued memorandum decisions only sparingly, even in the limited instances in which it was authorized to do so. In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993).

In Lanham v. Blue Cross and Blue Shield, 338 S.C. 343, 526 S.E.2d 253 (Ct. App. 2000), the ability of the Court of Appeals to issue unpublished opinions was questioned. The Court of Appeals defended its issuance of unpublished decisions only on the basis, stated in a footnote, that it had been issuing unpublished decisions. I.e., the Court of Appeals justified the challenged practice on the illogical basis that the court engaged in the practice.

¹⁴ The subjunctive task is for the justices consider whether the nature of the issues, the opinion and the case is such that the opinion would have no value if published: the value is freestanding and fixed and is to be contemplated and judged by them, rather than manipulated by them; they are not allowed to change the value and deprive the opinion of precedential value

The opinion in the instant case in no way qualified under the express terms of Rule 220(b)(1) to be a memorandum opinion because, among other things, it was not issued by the Supreme Court. The opinion (i) was not by the “Supreme Court,” (ii) was not determined unanimously by the Supreme Court¹⁵ to be “dispositive of the issues submitted to the Court for decision,” (iii) was not determined unanimously by the five justices to involve, while being dispositive of all issues, one of the four circumstances reserved for memorandum opinions, and (iv) was not issued after a determination “in unanimous decision [of the] the Supreme Court” “that a published opinion would have no precedential value.”

It was therefore error for the Court of Appeals to designate the opinion as unpublished and uncitable. The opinion should therefore be re-issued and the re-issued opinion, regardless of outcome, should be ordered published and should be regarded as precedent in other cases.

2. Error for the Court of Appeals to not identify and decide all the issues distinctly numbered and presented.

All judges in this state swear to preserve, protect and defend the Constitution of this State and of the United States, uphold the integrity of the judiciary, rule after careful and considerate deliberation, and seek justice, and justice alone. Rule 502.1, SCACR.

“In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the

simply by deciding to do so or writing the opinion in such a manner as to destroy its value. That is, they do not make the determination on the basis that they want the opinion to have no precedential effect; they make the determination on the basis of whether it would or would not have precedential value when issued in compliance with their sworn duties.

¹⁵ The Supreme Court, consisting of five justices, decides cases by a whole court of five; the Court of Appeals, consisting of nine judges, generally decides cases in panels of three judges. The instant case was not decided en banc.

record of the case.” Rule 220(b), SCACR; S.C. Code Ann. §18-9-280 (1985); id., §14-8-250 (Supp. 1992).

The Court of Appeals’ opinion did not identify for its readers, all of the several points involved. The Court of Appeals failed to identify and decide, among other things, the issues on appeal numbered “2” through “7,” “9” through “18,” and “20” through “25,” set out in a previous footnote.

The Supreme Court and the Court of Appeals are treated differently under Rules 220(b) and (c), SCACR and under analogous statutes. This difference is vital to the orderly functioning of the “Unified Judicial System” of Art. V. § 1 of the 1895 Constitution of the State, and is essential to meaningful opportunity for review of erroneous decisions by the Court of Appeals.

The Court of Appeals’ decision violates Rule 220(b) in all three particulars – (i) it does not disclose all the issues raised on appeal, (ii) it does not decide the skipped issues, and (iii) it obviously does not provide reasoning on the skipped issues. In this manner, the opinion tends to further evade review.

Rules 220(b)(1) and 220(b)(2) provide the extremely limited “memorandum opinion” exception to this requirement that the appellate court address each of the issues presented on appeal. This exception, however, is exclusively for the Supreme Court, as discussed above. The exception is not for use of the intermediate Court of Appeals.¹⁶ Rule 220 and the applicable statute therefore required that the Court of Appeals state its reasoning on each issue.¹⁷

¹⁶ In 1993, the Supreme Court of South Carolina issued an order regarding issuance of memorandum decisions by the Court of Appeals. See In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). However, the order did not arise from an advocated appeal. Nor was the order listed in the Court Register pursuant to S.C. Code Ann. § 14-3-940(a), nor was the order submitted to the legislature pursuant to S.C. Code Ann. §§ 14-3-940(b) and 14-3-950.

In the order, the Supreme Court clearly understood that the Court of Appeals was not allowed to issue “memorandum decisions.” The Supreme Court did not authorize the Court of

3. Error and bad public policy of the subject practices even if constitutionally enabled statutes and written rules of appellate procedure did not prohibit the Court of Appeals from issuing an unpublished uncitable decision which did not identify and decide issues distinctly stated in the case on appeal.

Depriving an appellate decision of publication and precedential effect by judicial fiat is

Appeals to proceed in violation of statute and rule. The Supreme Court advised of its opinion as to what minimum level of detail was sufficient to prevent a Court of Appeals decision from violating Rule 220(b), SCACR's requirements that all issues presented be addressed with reasoning. In Re Memorandum Decisions by Court of Appeals. The order required at least an identification of all the issues by number, and required reasoning allocated to each issue.

The order did not, however, authorize such non-memorandum decisions to be unpublished or authorize any other sort of decision of the Court of Appeals to be unpublished in violation of statute and rule.

In the instant case, the opinion of the Court of Appeals discussed some issues in summary fashion without context, but completely omitted others. The opinion did not comply even with the requirements for a "non-memorandum decision of the Court of Appeals," in that, in addition to omitting numerous issues entirely, the Court of Appeals did not identify by number the issues as numbered and framed by the appellant, but instead re-framed the issues to omit elements from them, and re-numbered them. In a sense, the Court of Appeals did not decide any issue presented for decision.

As to both the issues discussed and not discussed in the instant case, the opinion did not meet the standards set out in the Supreme Court's "low water mark" order.

Even if the Court of Appeals were unwisely to be considered eligible to invoke the Rule 220(b)(1) exception to the requirement of issuing a "published opinion," the unanimous "determination" required by the rule would fail in this case, and a "published opinion" would still be required.

The determination that, if published, the opinion would have no precedential value would hinge on presenting the opinion in a manner so as not to discuss important issues actually raised.

Next, one of the following four circumstances would need to be determined to exist: findings of fact in a bench trial, JNOV, findings of fact of administrative agencies, and complete absence of error of law. Rule 220(b)(1), SCACR; S.C. Code Ann. §18-9-280 (1985). The requirement of a "unanimous determination of the Supreme Court" – even if changed to "unanimous determination of the issuing court" is difficult to measure, as no record of a vote or actual determination has been provided -- only an indication that only the three-judge panel of the 9-member Court of Appeals (not, as with the S.C. Supreme Court, the entire Court of five Justices) "concur" with an opinion impliedly written and marked unpublished by someone else.

¹⁷ Both Rule 220(b)(2) and the applicable statute provide one exception which is available to the Court of Appeals. The limited exception is made for "a point which is manifestly without merit." Rule 220(b)(2), SCACR; S.C. Code Ann. § 14-8-250 (Supp. 1992). None of the twenty-six distinct points presented by the Landowners to the Court of Appeals were identified by the Court of Appeals in its decision as manifestly without merit – they all presented precedent and arguments of error by the Circuit Court.

outright destruction of stare decisis. In this case, it is a denial of justice and a step backwards when respect for law and the courts is at a low. South Carolina's constitutionally and statutorily recognized judicial tradition of written appellate decisions, followed for all people as legal precedents, is – or was -- in the vanguard of governmental transparency and responsibility. As other courts catch up, there is no reason for South Carolina courts to move backwards. Fairly recent measures have been taken by the United States Supreme Court with related issues of nonpublication and uncitability in the federal appellate judicial system.¹⁸

Neither the South Carolina Constitution, nor the statutes enacted pursuant to it, nor the rules of appellate procedure established pursuant to statutory rule-making procedure, authorize as an expedient, bulk intermediate appellate resolution by unpublished fiat.

Objections to uncitability and deprivation of precedential value in other jurisdictions have been based on First Amendment grounds, due process grounds, violation of Article III powers, pure logic, public policy, and loud outcry.¹⁹

¹⁸ See Federal Rule of Appellate Procedure 32.1 (abolishing, in the wake of over a decade of protest, the uncitability of unpublished decisions from 2007 forward). Quick references, with links, for the background and status of Fed. R. App. P. 32.1 are currently available at the URL, <http://www.nonpublication.com/32.1.HTML> . Protest over the practice of allowing obscure or oblique staff-generated summary opinions, and not requiring them to be published, not allowing citation of them, and not regarding them as law applicable to others has generated more writing than can be conveniently cited, including over 150 presentations, law review articles and journal articles. These include 155 resources, which even in a readable footnote, would require about twelve pages to list; these can be directly accessed by links found at the URL, www.nonpublication.com/ARTICLES.HTML .

¹⁹ One citizen formed his own organization, Committee for the Rule of Law, and commented as follows:

Having experienced a huge loss of property pursuant to an appellate decision containing 12 obvious misstatements of law, the correction of any one of which would have required a different result, I can tell this committee that I would have found the decision much easier to accept had the idiocy of the opinion been law for all. Then I could have been certain that those who depend on the contract law of California would have stood for me. Because of no-citation rules, no one cared. No one else should ever again stand so alone before an American judiciary.

FRAP 32.1 is essential to preserve the integrity of not only our judicial system,

Designating an erroneous opinion as unpublished and “without precedential value” perpetuates the errors by shielding the opinion from examination and correction. This effect is heightened if the opinion also does not identify all the issues which were raised on appeal. Such a measure should not be allowed to lessen the prospects of further judicial review on the grounds that, as an unpublished decision, the opinion is unlikely to do much further harm to anyone except the Landowners.

V. CONCLUSION

For all the foregoing reasons, it was wrong for the Court of Appeals to issue a partial decision, issue a clearly erroneous decision, and designate it as unpublished, and its act of doing so should be corrected as set forth hereinabove and in the Landowners’ briefs. There was no reason to dismiss the case. The Circuit Court should be reversed and the case, remanded for proceedings consistent with a revised, published, corrected decision.

Respectfully submitted,

s/M. Baron Stanton
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Date: 2-20-22

but our entire system of government.
Kenneth J. Schmier's comment on Proposed Fed. R. App.P. 32.1 to the Appellate Rules Committee. (Available currently by link in <http://www.nonpublication.com/32.1.HTML>.)

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Feb 21 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 20-CP-22-00930
CASE NO. 20-CP-22-00931
CASE NO. 20-CP-22-00932

M. Baron Stanton,Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Franklin D. Beattie, as trustee of the Franklin D. Beattie
Preservation Trust,Appellant,

v.

Town of Pawleys Island,.....Respondent.

and

Sunset Lodge, LLC,Appellant,

v.

Town of Pawleys Island,.....Respondent.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on this date, served the foregoing final **Petition for Rehearing** upon the Respondent by causing a copy to be e-mailed in accordance with current rules to will@belserpa.com. The postal mailing address of the above addressee is:

William C. Dillard, Jr., Esquire
Post Office Box 96
Columbia, SC 29202

s/M. Baron Stanton

M. Baron Stanton

Date: 2-20-23