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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
Appellate Case No. 2021-000757

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.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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Respondent Town of Pawleys Island ("Town") hereby submits its Return to Appellants' Petition for Rehearing. For the reasons set forth herein, Appellants' Petition should be denied.

Standard on Petition for Rehearing

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Id. At 532, 564 S.E.2d at 322 (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina 309* (1999)).

Arguments

1.) Appellants have not stated any basis for rehearing of the appeal.

The Appellants do not clearly state any issue that the Court overlooked or misapprehended. Instead, Appellants provide an extensive restatement of the arguments from their prior briefing and then paste a long list of their stated "issues on appeal" that they claim were not addressed. This is insufficient to support a petition for rehearing and, more broadly, the Appellants are not entitled to an Order providing granular analysis of every single argument and assertion they made. Instead, it is sufficient for the Court to "set forth each issue and [give] the case or cases which support its decision." In re Memorandum Decisions by Ct. of Appeals, 322 S.C. 53, 54, 471 S.E.2d 456, 457 (1993).

In consideration of Appellants' request for more specific analysis, a highly relevant factor is the sheer volume of briefing they have submitted to the Court. The Appellants' Brief, which is 45 pages in length and contains several pages of single-spaced footnotes, lists 26 arguments that it labels as "issues on appeal." The Appellants' Reply Brief is an additional 25 pages in length. The

Petition for Rehearing now argues that the Court did not rule upon "approximately twenty-one (21) remaining material and potentially dispositive issues." (Petition p.1)

This case did not present 26 issues on appeal, no matter how many ways the Appellants have stated and restated their arguments. The actual scope of issues on appeal is clearly illustrated by the general consistency between the numbered paragraphs in the Opinion (four), the numbered argument headers in the Appellants' Brief (five), and the numbered argument headers and issues on appeal in Respondent's Brief (six). Specifically, in its Opinion the Court ruled on the following issues:

i. **Validity of the Town's notices of abandonment** (corresponding to Appellants' argument header III and Respondent's argument header/issue on appeal number 1);

ii. **Mootness of the challenge actions** (corresponding to Appellants' argument headers I and II and Respondent's argument header/issue on appeal number 2);

iii. **Ripeness of any claim for prospective relief** (corresponding with Appellants' argument header III and IV and Respondent's argument header/issue on appeal numbers 3 and 5); and

iv. **Necessity for additional discovery** (corresponding with Appellants' argument header V and Respondents argument header/issue on appeal number 6).

Accordingly, the Court addressed all issues that were fairly raised and necessary for disposition of the appeal. The disproportionality between the number of Appellant's argument sections (five) and the number of Appellants' purported issues on appeal (twenty-six) is inconsistent with the procedural requirement that "[t]he brief shall be divided into as many parts as there are issues to be argued." Rule 208(b)(1)(E). This disproportionality also demonstrates that, in now asking the Court to address in granular fashion each and every argument the Appellants made, they are asking the Court to do something that *their own briefs did not do*: organize each of the twenty-six purported "issues on appeal" into distinct, clearly stated arguments and conclusions.

The Opinion addresses "every point distinctly stated in the case which is necessary to the decision of the appeal". Rule 220(b), SCACR. Furthermore, to the extent that the Court may not have addressed every single specific argument of Appellants, "[t]he Court of Appeals need not address a point which is manifestly without merit." Rule 220(b)(2), SCACR. Similarly, there is no basis under South Carolina law to request, as Appellants' have, that the Court reconsider its decision in order to provide a detailed statement of "pertinent facts giving rise to the appeal" (Petition p.1). Finally, to the extent that Appellants restate full portions of their original arguments and even refer the Court to their full Brief and Reply Brief, the Town is of course obliged to request reference to its own Respondent's Brief as well. However, the Town respectfully asserts that that type of review is beyond the proper scope of a petition for rehearing.

2.) The Court did not err in issuing an unpublished opinion.

Appellants misconstrue the procedural rules governing unpublished memorandum opinions. Rule 220(a), SCACR, plainly states that "[t]he appellate court shall make its decisions in writing by published opinions or memorandum opinions . . . memorandum opinions shall not be published in the official reports and shall be of no precedential value." Nowhere does that rule or any other procedural or statutory provision prohibit the Court of Appeals from issuing an unpublished memorandum opinion. Rule 220(b)(1) does not limit issuance of unpublished memorandum opinions, but instead provides that only the Supreme Court may do so without addressing "every point distinctly stated in the case which is necessary to the decision of the appeal."[1] This straightforward application of the plain language of the rule is supported by the Supreme Court order cited by Appellants, In re Memorandum Decisions by Ct. of Appeals, 322

[1] The exception to this requirement is that "[t]he Court of Appeals need not address a point which is manifestly without merit." Rule 220(b)(2), SCACR.

S.C. 53, 471 S.E.2d 456 (1993), which acknowledges in its first sentence "the authority of the South Carolina Court of Appeals to issue memorandum opinions".

The distinction, as the Supreme Court explained, is that while both courts are authorized to issue unpublished memorandum opinions, the Supreme Court has additional authority to "issue memorandum opinions w*hich do not give a reason for each issue involved in the appeal*". Id. at 54, 471 S.E.2d 456, 457 (emphasis added). The Supreme Court went on to explain that it nonetheless usually addresses each issue even when not required to do so, and found that, for purposes of the Court of Appeals, the Supreme Court's standard memorandum opinion format is sufficient to satisfy the requirement that every point be addressed.[2] The Opinion in this appeal clearly satisfies that standard. Likewise, the other appellate opinion referenced by Appellants simply does not, as they claim, question the authority of the Court of Appeals to issue unpublished decisions. See Lanham v. Blue Cross & Blue Shield of S.C., Inc., 338 S.C. 343, 526 S.E.2d 253 (Ct. App. 2000), aff'd as modified, 349 S.C. 356, 563 S.E.2d 331 (2002).

3.) The Court did not overlook or misapprehend any point in holding that the Town's abandonment of the condemnation notices was valid.

The Court properly held that the abandonment of the condemnation notices was valid. As noted in the Opinion, "in the absence of statutory authority, the condemnor may abandon the property condemned at any time before taking actual possession and entering thereupon." Jennings v. Sawyer, 182 S.C. 427, 189 S.E. 746, 751 (1937) (reporting and affirming circuit court order),

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[2] The Supreme Court's standard memorandum opinion format "normally takes the following form:

> Per Curiam. Affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: Issue 1: *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground at trial and another on appeal); Issue 2: S.C.Code Ann. § 19–5–510 (1985); *Kershaw County DSS v. McCaskill*, 276 S.C. 360, 278 S.E.2d 771 (1981); *Peagler v. Atlantic Coast Line Railway Co.*, 234 S.C. 140, 107 S.E.2d 15 (1959)."

In re Memorandum Decisions by Ct. of Appeals, 322 S.C. 53, 54–55, 471 S.E.2d 456, 457 (1993).

overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). As discussed in detail in Respondents' Brief, the Eminent Domain Procedure Act does not alter or diminish the power of a condemnor to unilaterally withdraw a condemnation action prior to physical appropriation and alteration of the property. *See* S.C. Code Ann. § 28-2-20 ("[T]his act is designed to create a uniform procedure for all exercise of eminent domain power in this State. It is not intended by the creation of this act to alter the substantive law of condemnation[.]").

Allegations regarding prior beach renourishment work do not change the analysis. Appellants argue for the first time in their Petition that the Town has made "material alterations" to the subject properties within the meaning of S.C. Code Section 28-2-230(B). However, it is clear from review of the Amended Complaint that, although Appellants alleged the Town performed certain beach renourishment work several months before serving the challenged condemnation notices (R.103 ¶ 45; R.104 ¶ 50-51; R.151 ¶ 352-353 (Am. Complaint)), there is no allegation that the Town purported to take possession of the property or that it made material alterations to the property after serving the condemnation notice. Instead, the Appellants allege the Town stated it needed to pursue easements, after certain work had already been performed, so that it could secure certain long-term support arrangements with the Army Corps of Engineers. (R.104 ¶ 53; R.106 ¶ 73).[3]

The Eminent Domain Procedure Act provides that a condemnor can only take possession of condemned property after the condemnation notice is filed with the Clerk of Court. S.C. Code Ann. § 28-2-230. Here, the condemnation notices were never filed because Appellants initiated their challenge actions within 30 days of receiving the condemnation notices, as authorized

[3] For context, the Town likewise alleged that the purpose of the easements was to satisfy Army Corps of Engineers requirements for long-term federal protection and financial support. (R.241-242 ¶ 13-14 (Ans. to Am. Complaint)).

pursuant to S.C. Code Ann. § 28-2-470. The practical application of the statutory framework to this situation makes good sense – there is no reason for a landowner to object to abandonment of a condemnation notice when the landowner has filed an action to challenge and quash that same condemnation notice. There is no allegation that the Town purported to take possession of the property, and the allegations of the Amended Complaint very clearly indicate that the Town could not have done so because the condemnation notices were never filed. Accordingly, the requirement of landowner consent to abandonment "after taking possession if material alterations have been made", S.C. Code Ann. § 28-2-230(B), simply does not apply to this case. In any event, this argument was not preserved.[4]

The Court's holding that the abandonment was valid also constituted a clear rejection of Appellants' argument that the statutory stay[5] on *pursuing* the condemnation action somehow prevented the Town from *withdrawing* the condemnation. Finally, Appellants have not cited to any authority in support of the proposition that they are entitled to a determination that the abandonment bars any future similar condemnation attempts; this argument was manifestly without merit and not necessary to the disposition of the appeal.

4.) The Court did not overlook or misapprehend any point in holding that the challenge actions were moot.

The Court properly held that the challenge actions are moot. Because the condemnation notices have been abandoned, "judgment, if rendered, will have no practical legal effect upon [the] existing controversy." Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996).

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[4] Appellants' new arguments regarding purported calculations of quantities of sand previously placed on the beach (Petition p.18, fn.8) are also unpreserved but, for the same reasons stated above, have no bearing on the abandonment issue.

[5] S.C. Code Ann. § 28-2-470 (imposing a statutory stay on condemnation proceedings after the timely filing of a challenge action).

While the Appellants argue that the Court should have performed a detailed factual analysis of the alleged circumstances surrounding the interactions of the parties, nothing in the surrounding circumstances (or any that might be alleged in an amended pleading) could change the facts that these condemnation notices are withdrawn and that any future additional condemnation attempt would be inherently susceptible to review in another challenge action.

Furthermore, the possibility of a future condemnation does not create a "cloud on title" giving rise to a justiciable controversy, because all private property is inherently subject to the government's potential exercise of the eminent domain power. See Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1922) ("[W]hen the state originally granted lands to individuals the grant was made under the implied condition that the state might resume dominion over the property whenever the interest of the public or welfare of the state made it necessary."). No condemnation notice or lis pendens was ever filed. The easements the Town sought are the same easements it has already obtained for more than a hundred neighboring beachfront properties without any condemnation action. (R.99 ¶ 17; R.145 ¶ 317(Am. Complaint)).

5.) The Court did not overlook or misapprehend any point in holding that the Appellants' purported claims for prospective relief are not ripe.

The Court did not err in analyzing the non-justiciability of any claims for prospective relief. The Town specifically argued in the Respondent's Brief that "[t]o the extent that the Appellants may wish to argue that the abandonment was somehow undertaken in "bad faith" and should bar a future condemnation attempt, any such factual and legal conclusion, however unlikely, would only be ripe for determination at the time that any new attempt is initiated based on the full set of circumstances presented at that time." (Resp. Br. p.26). The Town also argued extensively that the Appellants are not entitled to any prospective declaratory relief because "[a] justiciable controversy is a real and substantial controversy which is appropriate for judicial determination,

as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Thompson v. State, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016).[6]

Appellants had an opportunity to address these ripeness and justiciability arguments in their Reply Brief, and there was no error in the Court ruling based on these grounds. Even if the Town had not raised these arguments, a court may determine *sua sponte* that no justiciable controversy has been raised. Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999) *Accord*. Kremens v. Bartley, 431 U.S. 119, 136 (1977). The Court did not overlook or misapprehend any point on this issue.

6.) The Court did not overlook or misapprehend any point with regard to application of Rule 12(c), SCRCP.

While the Opinion did not specifically address Rule 12(c), SCRCP, it is clear that the Court did not fail to treat Appellants' allegations as admitted and liberally construed in their favor. Instead, the Court based its holding on the objective fact of the abandonment which, regardless of whatever else was alleged or might have been alleged, leads to the same dispositive legal conclusions: mootness and the non-justiciability of any claims for contingent prospective relief. Likewise, as discussed in more detail in the Respondent's Brief,[7] Rule 12(c) simply did not entitle Appellants to continue full-blown discovery for some unspecified period of time in the absence of any pending claims (and only later determine whether to possibly amend the pleadings to assert claims for damages or other relief). "The Court of Appeals need not address a point which is manifestly without merit." Rule 220(b)(2), SCACR.

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[6] The Town made identical arguments to the circuit court in its Memorandum in Opposition to the Plaintiff's Motion to Reconsider the Order of Dismissal (R.443-444, 446-447).

[7] Respondent's Brief p.13, 20 – 22. Appellants' counsel explained to the circuit court that he wanted to "leave the case open, allow us to pursue some discovery, and decide whether we want to amend to seek further relief . . . . [a]nd maybe sue them for damages." (R.34, ln. 15-24).

CONCLUSION

For the reasons set forth herein, the Appellants Petition for Rehearing should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **Respondent's Return to Petition for Rehearing** by causing a copy to be e-mailed on **March 6, 2023,** to counsel of record as listed below:

M. Baron Stanton (bstanton@stantonlaw.com)

s/ William C. Dillard, Jr.
William C. Dillard, Jr. (S.C. Bar No.78986)