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**May 01 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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The Honorable Marvin H. Dukes, III  
Beaufort County  
Trial Court Case No. 2018-CP-07-01622

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APPELLATE CASE NO. 2020-000862

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J & W Corporation of Greenwood,

Appellant,

vs.

Broad Creek Marina of Hilton Head, LLC;  
Broad Creek Marina Operations, LLC;  
Broad Creek Marina Properties, LLC;  
Broad Creek Marina and Development, LLC,

Respondents.

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**APPELLANT'S RETURN TO RESPONDENTS' PARTIAL MOTION TO DISMISS  
BASED ON ALLEGED MOOTNESS**

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s/Thomas C. Taylor

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Bluffton, South Carolina  
May 1, 2023

## INTRODUCTION

The Respondents' "Partial Motion To Dismiss Appeal Based On Mootness" filed thirteen (13) days prior to oral argument, should be denied and this Court should consider the imposition of sanctions upon the Respondents because the Motion is not in compliance with the South Carolina Appellate Court Rules. SCACR 269.

## FACTUAL SUMMARY

There are currently no facts properly before this Court supporting in any way the Respondents' "Partial Motion To Dismiss Appeal Based On Mootness" because there are no such facts in the Record on Appeal.

## ARGUMENT

### **There are no facts before this Court for consideration of Motion**

Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), SCACR, an appellate court will not consider any fact that does not appear in the Record on Appeal. Rule 210(h), SCACR. The moving party has the burden of presenting a record sufficient to allow the appellate court to make a decision. See, *e.g.*, Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996). None of the facts alleged to support the instant Motion are contained within the Record on Appeal and the Respondents' attempt to have this Court consider them to dismiss a portion of the pending appeal is unsupportable.

This Court is a court of appellate jurisdiction, having been vested by the General Assembly through the S.C. Const. Art. V, Section 9, with jurisdiction over "any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an

agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission. This Jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case. " S.C. Code Annot. Section 14-8-200(a). The appeal pending before this Court is from Judge Dukes' Orders, none of which were related to the actual issuance of the OCRM permit on July 8, 2022. In fact, final briefing on this case was completed on June 21, 2021—over a year before the OCRM permit issued and thus nothing related to that permit is properly before this Court.

The record before this Court should confirm that the issues on appeal were raised below and were ruled upon by the lower court. See, *e.g.*, Zaman v. S.C. Bd. Of Med. Exam'rs, 305 S.C. 281, 408 S.E.2d 213 (1991)(declining to consider an issue where record contained no factual basis for raising the issue on appeal); McCall v. IKON, 380 S.C. 649, 670 S.E.2d 695 (Ct. App. 2008) (finding nothing in the record concerning the argument party tried to make on appeal). It is self-evident that a permit issued by OCRM in July 2022 was not part of any trial before Judge Dukes in May of 2019, nor was it the subject of any subsequent orders issued by the circuit court in this matter. Simply put, the Respondents' effort to sway this Court's perspective of the appeal by filing a "Partial Motion To Dismiss Appeal Based On Mootness" with exhibits that are not part of the Record on Appeal, when the Respondents know that the issue of OCRM's permitting decision is not properly before this Court, is inappropriate and prejudicial to the Appellant. It should be denied and none of the documents attached to the Motion should be considered by this Court in evaluating whether Judge Dukes erred in ordering the Appellant J & W Corporation of Greenwood to move into a then non-permitted floating office, which under the evidence admitted and considered by the trial court in May 2019, did not come close to meeting the requirements of the Regulations permitting floating offices over South Carolina's waterways.

**The issue of the floating office is not moot**

Specifically reserving its argument that the Record on Appeal is devoid of any facts that could support the instant Motion, the Appellant further asserts that the issue of the legality and/or appropriateness of the floating office based on the facts and circumstances before Judge Dukes at trial in May of 2019 (and January of 2020 when he issued his final Order) (Record on Appeal, p. 19), is not moot.

Broad Creek Marina seeks dismissal of a portion of J & W's appeal on the grounds of mootness, asserting that since J & W did not appeal the July 2022 OCRM permit to the DHEC Board (Motion, Exhibit A), there is no remaining controversy before the Court. The law in South Carolina on the mootness of a pending appeal is well established. "An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Curtis v. State, 345 S.C. 557, 566, 549 S.E.2d 591, 596 (2001). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

But even if a case is moot under the above criteria, our appellate courts will still decide questions on appeal under three exceptions, namely: (1) if the issues raised are capable of repetition but generally will evade review; (2) if the issues are imperative and of manifest urgency to establish a rule for future conduct in matters of important public interest, and (3) the issues raised may affect future events or have collateral consequences for the parties." S.C. Pub. Int. Found. v. S.C. Dep't

of Transportation, 421 S.C. 110, 120, 804 S.E.2d 854, 860 (2017); Sloan v Greenville Cnty., 356 S.C. 531, 552-54, 590 S.E.2d 338, 349-50 (Ct. App. 2003).

**The case is not moot since a reversal of the trial Court's decision would return J & W to a mainland office**

Under the above standard, this case is not moot since a reversal of Judge Dukes' Order of May 29, 2019 compelling J & W to move into a floating office (Record on Appeal p. 8) will result in the return of J & W to a mainland office as the Release and Confidential Settlement Agreement (RCSA) provided. Record on Appeal, p. 1208. A similar scenario was before the Court in Skydive Myrtle Beach v. Horry County, 428 S.C. 638, 837 S.E.2d 485 (2020), a dispute concerning an ejectment of a tenant of an aircraft hangar. The tenant, Skydive, was required to vacate the premises by Court Order and thereafter appealed. *Id.* at 642-43, 837 S.E.2d at 487. The landlord, Horry County, sought to dismiss the appeal on the grounds of mootness, asserting there was no longer any justiciable controversy since Skydive had not occupied the property for three (3) years pending the appeal. *Id.* The Court rejected this argument, holding it still had the power to return possession to Skydive if the ejectment was improper. *Id.* at 644, 837 S.E.2d at 488. The Court noted Skydive had consistently and repeatedly contested all rulings with the clear intent to retain possession and had done nothing to delay the resolution of the appeal. *Id.* at 643, 837 S.E.2d at 487. In the instant case, J & W has also continuously asserted that State Regulations prohibited a floating office in these circumstances. (Record on Appeal p. 424, lines 8-13 and Appellant's Brief at p. 17.)

If the Court determines that the floating office violated Reg. 30-12(M) under the facts presented at trial in May 2019, it can reverse the Order of Judge Dukes and remand the case with instructions to require that J & W receive an office as set forth in the RCSA. The Trial Court can

also provide for whatever other relief J & W may be due for the loss of use of a mainland office pending the appeal. This substantive relief is still available to J & W and this existing controversy still needs to be decided by this Court.

**The validity of moving J & W into the floating office may affect future events or have collateral consequences for the parties**

Even if this Court determines the issues raised by J & W as to the floating office are moot, those issues can and should still be decided under the exception allowing for an appellate court to hear an appeal because issues may have an effect on future events or have collateral consequences for the parties. Curtis at 566, 549 S.E.2d at 596; Sloan at 554-55, 590 S.E.2d at 351, S.C. Pub. Int. Found. at 349-350, 590 S.E.2d at 552-553. J & W has strenuously maintained throughout this litigation that a floating office will never last for the duration of the 99-year Lease Agreement and J & W will be replacing it many times over during the course of the remaining years of the 99-year Lease. See page 19 of Appellant's Brief.

If the Court determines that Judge Dukes' ordering of J & W to a floating office was in error, but then determines for whatever reason that the Trial Court's placement of J & W in the floating office cannot be reversed, J & W still would have legal remedies for damages caused by the unlawful loss of a mainland office, or possibly other remedies.

**The issue of when and why a floating office should be allowed in South Carolina is an imperative issue and it is of manifest urgency to establish a rule for future conduct in this matter of important public interest**

Finally, this Court may and should consider the issue of the appropriateness of a floating office under the facts presented at trial (that clearly showed there was no water-dependent use for the office) because the issue of the environmental damage that is likely to be caused by floating

offices in South Carolina is imperative and of manifest urgency to establish a rule for future conduct in this matter of important public interest.

Respectfully submitted,

s/Thomas C. Taylor

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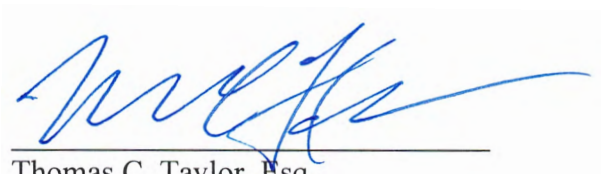
I hereby certify that this law firm represents the Appellant in the above-captioned matter and that on the date below, in Bluffton, South Carolina, I served a copy of the below listed document on the Clerk of Court of the South Carolina Court of Appeals by e-filing same.

**Document Served: Appellant's Return to Respondents' Partial Motion To Dismiss Based On Alleged Mootness**

In addition, copies of the Return and this Proof of Service were served upon the attorneys for BROAD CREEK MARINA OF HILTON HEAD, LLC; BROAD CREEK MARINA OPERATIONS, LLC; BROAD CREEK MARINA PROPERTIES, LLC; and, BROAD CREEK MARINA AND DEVELOPMENT, LLC, by service to their AIS - E-mail addresses as follows:

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