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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM BEAUFORT COUNTY
FOURTEENTH JUDICIAL CIRCUIT
THE HONORABLE R. KEITH KELLY
Trial Court Case Number: 2022-CP-07-01598

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APPELLATE CASE NUMBER: 2024-000759

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James Ware, Alisa Ware, Jason DuBose,
and Amanda DuBose,

Appellants,

vs.

Beaufort County Zoning Board of Appeals and
Robert Merchant, in his Capacity as
Planning Director of Beaufort County,

Respondents.

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# BRIEF OF APPELLANTS JAMES WARE, ALISA WARE, JASON DuBOSE and AMANDA DuBOSE

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## STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in dismissing the Petitioners' appeal from a decision and Order of the Beaufort County Zoning Board of Appeals concerning the County's operation of a commercial public ferry from the Petitioners' historic Buckingham Landing neighborhood?

2. Did the Court err in denying the Petitioners' Motion to Serve A Supplemental Pleading, with its attached proposed Supplemental Notice of Appeal and Petition?

## STATEMENT OF THE CASE

This case arises out of a dispute over whether Beaufort County must abide by its own zoning ordinance that specifically prohibits commercial businesses in the historic Southern Beaufort County neighborhood known as Buckingham Landing.

The four Appellants herein filed their original Notice of Appeal and Petition of the Beaufort County Board of Zoning Appeals' decision, on August 23, 2022. The Petitioners/Appellants are also members of a group of 36 homeowners in Buckingham Landing, located on the shores of Mackay's Creek in Southern Beaufort County, who filed a separate suit in Circuit Court on June 11, 2021, alleging that Beaufort County and two private ferry companies are damaging the Plaintiffs and have ruined the Buckingham Landing neighborhood, by operating a commercial ferry terminal annually shuttling thousands of tourists and Daufuskie Island residents back and forth from the mainland to Daufuskie, in blatant violation of the County's own zoning ordinances. The County operated the commercial ferry service there for more than six years in disregard of the Buckingham Landing Community Preservation District (which bars such commercial businesses in the historic, quiet neighborhood), until December 31, 2023, when the County moved the ferry terminal to nearby Pinckney Island.

The Plaintiffs in that suit, assigned Civil Action No. 2021-CP-07-01078 (which is currently being appealed by the County to the Court of Appeals following the entry of a Temporary Injunction by the Hon. Courtney Pope that required the County to cease all commercial ferry operations from the Buckingham Landing site on December 31, 2023)(2023-000581), also allege causes of action for creating a nuisance, negligence, inverse condemnation and promissory estoppel, and seek temporary and permanent injunctive relief, along with a declaratory judgment. (R. pp. 123-138)

In this case, the Appellants/Petitioners Alisa Ware, James Ware, Jason DuBose and Amanda DuBose (the "Appellants"), have appealed the decision of the Beaufort County Zoning Board of Appeals (the "ZBOA") actually made July 28, 2022, arguably upholding an earlier determination by Respondent/Defendant County Planning Director Robert Merchant, that the County's commercial use of that parcel of land known as TMS R 600 041 000 0008 0000 (the "Property") owned by Beaufort County, is not in violation of the County's zoning standards applicable to the Property, including the Buckingham Landing Community Preservation District (the "BLCPD"). (R. pp. 16-33)

Although the ZBOA had not issued a written Notice of Action regarding their decision made in open chambers on July 28, 2022, by August 23, 2022, because almost thirty (30) days had run since the July 28, 2022 ZBOA hearing wherein the actual vote was taken, the Petitioners' counsel--in an abundance of caution to insure that neither the County nor the Ferry Defendants ever asserted that the Notice of Appeal had not been filed within 30 days of the ZBOA's rendering of the July 28, 2022 verbal decision--filed the original Notice of Appeal and Petition on August 23, 2022, and all Respondents were properly served. (R. pp. 34-35) In that August 23, 2022 initial Notice of Appeal and Petition, the Petitioners noted that they *"specifically reserve their right to supplement this Notice of Appeal and Petition when the ZBOA issues a written Notice of Action and further, the Appellants specifically reserve their arguments made by letter of their counsel to the ZBOA on August 18, 2022, that no decision has yet been reached by the ZBOA."* (Emphasis added). See the August 23, 2022 Notice of Appeal, p. 1 (R. p. 16), and the Appellants' counsel's August 18, 2022 letter therein cited. (R. pp. 29-30)

As is admitted by the County in its April 13, 2023 Memorandum Of Respondent Merchant In Support Of His Motion To Dismiss And In Opposition To Appellants' Motion To Serve

Supplemental Pleading, the following pertinent dates are shown by the pleadings of record in this case:

| | | |
|---|---|---|
| September 16, 2022 | - | Written Decision and Order and Notice of Decision of the Beaufort County Zoning Board of Appeal (Order) completed. |
| September 20, 2022 | - | Zoning Board of Appeals Order mailed to Appellants' attorney by certified mail. |
| September 24, 2022 | - | Zoning Board Order received by Appellants' attorney. |
| October 24, 2022 | - | Appellants file their Notice of Motion and Motion To Serve Supplemental and Amended Notice of Appeal. |

(R. pp. 66-67)

In their Notice of Motion and Motion to Serve Supplemental Pleading and attached proposed Supplemental Notice of Appeal, filed on October 24, 2022, the Appellants specifically noted the Motion to file the supplemental pleading pursuant to SCRCP 15(d), was being made because "since the timely filing of the original Notice of Appeal and Petition on August 23, 2022, the Defendant Beaufort County Zoning Board of Appeals issued a written Decision and Order and Notice of Decision of the Beaufort County Zoning Board of Appeals, dated September 16, 2022, mailed on September 20, 2022 and received by the undersigned counsel on September 24, 2022." (R. p. 36)

The Appellants went on to advise the Respondents by the October 24, 2022 filing, that the Appellants/Petitioners wished to file and serve a Supplemental Notice and Petition adding the additional occurrence of the issuance of the written Order issued seven weeks after the July 28, 2022 meeting where a tie vote occurred, into their appeal. See Appellants' Notice of Motion and

Motion To Serve Supplemental Pleading and attached Amended Notice of Appeal, as filed October 24, 2022. (R. pp. 36-50)

The detailed allegations of both the original August 23, 2022 Notice of Appeal and Petition and the October 24, 2022 Motion to Serve Supplemental Pleading and attached proposed Amended Notice of Appeal and Petition made clear the following undisputed facts:

The Appellants notified Director Merchant on September 15, 2021, of the County commercial ferry operating in violation of the residential zoning in Buckingham Landing and requested a good-faith investigation into the issue and County action to stop the violation. (R. pp. 160-161) Seven months later (and after seven more months of County operations of the ferry in derogation of its own ordinance), on April 21, 2022, the Director notified the Appellants' counsel by letter that he had determined the commercial use was actually allowed under a theory originally drafted by the County's attorney. See Merchant letter of April 21, 2022. (R. p. 162) The Appellants further alleged in their original appeal to the BZOA, that the actions and non-actions by the Director to refuse to investigate in good-faith and to refuse to order the commercial ferry operations to cease and desist, were in error, wrongful, an abuse of discretion, and devoid of good faith.

The Appellants further alleged to the BZOA that on May 20, 2022, Appellants filed appropriate applications for Appeal (Administrative Interpretations) of the Director's Determination that the commercial ferry operation is in keeping with zoning standards to the ZBOA, and sought to reverse that Determination and compel the Director to take action to immediately stop the continuing zoning violation. On July 28, 2022, the ZBOA heard the Appellants' Appeal, and following extended discussion, a motion was initially made to reverse the Director's Determination Letter, but it resulted in a 3-3 tie vote.

The Appellants, in their appeal to the Circuit Court, go on to point out that the state enabling statute, found at S.C. Code Annot. Section 6-29-800, provides at sub-section (E), that: "In exercising the above power, the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit."

The Beaufort County Community Development Code at Section 7.3.70, provides that:

> a. The appellate body shall base its decision solely on the record of the appeal, as supplemented by arguments presented at the public hearing, and the standards in Subsection 7.30.70.D. **The final decision of the appellate body shall be one of the following:**
>
> **(1) Affirmation of the decision or interpretation (in whole or in part);**
>
> **(2) Modification of the decision or interpretation (in whole or in part);**
>
> **or**
>
> **(3) Reversal of the decision or interpretation (in whole or in part).**

[Emphasis added.] (R. p. 145, No. 6)

And finally, the Appellants notified the Circuit Court that the Rules of Procedure of the Beaufort County ZBOA provide at Article III, Section 6, that "A motion by a Board member is the procedure leading to a final decision by the Board, when the motion is seconded by another Board member **and adopted by a vote of a majority of the Board members present."** [Emphasis added]. (R. p. 151)

The Appellants argued to the Circuit Court that, read together, this statute, ordinance and Rule of Procedure, make abundantly clear that the ZBOA was required, by a majority vote, to take affirmative action on the appeal. On July 28, 2022, the ZBOA motion to reverse Director Merchant's Determination ended on a tie vote, and thus no action was taken by the ZBOA, as

required by the CDC. Thus, the Appellants argued that they did not receive an answer from the ZBOA to their appeal and by letter to ZBOA Chair and its attorney dated August 18, 2022, the Appellants asked that the issue be further considered at the ZBOA's earliest convenience.

Further, the Appellants disagreed with the Director's determination that the County's use of the Property as a commercial ferry embarkation and debarkation point is appropriate in the neighborhood zoning district and further disagreed with the Director's determination that any prior authorization by the County for the Property to be used as a commercial ferry operation, was not lost by abandonment.

In sum, the Appellants sought an Order from the Circuit Court that the ZBOA's denial of the ZBOA Appeal and the alleged upholding of the Director's Determination was incorrect as a matter of law, and was arbitrary, capricious, and without reasonable relation to a lawful purpose.

Director Merchant filed a Motion to Dismiss the Appeal on October 25, 2022 (R. pp. 51-52), notwithstanding the fact the Motion To Serve Supplemental Pleading was filed 30 days after receipt of the formal ZBOA Order and 34 days after the Order was mailed. (R. pp. 36-50) At a hearing on April 18, 2023, the Motion to Dismiss was argued along with the Appellants' Motion to File Supplemental Pleading, and on May 17, 2023, the Court entered an Order granting the Motion to Dismiss and denying the Appellants' Motion to Serve Supplemental Pleading. (R. pp. 3-9) On May 25, 2023, the Appellants filed their Rule 59(e) Motion To Alter or Amend the Order Dismissing Case, arguing that the Order was a clear error of law, and given the circumstances of the case in which the Defendants were clearly on notice of the Petitioners' appeal and suffered no prejudice, the dismissal amounts to manifest injustice. (R. pp. 74-76) On April 8, 2024, the Circuit Court denied the Motion to Alter or Amend (R. pp. 10-15), and the Appellants filed their Notice of Appeal on May 7, 2024.

## STANDARD OF REVIEW ON APPEAL

This case, in which the essential facts are largely undisputed, raises a novel question of law: can an appeal be filed too early? This Court is free to decide the question of law with no particular deference to the lower court. *See* S.C. Const. Art. V, Sections 5 and 9; S.C. Code Annot. Sections 14-3-320 and 330; S.C. Code Annot. Section 14-8-200 (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). If this Court does not interpret this appeal as a novel question of law, then the standard of review is whether, in the light most favorable to the Petitioners/Appellants, and with every doubt resolved in their behalf, the allegations set forth on the face of the Petition set forth a valid claim for relief. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008). As to the issue of whether the Court erred in denying the Appellants' Motion to Serve Supplemental Pleadings, the standard of review is that the lower court should have liberally allowed the Appellants' Motion to Supplement (or amend) their pleadings as long as the opposing party was not prejudiced, and justice requires. *See* S.C.R.Civ.P. Rule 15 and Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); *see also*, Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002) and Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 450 S.E.2d 59 (Ct. App. 1994).

## ARGUMENT AND CITATION OF AUTHORITY

**Argument No. 1: The Court erred in dismissing the Appellants/Petitioners' appeal to Circuit Court from the decision of the Beaufort County Zoning Board of Appeals.**

As is discussed at length in the seminal case of Vulcan Materials Company v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), in 1994 the

Legislature enacted a new statutory scheme for local planning and zoning entities embodied in Title 6, Chapter 29, which replaced the then existing scheme found in portions of Title 6, Chapter 7, and elsewhere. The time period in which an appeal from a zoning board's decision must be raised to the Circuit Court varies slightly between the old and new statutory schemes. While both require an appeal to be "filed within thirty days after the decision of the board," the old statutory scheme starts the 30-day clock after a decision is "rendered," whereas the newer statutory scheme starts the clock after the decision has been "mailed." Vulcan, *id.* at 488. Compare S.C. Code Annot. Section 6-7-750 (1970) with Section 6-29-820 (Supp. 1999). "Obviously, a difference arises whenever the zoning board's decision is not rendered and mailed on the same day, as was the case in the action sub judice." *Id.* at 489.

When a Court reviews a zoning ordinance, it should be construed in a "practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers." City of Myrtle Beach v. Juel P. Corp, 337 S.C. 157, 522 S.E.2d 153 (Ct.App. 1999). As with statutes, the lawmakers' intent embodied in an ordinance "must prevail if it can be reasonably discovered in the language used." Parks and Recreation Comm'n v. Somers, 319 S.C. 65, 458 S.E.2d 841 (1995). After the Beaufort County ZBOA failed to render a decision in this matter within 25 days, it was reasonable for Appellants' counsel to file the initial Notice of Appeal and Petition on August 23, 2022, which specifically reserved the right to "supplement this Notice of Appeal and Petition when the ZBOA issues a written Notice of Action." The filing put Director Merchant and the ZBOA on timely notice of the Appellants' intention to appeal the ZBOA "action" to the Circuit Court and met the Legislative intent of both the old and new versions of Section 6-29-820. To assert that the Appellants did not "timely" file their Notice of Appeal because they did it within 30 days of the

ZBOA's rendering of its decision, but prior to the ZBOA issuing a written decision, is a classic "gotcha" claim that our Court's do not encourage in the appellant arena.

Our appellate courts have, since the Supreme Court's 1899 holding in Moody v. Dickinson, 54 S.C. 526, 32 S.E.2d 563 (1899), recognized that while service of the notice of appeal is a jurisdictional requirement, non-prejudicial clerical errors in the notice are not detrimental to the appeal. In Moody, the appealing defendant's counsel erroneously mistitled the caption of the appeal, citing it as "H.J. Moody, as administrator, Plaintiff, against F.H. Dickinson, Defendant," instead of "H.J. Moody & Others v. F. H. Dickinson," as it should have been. 32 S.E. at 565. The appealing counsel then moved to amend the notice of appeal after the technical time had run. The Circuit Judge, after hearing argument that the appeal was defective, granted an Order stating "I am satisfied that the notice of appeal was served in due time and in good faith; that the notice of appeal was amply sufficient to apprise plaintiffs of the case to which it had reference...and that the error of inserting the name of 'H.J. Moody, Administrator,' instead of H.J. Moody et al. in the notice of appeal was excusable inadvertence, arising from confusion of different cases on the calendar, and the defective notice of appeal, with objections stated, should have been returned at once to the party serving it, which was not done; that the plaintiffs have not been misled or surprised, nor will they be delayed by allowing the proposed amendment." *Id.*

The Supreme Court, writing through Chief Justice McIver, noted that "There can be no doubt that plaintiffs did have notice of defendants' intention to appeal, within due time, and effort to take advantage of a mere clerical error in the title of the notice, by which they were in no way prejudiced or misled, seems clearly technical." *Id.* at 566. The Supreme Court then went on to affirm the Circuit Court, which had allowed the amended appeal to proceed.

In 1994, the Court of Appeals reached a similar conclusion regarding appellate jurisdiction in Charleston Lumber Co. Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (S.C.App. 1994), when a respondent attacked an appeal of five similar lawsuits where one case was inadvertently left off of the appeal notice. "Clerical errors in a notice of appeal do not destroy the appeal. Moody v. Dickinson, *id.* (the court may properly allow an appellant to correct a mere clerical error in the title to his notice of intention to appeal where there was no prejudice to the appellee). We find this error was clerical in nature, and does not warrant a dismissal of the appeal. Charleston Lumber does not allege any prejudice as a result of the omission, and there can be no doubt that Charleston Lumber had notice that the Millers had appealed all cases. Charleston Lumber's effort to take advantage of a mere clerical error when they were in no way prejudiced or misled is rejected....We therefor find this court has jurisdiction to hear this appeal." 318 S.C. at 478.

Our Supreme Court later, in 2002, affirmed this policy: "While this Court has consistently held service of the notice of appeal is a jurisdictional requirement, non-prejudicial clerical errors in the notice are not detrimental to the appeal." State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002). Therein, the State had filed its Notice of Appeal, stating that the appeal was being taken from Richland County as opposed to the appropriate forum of Lexington County. "Scott does not allege, nor do we discern, he was prejudiced by the error, which was corrected within 10 days of notice to Scott. We are, therefore, not deprived of subject matter jurisdiction." (Citing Charleston Lumber, *id.*)

In this case, Beaufort County's Planning Director Merchant complains that the appeal was filed too early. Neither Mr. Merchant nor the ZBOA have asserted, nor can they realistically assert, any prejudice by the error, if filing too early is determined to be an error. This court should reject

the attempt by Mr. Merchant to take advantage of, at worst, a good faith clerical error by which neither he nor the ZBOA was prejudiced or misled, and reject the Motion to Dismiss. *See* Charleston Lumber, *id.*

The single case cited by Mr. Merchant in his Memorandum to the trial court in Support of Motion to Dismiss and In Opposition To Appellants' Motion to Serve Supplemental Pleading (R. pp. 65-66), Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals, 340 S.C. 57, 530 S.E.2d 383 (2000), does not actually address the issue of whether or not filing an appeal "early" is fatal, or whether when no prejudice is possible and the respondents were on notice of the appeal, such extraordinary remedies as dismissal of the appeal should be considered. Sadisco, a Per Curiam decision, simply holds that the Circuit Court does not have authority to extend the time for filing an appeal under SCRCP 60(b)(1) under a claim of excusable neglect, and thereby affirmed Burnett v. South Carolina State Highway Dep't, 252 S.C. 568, 167 S.E.2d 571 (1969). The Petitioners herein did not seek the Circuit Court's extension of time to file their Notice of Appeal. They simply, at worst, filed "too early." This case represents a chance for this Court to distinguish and establish a bright line between instances where an appeal was actually untimely filed (as in "late") and the instance, such as here, where the Notice of Appeal was filed in good-faith "too early," in order to insure the notice was properly given within 30 days of the ZBOA's rendering of its decision. As Justice Black stated in Hormel v. Helvering, 312 U.S. 552 (1941):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental fairness.

**Argument No. 2: The Court erred in denying the Appellants/Petitioners' Motion to Serve a Supplemental Pleading with its attached proposed Supplemental Notice of Appeal and Petition.**

This Court actually need not reach the issue of whether the August 23, 2022 Notice of Appeal that was allegedly filed "too early," striped the Circuit Court of appellate jurisdiction, because the Petitioners' Notice of Motion and Motion to Serve Supplemental Pleading filed on October 24, 2022, which included an amended and supplemented Notice of Appeal, was filed within "within thirty days after the decision of the board" was mailed, which is specifically permitted under SCRCP 6(e). (R. p. 38) As such, the appeal of the BZOA decision was timely filed in any event.

As noted above, and set forth in Director Merchant's Memo of April 13, 2023 (R. p. 65-68), the ZBOA Order was mailed out on September 20, 2022. Thus, Section 6-29-820 would normally require the appeal to be filed within thirty (30) days after the decision was mailed, or by October 20, 2022. However, the South Carolina Rules of Civil Procedure, which govern and control pleadings in the Circuit Court, specifically provide at Rule 6 (e) that "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period." Mr. Merchant admits the Order was served by "certified mail" on September 20, 2022. See Memo of April 13, 2023 (R. p. 67), S.C. Code Annot. 6-29-820 "requires" a would-be appellant from the ZBOA "to do or take some act or take some proceedings within a prescribed period after the service of a notice upon him." Thus, SCRCP 6(e) directly applies, and five (5) days were added to the prescribed thirty-day period, meaning the Notice of Motion to File

Supplemental and Amended Appeal had to be filed by October 25, 2022 at the latest, and it was filed on October 24, 2022. Rule 6(e) applies on its face. *See,* Dortch v. City of Columbia Planning & Development, a Per Curiam, unpublished Opinion No. 2015-UP-535, where the Court of Appeals remanded an appeal for a Circuit Court ruling on Dortch's motion to reconsider a 2010 Order of the Circuit Court that her appeal from the City of Columbia Board of Zoning Appeals had been untimely filed. Therein, the Court of Appeals directed the Circuit Court to reconsider the 2010 Order pursuant to Rule 220(b), SCACR, and "S.C.Code Annot. Section 6-29-820(A)(Supp. 2014)(stating, in pertinent part, that appeals from local zoning boards 'must be filed within thirty days after the decision of the board is mailed'), *Rule 6(e) SCRCP ('Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or paper is served upon him and the notice of paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period.')*; Rule 74, SCRCP ('The proceedings in the circuit court shall be in accordance with these rules....')" [Emphasis added.] *Id.* Judges Short, Lockemy and McDonald's opinion could not have been more clear that the five-day extension of SCRCP 6(e) is applicable in a Section 6-29-820(A) appeal from a zoning board of appeals. (The Petitioners/Appellants are aware of SCRAP 268, but believe the holding of this unpublished opinion is directly involved in this case.)

## CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's dismissal of the Petitioners/Appellants' appeal of the BZOA decision to the Circuit Court.

Respectfully submitted,

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**CERTIFICATION**

I certify that this final Brief complies with SCACR 211(b).

*s/Thomas C. Taylor*