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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Scott Sprouse,
Circuit Court Judge

Appellate Court Case No. 2023-000953
Civil Case No. 2021-CP-07-00663

West Street Farms, LLC and
Mix Farms, LLC,

Appellants,

v.

City of Beaufort, Beaufort
Inn, LLC, and 303 Associates, LLC

Respondents.

FINAL BRIEF OF APPELLANTS

/s W. Andrew Gowder, Jr.
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October 17, 2023

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STATEMENT OF THE CASE

Declaratory Judgment action challenging actions of the City of Beaufort as contrary to law.

The case that is on appeal before this court was commenced on April 6, 2021, by the Appellants, property owners within the City of Beaufort, who filed this declaratory judgment action challenging the City of Beaufort's issuance of permits, approvals, and Certificates of Appropriateness for three separate projects in violation of the City's zoning ordinances.

Specifically, the Amended Complaint in this action asserts that three separate projects owned by the developer Defendants Beaufort Inn, LLC, and 303 Associates, LLC, (the "Hotel Project," the "Parking Garage," and the "Apartment Project" as defined in the Amended Complaint) were allowed to proceed with permitting without the City's Zoning Board of Adjustment having first granted them Special Exceptions to these projects as required by the Beaufort Code. Special Exceptions are necessary for the permitting of any Large Footprint Building or building in the Historic District with a certain size footprint as defined in the Beaufort Code.

This declaratory judgment action requests that the court make several declaratory findings, as follows:

a. The Hotel Project, the Parking Garage Project, and the Apartment Project as currently designed and submitted to the City, exceed 100 feet width frontage and, under the Beaufort Code,

shall comply with the Large Footprint Building standards of Beaufort Code Sec. 4.5.10. (R.pp. 1006-1007)

b. Under Sec. 4.5.10, as the Hotel Project, the Parking Garage Project and the Apartment Project are in the Historic District Overlay, both are permitted only by the granting of a Special Exception by the ZBOA.

c. Neither the Hotel Project, the Parking Garage Project, nor the Apartment Project have received a Special Exception from the ZBOA.

d. Neither the Hotel Project, the Parking Garage Project, nor the Apartment Project may proceed with any construction, alteration, or improvement on those project sites without first receiving a Special Exception for each project from the ZBOA.

e. All prior approvals by the City that were issued without the prerequisite Special Exception permitting by the ZBOA are null, void, and of no effect. (R. p. 44, line 16-p. 45, line 7)

The parties conducted and completed discovery in the Declaratory Judgment case. Days following the court's decision in denying the appeal of the HRB award, the Respondents filed a motion for summary judgment on February 14, 2022, in this case, arguing that the Court's written order denying the HRB appeal acted as collateral estoppel preventing this declaratory judgment action from proceeding. After briefing and oral argument, the court on May 9, 2022, denied the motion for summary judgment and this case proceeded to trial.

On May 11, 2023, the Court heard this matter at a bench trial. The parties stipulated a large number of exhibits which were placed in the record. The Court heard testimony and arguments of counsel.

On June 9, 2023, the Court issued an order denying the Appellants' prayers for relief ruling that the Appellants had failed to exhaust their administrative remedies because the HRB's award of a

certificate of appropriateness was on appeal and the issues in this declaratory judgment action and the issues in the appeal of the HRB's award were identical.

On June 13, the Appellants timely filed their notice of appeal of that decision.

Subsequent and separate appeal of a Historic Design Review Board certificate of appropriateness award.

The matter that the trial court named a "parallel case," barring the Appellants for decision on the merits in this declaratory judgment case was in fact a subsequently filed appeal from an architectural review board in the City of Beaufort.

On July 9, 2021, West Street Farms, LLC, and Mix Farms, LLC filed an appeal under S. C. Code Ann. Sec. 6-29-900, et al., and The Beaufort Code Sec. 9.10 of a decision of the City's architectural review board, or Historic District Review Board ("HRB"). That appeal, *West Street Farms, LLC and Mix Farms, LLC v. City of Beaufort, City of Beaufort Historic District Review Board, and The Beaufort Inn, LLC*, Case No. 2021CP0701231 (filed July 9, 2021, Beaufort County Court of Common Pleas) was a challenge to an award of a Certificate of Appropriateness by the HRB to The Beaufort Inn, LLC for the Hotel and Parking Garage projects (but not the Apartment project).

Defendant 303 Associates, LLC, a Respondent in this case, was not a party to that appeal.

Under the zoning code of the City of Beaufort, the HRB has jurisdiction throughout the Beaufort Historic District and shall review and act on any Major Certificates of Appropriateness. Beaufort Code 10.7.2. (R.p. 1018, lines 8-31). A Certificate of Appropriateness ("COA") is required for any new construction activity in the historic district, Beaufort Code 9.10.1. (R.p. 1011, lines 1-8). In deciding whether to grant a COA, "the HRB shall conduct a public meeting and consider, among other things, the historic, architectural, and aesthetic features of such structure, the nature and character of the surrounding area, the use of such structure and its importance to the city, the character and appropriateness of design, scale of buildings, arrangement, texture, materials and color of the structure in question, and the relation of such elements to similar features of structures in the

immediate surroundings. The HRB shall not ...make requirements except for the purpose of preventing developments that are not in harmony with the prevailing character of the Beaufort Historic District, or that are obviously incongruous with this character." Beaufort Code 9.10.2 (C). (R.p. 1014, lines 110).

An appeal to a decision of an architectural review board is a limited proceeding under South Carolina statute and the City of Beaufort ordinance. S.C. Code Ann. Sec. 6-29-930(A) provides that "[a]t the next term of the circuit court or in chambers upon ten days' notice to the parties, the resident presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. The findings of fact by the board or architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence."

As the statute requires, there was no discovery in this appeal, the certified record of the board proceedings was prepared and submitted to the circuit court, and on January 6, 2022, the circuit court heard argument from the petitioners in this appeal as well as a related appeal of the same decision by the Historic Beaufort Foundation. The appeal of the HRB decision was limited to the issues of whether the Board erred as a matter of law in issuing the Certificate of Appropriateness because (1) the Board had no legal authority to consider the applications; and (2) the Board had no factual basis in the record for approving the applications. Specifically, with regard to the first argument, that the Board had no jurisdiction to the applications, the Petitioners argued that (a) any approval that the HRB may have granted the Parking Garage under the UDO had expired by June 9, 2021, and the HRB erred in acting on this application; (b) any application that the HRB had previously granted the Hotel was granted under The Beaufort Code, not the UDO, and that approval had expired by the terms of the ordinance; and (c) neither application could proceed before the HRB without each of

these Large Footprint Buildings having first obtained a special exception from the City of Beaufort Board of Zoning Appeals.

At the hearing, the Defendants argued, as they had in their memoranda, that the appeal of the final decisions of the HRB was not timely and that the developer Defendants had a vested right to develop, precluding the Board from denying their applications for Certificates of Appropriateness. The argument that the application could not proceed before the HRB without having obtained a Special Exception was hardly mentioned, if at all, and was not the subject of evidence presented to or questions posed by the court.

At the conclusion of the argument, the circuit court denied the appeal from the bench after hearing argument only and asked the Defendants to prepare an order. Defendant's counsel did prepare that order, including fully all their arguments in their pleadings and briefs, whether the subject of argument in the hearing or not, and the court signed the order prepared by the Defendants as the Order of the court. The court entered the Order as written and prepared by the Defendants as the Order deciding the appeal on January 20, 2022.

The Court's written Order emphasized that (1) the Certificates of Appropriateness that were being appealed were based on prior decisions that had not been appealed and the time for making those appeals had passed (R.pp. 23-25); (2) that the developer applicant had vested rights in the Certificate of Appropriateness and the Board could not have denied the issuance of the certificate (R.pp. 25-26); (3) the final approval for the Hotel was supported by the record (R.pp. 27-28); (4) the Board properly issued the Parking Garage approval because it properly issued an extension of time to the applicant and that issuance was supported by the record (R.pp. 28-31).

It was only in Section III (D), on page 17 of 19 of the Order (R.p. 31), where the court additionally found that: (1) the Parking Garage project and the Hotel project were "grandfathered" and governed by the prior zoning code (UDO) that had been replaced by the current zoning code

(The Beaufort Code) and in the prior zoning ordinance, the UDO, there was no provision requiring Large Footprint Buildings to obtain a Special Exception from the ZBOA before obtaining a Certificate of Appropriateness; (2) There is no requirement for sequential ordering of applications in The Beaufort Code; and (3) The HRB and ZBOA have different functions and render different kinds of approvals. These same points were made by the City (but not by the developer Defendants) in its memo filed in opposition to the petition before the court, also as a last argument at the end of page 14 and on page 15 of its 16-page memorandum filed prior to the appeal hearing.

After the Plaintiffs' motion to reconsider was denied by order of the court on February 11, 2022, the Plaintiffs timely appealed that decision to the South Carolina Court of Appeals where that appeal is pending. (R.pp. 35-37)

STANDARD OF REVIEW

"Our standard of review of a law case tried by a court sitting without a jury is to search the record for errors of law and to determine if there is any factual basis to support the findings of the trial court." *Bivens v. Watkins*, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993), citing *Snell v. Parlette*, 273 S.C. 317, 322, 256 S.E.2d 410, 412 (1979).

STATEMENT OF FACTS

In this declaratory judgment action that is the subject of this appeal, the Appellants, two property owners in the historic district of Beaufort, S.C. who own real property adjacent to the two projects that are the subject of this action challenge the actions of the City of Beaufort in processing the development entitlements for the Respondents 303 Associates, LLC and the Beaufort Inn, LLC (collectively "Developer"), companies that own and seek to develop (1) 812 Port Republic Street and 212 Scott Street, identified as R120, Tax Map 4, Parcel 984, as a 77-unit hotel building, with retail/commercial space on the ground floor and the hotel on the upper floors ("Hotel Project"); and

(2) 918 Craven Street for which it has sought approval of plans for a parking garage ("Parking Garage Project").

The Beaufort Code and Large Footprint Buildings

The Hotel Project and the Parking Garage Project are located in the Downtown Core District (T5-DC) zoning district under the Beaufort Code and must adhere to the T5-DC Development Standards as presented in Beaufort Code Sec. 2.4.1: DISTRICT DEVELOPMENT STANDARDS. Additionally, The Hotel Project and Parking Garage Project are located within the Beaufort Historic District (HD) Overlay as defined by Beaufort Code Sec. 2.7.1 and within the Preservation District as shown on the official Zoning Map of the City of Beaufort. Beaufort Code Sec. 13.3.2.

In the T5-DC transect zoning district, buildings are restricted to 100 feet of building width at the frontage. Beaufort Code Sec. 2.4.1(D)(3). Buildings that exceed 100 feet building width at frontage shall comply with the Large Footprint Building standards in Beaufort Code Sec. 4.5.10 (R.pp. 1006-1007). Beaufort Code Sec. 2.4.1(D)(3), footnote 9.

The Beaufort Code defines a Large Footprint Building as "a building that has a footprint greater than 20,000 square feet. It is a type often used by big-box, national retailers. In the T4 and T5 transect zones, they shall be integrated into the streetscape or screened with Liner Buildings (see Section 4.5.9)." Beaufort Code Sec. 4.5.10(A).

Large Footprint Buildings have various specific development requirements under Beaufort Code Sec. 4.5.10 (B)(1)-(7). One preliminary and fundamental requirement for Large Footprint Buildings is that in the Historic District, except along Boundary Street, Large Footprint Buildings "are permitted by Special Exception only." Beaufort Code Sec. 4.5.10 (B)(5).

Special Exceptions to the Beaufort Code can only be granted by the City of Beaufort Zoning Board of Appeals ("ZBOA") Beaufort Code Sec. 10.3.1(C)(3). (R.p. 1016).

The Hotel Project

Lauren Kelly, the City planner at the time, originally presented the Hotel Project in a July 12, 2017, Historic Design Review Board ("HRB") meeting, approximately two weeks after the Beaufort Code was adopted. The HRB granted the Hotel Project preliminary approval at that meeting. Furthermore, the July 12, 2017, minutes quote Lauren Kelly saying, "this project (the Hotel) is being evaluated under the new Beaufort Code," confirming that the Hotel was being considered under The Beaufort Code and not the prior zoning code, the Unified Development Ordinance ("UDO")[1]. (R.pp. 1001-1004)

Lauren Kelly originally contended the preliminary approval lasted 12 months, until July 12, 2018. Thereafter, in May 2018, at the request of the Developer, Kelly purported to extend the Hotel project preliminary approval for 24-months, with approval expiring July 12, 2019.

The next approval, however, for the Hotel was not granted until almost 27 months after preliminary approval, on October 9, 2019, when the HRB purported to issue the applicant for the Hotel a "Certificate of Appropriateness."

Though the Hotel Project received a Certificate of Appropriateness in October 2019, Developer made additional subsequent substantial changes to the plans in February 2021. On June 9, 2021, the HRB granted the Developer's request for "Changes after Certification."

The Hotel Project as currently submitted has a 173-foot building width at frontage and, as such, if governed by the Beaufort Code, is a "Large Footprint Building" subject to the requirements of Sec. 4.5.10.

[1] The Beaufort Code was adopted on June 27, 2017, and replaced the UDO as of that date.

The Hotel Project, despite receiving some development approvals from the City, has not applied for or received a Special Exception by the ZBOA. When the applications for preliminary approval of the Hotel Project was presented to the HRB in 2017, neither the City staff members nor the Developer's agents presenting these plans for approval made the members of the HRB aware that these projects as planned were Large Footprint Buildings or of the requirement for Special Exception approval by the ZBOA of Large Footprint Buildings before further planning approval could be obtained. In fact, the HRB was told at the 2017 meeting when that version of the Hotel Project was presented that "no zoning issues existed."

The Parking Garage Project.

On September 20, 2017, the HRB gave preliminary approval for the Parking Garage plan with various conditions. The then-current drawings were approved as submitted and the Developer was tasked with refining the design details in order to receive final approval. According to the UDO and the Beaufort Code, such preliminary approval expired twelve months later on September 20, 2018, with a potential six-month extension if requested to March 20, 2019, i.e., 18 months after the issuing of such preliminary approval.

On June 21, 2019, David Prichard, the City planning director at the time, purported to extend a Certificate of Appropriateness for one year, though no Certificate of Appropriateness had been issued, only preliminary approval, nearly 2-years earlier. A year later, on July 1, 2020, David Prichard issued another extension to a Certificate of Appropriateness that had never been issued. On March 4, 2021, the Developer submitted for final approval. On June 9, 2021, the HRB granted final approval for new construction for the Parking Garage. Like the Hotel Project, if governed by The Beaufort Code, the Parking Garage Project is also a Large Footprint Building, having a width at the frontage of 300 feet. Like the Hotel Project, the Parking Garage Project has not applied for or received a Special Exception from the ZBOA.

These arguments pled, presented, and argued in the Declaratory Judgment action present factual and legal issues that far exceed the limited issues in the appeal of the HRB's certificate of appropriateness that decided whether the Hotel and Garage would be detrimental to the interests of the City pursuant to the standards and guidelines listed in Section 9.10.2 B of the Code. (R.p. 1013 line 29-44).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE ISSUES IN THIS DECLARATORY JUDGMENT ACTION AND THE HRB'S CERTIFICATE OF APPROPRIATENESS APPROVAL WERE IDENTICAL AND THAT THE APPELLANTS HAD FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES WHEN THE HRB'S APPROVAL DID NOT DECIDE THE ISSUES RAISED IN THIS DECLARATORY JUDGMENT ACTION.

The issues raised by the declaratory judgment action were that the City was not following its own ordinances in considering continuing applications by the applicants for the Hotel and Garage when the predecessor approvals had expired, and the parcels were not properly zoned to allow construction of buildings of this size and character in the historic district.

The issues presented to the DRB were design and aesthetic ones and the decision was only a general grant of the COA with conditions.

The Appellants did raise these legal issues to the DRB at the hearing, in order not to waive their rights under the prior-filed, pending declaratory judgment action, but those legal issues were not considered or ruled on by the DRB.

Though the Court in deciding the appeal of the DRB award did rule on certain of the legal issues raised by the Appellants in the declaratory judgment action, since those issues were not decided by the HRB and there was no ability to present evidence outside of the record of the DRB decision

to the court, the Court's appellate decision could not address the same issues raised in the declaratory judgment complaint.

II. THE CIRCUIT COURT ERRED IN FINDING THAT THE COURT'S DECISION IN THE HRB APPEAL BARRED THE COURT FROM DECIDING THIS CASE ON ITS MERITS WHERE THE ISSUES, IN THIS CASE, WERE NOT ACTIVELY LITIGATED OR DIRECTLY DETERMINED IN THE APPEAL AND WERE NOT NECESSARY FOR A DETERMINATION OF THE APPEAL.

Though the Court in this case cast its decision in terms of exhaustion of remedies and the "two-judge rule," those decisions presume as their basis that the decision of the Court in the HRB appeal and the decision it was being asked to make were equivalent. In fact, this is clear when the Court in its order characterizes this case as a "parallel case" to the architectural review appeal. This was a decisive legal error.

Rather, the court should have analyzed this case based on the legal doctrine of collateral estoppel, which the Respondents raised in their motion for summary judgment and again at the trial of this matter.

Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Kunst v. Loree*, 404 S.C. 649, 653-54, 746 S.E.2d 360, 362 (Ct. App. 2013), citing *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the

issues." *Kunst,* 746 S.E.2d at 362 citing *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008).

In *State v. Bacote*, 331 S.C. 330-31, 503 S.E. 2d 161, 162-163 (1998), the court stated "We have previously adopted the general rule of collateral estoppel as set forth in the Restatement (Second) of *Judgments* § 27 (1982) in *South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991). *Kunst*, 404 S.C. at 654. Section 27 states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim." *Id., citing Palm v. General Painting Co., Inc.*, 302 S.C. 372, 396 S.E.2d 361 (1990) (citations omitted) ("Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues 'actually and necessarily litigated in the first suit.'"). *Id.*

A. The Respondents' claims are not barred by collateral estoppel.

The declaratory case was commenced before the issuance of the certificate of appropriateness in June 2021 and well before the Court's hearing of the appeal in January 2022. The much narrower permit appeal does not limit this civil action.

Because the Respondents chose to continue to seek approval of their project from the HRB even though the Declaratory Judgment action challenging the legitimacy of their ongoing entitlements was pending, they confronted the Appellants with a Hobson's Choice of either not appearing and challenging the ongoing HRB approvals and being argued to have waived their rights, or appearing, as they did in a limited fashion to preserve their arguments, and face the argument that their appearance precludes them from a full and fair opportunity to litigate the issues in the Declaratory Judgment action in Circuit Court.

The issues of whether the Hotel or Parking Garage were Large Footprint Buildings under The Beaufort Code and required obtaining Special Exceptions prior to seeking further city approvals or whether the time for converting the preliminary approvals to final COAs were neither actively litigated nor directly determined in the circuit court's limited appeal hearing and was not necessary to support the decision in the board of architectural review appeal.

The board of architectural certificate of appropriateness review is not a proceeding that allows for the active litigation of any issues necessary to support collateral estoppel. **The appeal proceeding to the Circuit Court that the Court found was a "parallel proceeding" is an appeal, not litigation on the merits. By statute, review in this appeal is limited only to the certified record below. There is no discovery, and no additional facts can be submitted.**

The hearing, too, is expedited and scheduled as soon as possible after the board decision. It does not allow for development of the issues, discovery of facts or other aspects of normal civil litigation under our Rules of Civil Procedure.

This case is akin to the line of cases involving default judgment hearings and administrative hearings that our courts have determined cannot support collateral estoppel.

In *Kunst,* the Court of Appeals firmly adopted the rule in South Carolina first enunciated in *State v. Bacote* that a default judgment proceeding could not support a later offensive use of collateral estoppel because there is no opportunity for active litigation of the issues in that limited proceeding. *Kunst*, 404 S.C. at 658, 746 S.E.2d at 364 (the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded have been litigated in the earlier action is not met). The Court noted that though a litigant in default can at the damages hearing participate in a limited way, it is not a full and fair litigation of the issues allowing for the imposition of offensive collateral estoppel:

> [I]t appears he [Kunst] was not afforded the opportunity to testify or to call witnesses to testify on his behalf. Kunst was also not allowed to participate in any discovery on this

> matter. In addition, because Kunst was in default, the circuit court "start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted." Accordingly, we hold Kunst was not presented with a fair opportunity to "actually litigate" the veracity of Loree's alleged statements to others. *Kunst,* 404 S.C. at 657-58, 746 S.E.2d at 364.

Similarly, even if the issue purportedly ruled on by the circuit court in the HRB appeal is identical to the issue that is the subject of this declaratory judgment action, an appeal from a board of architectural review appeal hearing cannot support an offensive use of collateral estoppel because it cannot meet the active litigation prong of the collateral estoppel test.

The parties did not and could not conduct discovery on this issue in the appeal proceeding. No witnesses could be deposed in discovery or were proffered or cross-examined at trial. No documentary evidence (other than the HRB record below) could be submitted. In fact, there is less active litigation in the HRB appeal than was found to be inadequate in the default hearing in *Kunst*.

The board of architectural review appeal meets no reasonable definition of active litigation under the *Kunst* and *Bacote* decisions and the law upon which they rely, and findings in an order based on that prior proceeding cannot support a finding of collateral estoppel.

B. The issue was not directly determined in the HRB appeal and was not necessary to support the decision in that appeal decision by the circuit court.

It is clear from reviewing the briefing of the City of Beaufort and the developer Defendants and from the court's Order written by them that the issue of whether these buildings met the definition of Large Footprint Buildings under The Beaufort Code and required a prior Special Exception from the ZBOA before proceeding with other approvals was not a necessary issue squarely presented for decision to the Court. The City and Developers' arguments centered on whether the approvals for these projects had already occurred, and the appeal was therefore not timely or waived, and whether the Developer had already vested rights in the projects such that the HRB could not deny them approval. Secondarily, the City and Developers argued that the decisions on the merits were supported by the evidence before the Board.

Only lastly, as if in an afterthought, the City (not the Developer) argued and the Court included in its Order, language addressing this issue.

The decision denying the appeal and upholding the HRB's decision clearly does not rest on the ruling on this issue and this issue, again, was not directly determined in this appeal proceeding, which, as has already been argued, was necessarily limited in scope, and did not allow such a determination.

The circuit court had insufficient evidence in the record before it to make any of these determinations. They were likewise not necessary for the circuit court to rule on the appeal of the Certificate of Appropriateness. For these reasons, as well, the appellate ruling by the circuit court cannot support an offensive use of collateral estoppel to support a motion for summary judgment in this case.

CONCLUSION

Appellants respectfully request an order reversing the decision of the Circuit Court.

Respectfully submitted,

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