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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County Court of Common Pleas
Honorable Jenifer B. McCoy
Trial Court Case No. 2021-CP-10-02888

Appellant Case No. 2023-000296

J. Doe,Appellant,

v.

Design Review Board (DRB) of the Town of Sullivan’s Island (S.I.),
and Town of Sullivan’s Island, Respondents.

**RESPONDENTS DESIGN REVIEW BOARD OF THE TOWN OF SULLIVAN’S
ISLAND (S.I.) AND TOWN OF SULLIVAN’S ISLAND’S REPLY TO APPELLANT’S
RETURN TO RESPONDENTS’ DECEMBER 13, 2024 MOTION TO DISMISS**

REPLY ARGUMENT

I. The Motion to Dismiss and accompanying materials are properly considered by the Court because the motion challenges subject matter jurisdiction and present evidence of events that occurred during the pendency of this appeal.

The affidavit and materials in support of the Motion to Dismiss are proper because they reveal that events during the pendency of this Appeal now render the matter moot and outside the Court's subject matter jurisdiction.

“The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation.” Sloan v. Greenville Cnty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (internal quotation omitted). “A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy.” Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (italics in original) (internal quotation omitted). A case becomes moot, when a judgment will have “no practical effect upon [an] existing controversy.” Id., 349 S.C. at 137, 561 S.E.2d at 637 (quotation omitted). Specifically, if an intervening event makes the relief sought impossible, a case becomes moot. Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). Appellate Courts have a *duty* to vacate a case when the underlying subject matter becomes moot, pending appeal. Byerly v. S.C. Nat. Bank Corp., 313 S.C. 385, 386, 438 S.E.2d 233, 233 (1993) (*affirming* Byerly v. South Carolina Nat'l Bank Corp., 311 S.C. 127, 427 S.E.2d 715 (Ct. App. 1993) finding an action for trespass moot when the plaintiff, a possessor of a life-estate, died during the case's pendency).

Generally speaking, “[w]hen a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint **but may resort to affidavits** or other evidence to determine jurisdiction.” Sullivan v. Hawker Beechcraft

Corp., 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012) (internal quotation omitted) (bold added); J & W Corp. of Greenwood v. Broad Creek Marina of Hilton Head, LLC, 441 S.C. 642, 665, 896 S.E.2d 328, 341 (Ct. App. 2023) (noting that although the affidavit submitted was in support of another motion to dismiss, the Court applied its information to the motion to dismiss the appeal for mootness); Baird v. Charleston Cnty., 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (“affidavits and other evidence outside the pleadings, may . . . be considered in support of a motion to dismiss based on lack of jurisdiction.”).¹

It is clear from the Motion to Dismiss and supporting Exhibits/Affidavit that the proposed additions that Appellant contested have been complete for some time.² Those submissions are permissible in jurisdictional challenges as explained above. As such, the ambiguous relief that Appellant requests can no longer be provided since an “event occur[ed] making it impossible for [the] reviewing Court to grant effectual relief.” Byrd, 321 S.C. at 431, 468 S.E.2d at 864 (quoting Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). Neither reversal nor remand would provide Appellant with the relief sought. The appeal is moot.

Therefore, since the project is now complete, and since this Court may review affidavits that challenge subject matter jurisdiction, the Court should dismiss the Appellant’s appeal.

¹ Glass v. Dow Chem. Co., 316 S.C. 116, 122, 447 S.E.2d 209, 213 (Ct. App. 1994), aff'd, 325 S.C. 198, 482 S.E.2d 49 (1997) (“When the allegations of the complaint are factually sufficient, but do not affirmatively show subject matter jurisdiction, the motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction.”).

² Respondents reiterate that this Court previously dismissed a different appeal by this same Appellant on the grounds of mootness. There, the Appellant similarly opposed a decision of the DRB that approved the construction of a house. **See (Resp’ts’ Mot. to Dismiss at Ex. 2, filed on Dec. 13, 2024)** (Order Dismissing Appellate Case No. 2019- 001671 for Mootness at 1-2, filed Mar. 31, 2022). The Court of Appeals issued an Order dismissing that appeal for mootness because the “house [had] been fully built and occupied for two years” by the time the case reached the Court. **See (Resp’ts’ Mot. to Dismiss at Ex. 2, filed on Dec. 13, 2024)** (Order Dismissing Appellate Case No. 2019-001671 for Mootness at 1-2, filed Mar. 31, 2022).

II. Appellant’s due process claims are invalid because Appellant has had ample opportunity to plead her case, and the materials Appellant cites are inapplicable to this appeal.

This Court should grant Respondents’ Motion to Dismiss because the underlying issue is moot, and Appellant cites no relevant law demonstrating how a decision on that Motion would deny Appellant due process of law.

The touchstone of due process is one’s ability to be heard before the deprivation takes place. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). The requirements of procedural due process are: (1) notice; (2) opportunity to be heard; (3) the right to introduce evidence; and (4) the right to cross-examine witnesses. Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743, 746 (2008).

In Appellant’s Return Brief, Appellant alleges granting the Motion to Dismiss will deny her due process of law. Appellant cites various statutes and provisions in this State’s Constitution but makes no coherent argument. The statutes Appellant cites bear no importance in this case. S.C. Code Section 14-8-220 addresses the power of the Court of Appeals and its judges to administer oaths and issue writs. That statute has no applicability since this Court is currently reviewing the case. Appellant either mistakenly or intentionally quotes language not present in S.C. Code Section 14-8-80 which relates to the makeup of this Court and how cases are distributed.³ Additionally,

³ S.C. Code Ann. § 14-8-80 reads as follows:

(a) The Court shall sit in three panels of three judges each. However, nothing in this section may be construed to prevent the Court from sitting as a whole.

(b) The Chief Judge is responsible for the administration of the Court, subject to the provisions of Article V, Section 4 of the Constitution of this State. The Chief Judge shall assign the members of the panels and shall systematically rotate and interchange the members of the panels in accordance with rules promulgated by the Supreme Court. The Chief Judge shall preside over the panel of which he is a member and in his absence the judge senior in service and present shall preside. The judge senior in service and present

Appellant cites to S.C. Code Section 5-31-450, which, as Respondents explained in their Initial Brief, has no applicability to this case. **See (Resp'ts' Initial Br. at Arg. III.B.3., filed on Dec. 16, 2024).** As such, without expounding on how these statutes or State Constitutional Provisions are applicable, Appellant effectively abandons them. An argument is “abandoned” and this Court will not address the merits of an issue if it is not accompanied by legal analysis. Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019). Regardless, the lack of subject matter jurisdiction over this proceeding requires dismissal.

Appellant has had multiple chances to present Appellant’s case per the requirements of Fuentes and Moore. **See (Resp'ts' Initial Br. at 24, filed on Dec. 16, 2024).** Moreover, Appellant’s predicament is one of Appellant’s own design. Appellant had ample opportunity during the pendency of this appeal to move for the Circuit Court Judge to stay the construction pursuant to S.C. Code Section 6-29-920⁴ and failed to do so.

on the other panel shall preside over the other panel. For the five associate judges whose terms begin on July 1, 1985, the determination of their length of service shall be based on their order of election, with the associate judge who is elected first being the associate judge senior in service; provided, however, that seniority among the judges on an interim Court of Appeals shall continue on the permanent Court of Appeals established by the provisions of this chapter and service on that Court shall be included in determining the length of service on the Court herein established.

(c) Cases must be distributed between the three panels by the Chief Judge in accordance with rules promulgated by the Supreme Court; however, the Chief Judge may transfer cases from one panel to the other in order to maintain approximately equal caseloads for the three panels.

(d) On a panel, three judges shall constitute a quorum, and the concurrence of a majority of the judges is necessary for the reversal of the judgment below.

⁴ “The filing of an appeal in the circuit court from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper.” S.C. Code Ann. § 6-29-920(B).

For this additional reason, this Court should dismiss the appeal as moot or alternatively, affirm the decision of the circuit court.

CONCLUSION

The Respondents respectfully request that this Court grant the Motion to Dismiss since the construction, which is the underlying subject matter of this dispute, is now complete, rendering any relief sought impossible and the dispute moot; in the alternative, Respondents ask this Court to affirm the decision of the circuit court dismissing the appeal for Appellant's failure to join a necessary party, the Nelsons, who are the permittees in the case at hand.

Respectfully submitted,

January 08, 2025
Charleston, South Carolina

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**ATTORNEY FOR DESIGN REVIEW
BOARD OF THE TOWN OF
SULLIVAN'S ISLAND AND TOWN OF
SULLIVANS ISLAND**

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PROOF OF SERVICE

I certify that I have served the **RESPONDENTS DESIGN REVIEW BOARD OF THE TOWN OF SULLIVAN’S ISLAND (S.I.) AND TOWN OF SULLIVAN’S ISLAND’S REPLY TO APPELLANT’S RETURN TO RESPONDENTS’ DECEMBER 13, 2024 MOTION TO DISMISS** by depositing a copy in the United States Mail, postage prepaid, on January 8, 2024, addressed to:

C. Holmes
P.O. Box 187
Sullivans Island, SC 29482-0187

and by electronic mail addressed to:

Cynthia Holmes
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