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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2020-000837
Case No. 19-ALJ-17-0001-CC

Eighteen Ink, LLC, d/b/a Group Therapy . . . . . Respondent

v.

South Carolina Department of Revenue . . . . . Respondent

and

Thomas R. Gottshall, April C. Lucas, and Michael Drennan . . . . . Intervenors/Appellants

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RESPONDENT EIGHTEEN INK, LLC'S RETURN TO APPELLANT'S PETITION FOR REHEARING

Respondent Eighteen Ink ("Respondent"), pursuant to Rule 221(a), SCACR, submits this Return to Appellants' Petition for Rehearing. As determined by this Court, this appeal is moot because Appellants failed to protest or withdrew their protest on two separate licenses since the issuance of Respondent's 2018-2020 on-premises beer and wine permit and restaurant liquor by the drink license (hereinafter "licenses")—the issue underlying the appeal. Simply put, this appeal was properly dismissed because Appellants rendered their case moot by their own action.

Appellants concede the issues on appeal have been rendered moot, stating in their Petition for Rehearing that any action by this Court would have no effect on Respondent's current licenses. Nevertheless, Appellants argue this Court should address the issues under an exception to the

mootness doctrine. Yet, they fail to acknowledge Appellants' actions make such an exception inapplicable.

"[A] court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). (internal quotation marks omitted) (quoting *In re Darlene C.*, 278 S.C. 664, 665, 301 S.E.2d 136, 137 (1983)). However, for the exception to apply, "the action must be one which will truly evade review." *Croft v. Tr. of James A. Croft Tr. v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) (quoting *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006)). Crucially, an issue does not evade review when mootness is a byproduct of a party's own actions. *See id*. at 481, 860 S.E.2d at 356 ("Even if the issues related to alleged FOIA and ordinance violations by the Board are capable of repetition, they do not evade review. *Here, Petitioners' appeal became moot because the Developer decided to abandon the Project, not because Petitioners had insufficient time to challenge the Board's approval before the controversy ended*." (emphasis added)); *Seabrook v. City of Folly Beach*, 337 S.C. 304, 307, 423 S.E.2d 462, 463 (1999) ("Moreover, while the factual scenario presented by this appeal is certainly capable of repetition, *it does not evade review, and would have been clearly reviewable had Folly Beach not voluntarily removed the conditions and Respondents abandoned their taking claim*." (emphasis added)).

The ruling related to this appeal was a result of the actions taken by Appellants—not from the passage of time. As Appellants pointed out in their Final Reply Brief, the issues surrounding Respondent's 2018–2020 licenses would continue to be justiciable so long as Appellants protested

the renewal/reissuance of the licenses in subsequent licensing periods.[1] (Appellants Final Brief, pg. 5–6). Such a result is controlled by section 1-23-370 of the South Carolina Code, which provides:

> [w]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

S.C. Code Ann. § 1-23-370.

Practically, if Appellants protested the renewal of Respondent's licenses in subsequent licensing periods, Respondent's 2018–2020 licenses would remain in effect while the protests were resolved. Thus, if this Court determined that Respondent should not have been granted its 2018–2020 licenses, Respondent could not rely on the same to sell alcoholic beverages. As a result, the issuance of Respondent's 2018–2020 licenses remained a live controversy during the pendency of Appellants protest of the 2020–2022 licenses.

However, as demonstrated by the documents in the Supplemental Record, Appellants withdrew their protest to Respondent's 2020–2022 licenses after the parties reached an agreement, which Appellants concede was designed to address the concerns they raised in this case. At that point, because Respondent's 2020–2022 licenses were granted, Respondent was no longer relying on its 2018–2020 licenses through operation of section 1-23-370. Appellants further ***chose not to***

[1] Despite explaining how the operation of section 1-23-370 acted to keep the underlying appeal justiciable during protests in subsequent licensing periods, Appellants now assert this Court's ruling eliminates any appellate review of two-year licenses. However, Appellants' contention is misplaced, as future appellants can ensure the continued justiciability of their challenges by simply protesting in subsequent licensing periods as laid out by Appellants themselves in their Final Reply Brief.

protest Respondent's 2022–2024 licenses. Thus, Appellants were not denied an opportunity to have this Court rule on the merits of their appeal as a result of the passage of time.

Appellants were fully aware the justiciability of their appeal hinged on their continued protest of Respondent's subsequent license applications and Respondent's reliance on the 2018–2020 licenses. Despite such knowledge, Appellants made a voluntary, affirmative decision to withdraw their protest in exchange for Respondent addressing their concerns in a settlement. Had Appellants opted instead to continue protesting Respondent's subsequent licenses, this appeal would still be a live controversy. As such, this is not an issue capable of repetition yet evading review. Rather, this is merely a case where Appellants intervening actions rendered the controversy moot. *See Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief.").

Moreover, Appellants are attempting to have their cake and eat it too. As noted above, Appellants assert in their Petition that their settlement with Respondent was "designed to address the very concerns raised in this case." Thus, Appellants received what they wanted through the settlement. Now that Appellants do not face the risk of losing the appeal on the merits, they ask this Court to issue an advisory opinion on the hypothetical question of whether Respondent should have been issued licenses under conditions that existed years ago. This Court should refuse Appellants' request. *See id*. ("An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists.").

Based on the foregoing, Appellants' Petition for Rehearing should be denied.

Signature included on following page

Respectfully submitted,

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PROOF OF SERVICE

I certify that on August 31, 2023, I served Respondent Eighteen Ink, LLC's Return to Appellant's Petition for Rehearing on Respondent South Carolina Department of Revenue by emailing it to its attorneys of record, Patrick McCabe and Jason Luther, at Patrick.McCabe@dor.sc.gov and Jason.Luther@dor.sc.gov, and upon the Intervenors/Appellants, by emailing it to their attorneys of record, Richard A. Harpootlian and Chris Kenney, at rah@harpootlianlaw.com and cpk@chriskenney.law.

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