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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-000719

Nancy Morris, as Personal Representative of the Estate of David Allan Woods. Appellant

vs.

State Fiscal Accountability Authority, at al. Respondents

**APPELLANT’S REPLY TO RESPONDENTS’ RETURN TO
APPELLANT’S PETITION FOR REHEARING & PETITION FOR
REHEARING *EN BANC***

INTRODUCTION

Conspicuously absent from Respondents’ Return is any factual basis to support the finding of mootness. Respondents conveniently ignore the plain language of the Covenant not to Execute,¹ and offer no factual support for the notion that the ability to collect against the personal assets of the defendant “Officers” was necessary for Appellant to pursue the instant claims. That is because no such factual support exists. Instead, Respondents resort to a misguided preservation argument.

Respondents’ reasoning, like this Court’s, rests on the flawed assumption that the mere existence of the Covenant could render this matter moot without regard to the specific document at

¹ Appellant executed identical covenants with each of the defendant Officers in the underlying action. Those covenants are attached as an exhibit to Appellant’s Petition for Rehearing. The term “Covenant” in its singular form as used herein is intended to apply to all or any one of the covenants as the context may require.

issue or the claims raised. However, this reasoning ignores the fundamental question here, which is whether *this* Covenant renders *this* case moot. It does not, and because this question remains unanswered, this Court’s opinion fails to resolve the question on appeal unless it is to be interpreted as adopting a new rule that *any* covenant, regardless of its terms, will render every case *per se* moot.

Appellant points out this discrepancy between the question presented—which concerned *this* Covenant—and the question seemingly answered by this Court in Section “1” of her Petition for Rehearing. The balance of the arguments made in Appellant’s Petition—at Sections “2” through “7”—outline the problems with this new ruling. Because Appellant had neither the reason nor ability to develop these arguments prior to this Courts’ order, Respondents’ invocation of the rules of issue preservation are misplaced. The rules of issue preservation did not require Appellant to predict this Court’s ruling before it was made.

ARGUMENT

A finding of mootness requires factual support. Thus, this Court erred in failing to find or identify any provision of the Covenant or other facts to support its ruling. *See generally e.g., Skydive Myrtle Beach, Inc. v. Horry Cty.*, 428 S.C. 638, 643, 837 S.E.2d 485, 487 (2020) (recognizing that mootness is a factually specific inquiry and reversing this Court’s finding of mootness where there was “nothing in th[e] record to indicate” there was factual support for this Court’s ruling). But the problem goes deeper.

Where there is a claim that the execution of a document has defeated justiciability, the law has (at least until now) directed that the issue is controlled by the specific terms of the document in question. Thus, justiciability in this case should have been determined by the actual language of the Covenant, and in the context of the specific claims made in this case. *See id.*; *see also* (App. Br. p. 26) *citing Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011) (indicating that whether a release renders a matter moot depends on whether “the plain language . . . resolved all of Appellant’s

claims” and “did not reserve any rights”); *Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (stating a “release is a contract, and the scope of a release is gathered by its terms”); *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994) (confirming waiver is a factual question of whether there has been a “voluntary and intentional relinquishment of a known right,” and “the burden of proof is upon the party who asserts it”).

This Court found the Covenant here rendered the matter moot without any findings that the actual terms of the Covenant supported that conclusion and without any factual finding that exposure of the Officers’ personal assets was necessary to pursue the claims asserted by Appellant. The Court’s ruling is based on nothing more than the mere existence of the Covenant. This constitutes a departure from the law that has traditionally made the question of justiciability case-specific and dependent upon the terms of the document at issue. *See Skydive Myrtle Beach*, 428 S.C. at 643, 837 S.E.2d at 487; and (App. Br. p. 26) (*supra*).

In essence this Court reframed the question from one that should have focused on *this* Covenant specifically and made it about covenants generally. In doing so, it effectively created a new rule—*i.e.*, that every covenant renders a case *per se* moot, without regard to specific facts.² Contrary to Respondents’ suggestion, the rules of issue preservation do not require clairvoyance. Because this Court addressed a different question than the one on appeal, and established a new rule for analyzing the effect a covenant has on justiciability, Appellant never had the need or ability to develop the

² Whether there should be a universal rule concerning covenants was not the issue. A point demonstrated by the fact that Respondents’ motion was based on the specific Covenant given by Appellant in the underlying §1983 matter and requested the trial court take judicial notice of the Covenant. (R. p. 304). If the terms of the Covenant did not matter, why did Respondent attempt to discuss them? If the specific Covenant here did not matter, why request judicial notice? Even Respondent understood the question was whether *this* Covenant rendered the matter moot, not whether *any* covenant would render a case moot.

arguments concerning this Court’s ruling. *Accord generally, State v. Tapp*, 398 S.C. 376, 386, 728 S.E.2d 468, 473 (2012) (holding that South Carolina’s preservation rules “certainly do not require clairvoyance”). Accordingly, the rules of issue preservation did not require these arguments to be developed prior to this Court’s ruling. And the fact that the trial court *might* have taken judicial notice of the Covenant does not change this.

As the moving party below, it was incumbent on Respondents to provide support for its claim that this Covenant rendered the case moot. *See e.g., George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 592, 545 S.E.2d 500, 505 (2001) (observing in a declaratory judgment action “the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact”). Presumably to satisfy this burden, Respondents asked the trial court to take judicial notice of the Covenant. In its order, the trial court did not explicitly take judicial notice of the Covenant (nor did it take judicial notice of the terms of the Covenant). Instead, it merely recognized that the Covenant was an exhibit to a pleading in a separate matter. (R. pp. 25-26).

Similarly, the only factual basis this Court provided for its decision was the observation that the trial court’s order suggested it took judicial notice of the Covenant.³ However, even if the trial court did take judicial notice of the Covenant this alone could not resolve the question before the Court.

A court may take judicial notice of a fact, provided the fact “must be so notorious that the court may properly assume its existence without proof.” *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984). “Unless the fact is [] of such common or general knowledge that it is accepted by the public without qualification or contention . . . it is not subject

³ Perhaps recognizing that the trial court did not expressly take judicial notice of the Covenant, this Court offers the more equivocal observation that the amended order “indicated” the trial court took judicial notice of the Covenant.

to judicial notice.” *Id.* While a Court may take judicial notice of a public or recorded document, taking notice of the *existence* of a document is distinct from taking judicial notice of the *contents* of that document or of the effect/interpretation of those contents. *See e.g., id.*, at 256-57, 321 S.E.2d at 197) (finding the recitals of a recorded deed did “not constitute ‘indisputable matter’ subject to judicial notice” and noting that “[w]hile the existence of recitals in the deed may be verified by resort to the public records, mere recitals in a deed do not establish, as against strangers, the facts recited there.”).

Here, while the trial court *might* have taken judicial notice of the existence of the Covenant, the issue here does not turn on the existence of the Covenant. Instead, it turns on whether the plain language of the Covenant unambiguously released, waived, or otherwise mooted the claims asserted by Appellant. *See* (App. pp. 26-27). Because the interpretation of the Covenant is neither a question of fact, nor undisputed, this determinative issue could not be resolved by mere judicial notice of the Covenant. *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (finding covenants not to execute are interpreted, as any other contract, to give effect to the parties’ intent as shown by the plain language); *and First S. Bank v. Rosenberg*, 418 S.C. 170, 173, 790 S.E.2d 919, 921 (Ct. App. 2016) (finding “the interpretation of an unambiguous contract **is a question of law**” rather than fact) (emphasis added); *contra Masters*, at 255-57, 321 S.E.2d at 196-97) (explaining that judicial notice may only be taken of an undisputable fact). In short, the trial court did not (and could not) take judicial notice of the legal import of the Covenants’ terms—this requires specific analysis and findings.

Similarly, although Appellant acknowledged the Covenant released the Officers from having to use their personal assets to pay the §1983 judgment, the trial court does not make any findings to suggest the IRF’s insurance policy at issue here made the Officer’s personal exposure a pre-requisite to the indemnity Appellant sought in this action. Thus, even if the trial court did take judicial notice

of the Covenant, this does not take the place of proof that the Covenant clearly and unambiguously released, waived, or otherwise mooted this case; nor does it constitute evidence that the Officers' personal exposure for the judgment was a pre-requisite for the IRF's payment obligation under the policy or the SFAA's payment obligation under the statute.

Ultimately, no matter how many different ways it is explained, the problem here boils down to the simple and fundamental lack of evidentiary support for the trial court's finding of mootness—the exact argument Appellant made on appeal. *See* (App. Br. pp. 26-27) (arguing for reversal because, among other things, the trial court “failed to make any finding [to support] that [Appellant] waived, released, or otherwise ‘relinquished’ any claim against Respondents”). Because this Court chose to adopt an approach that decides justiciability without consideration of the evidence, it did not consider this point. Therefore, Appellant explained the problems with this Court's approach in her Petition. To the extent these arguments might be seen as new, it is only by virtue of this Court's novel approach. Because there was neither the need nor ability to explain the problems with this Court's order before that order was issued, Respondents' attempt to implicate the rules of issue preservation must fail. This Court should therefore consider the arguments set out in Appellant's Petition for Rehearing.

CONCLUSION

For the reasons stated, this Court should grant Appellant's Petition for Rehearing and/or Petition for Rehearing *en banc*.

[signature block to follow]

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PROOF OF SERVICE

I hereby certify that the enclosed was served on all other parties to this matter by email and with an offer to send the same by US Mail on this day and properly posted for delivery to the following addresses:

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