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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-40-02159

Frieda H. Dortch, ... Appellant,

v.

City of Columbia Planning & Development Services/Zoning Division, ... Respondent.

APPELLANT'S REPLY BRIEF OF FRIEDA DORTCH

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I. Reply to the Arguments Made By the City in Its Statement of the Case, and Generally

The City begins its argument in its statement of the case.[1] Here, the City addresses issues 6 and 7 raised by Dortch in her Appellant's Brief.

First, however, in similarly argumentative fashion, the City implies fault of Dortch and insinuates that she takes lightly, spending her time and money on zoning board appeals in order to try to fix her house. While the City (through the City Attorney's Office) prosecuted Dortch while her first appeal was still pending (Dortch 4/11/13 Pet'n at 5, R.p.147; Tr. of Hrg., 11:24-12:8, R.pp.21-22), the City accuses Dortch of "abusing the system." (Resp. Brf. at 6.) Dortch, who is not a lawyer, simply sought more than once, relief from a zoning board, which is not a judge.

Implying that anything short of permanently foreclosing Dortch's appeal without reaching the merits will create a "floodgate" effect of torrential, successive zoning board applications, the City asks this court to overrule and set aside decades, if not centuries, of established law pertaining to the doctrine of res judicata.

This doctrine, which originated in Roman law, and originally applied only to civil suits between private parties, so as to prevent one from "being sued twice," has certain attributes and elements:

1. Firstly, it has historically been regarded as a doctrine applicable to "actions" in "courts." The zoning board is not a court and the matter before it was not an action.

2. Secondly, it is an affirmative defense, which does not apply in the action unless specifically pled as an affirmative defense in the lower tribunal whose determination of the

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[1]Although the Appellate Court Rules prohibit inclusion of argumentative, contested matters in a party's statement of the case, Appellant would prefer to address these arguments.

merits is sought to be precluded. The City did not plead or in any way assert res judicata before the zoning board.

3. Res judicata only applies when the prior decision sought to be given preclusive effect was a final decision. Here, the first proceeding was not finally determined.

4. Res judicata only applies when the prior final decision was a final decision on the merits. No final decision on the merits was ever made. Now a second non-merits disposition is sought by the City.

5. Res judicata ordinarily applies only to a final judgment rendered on the merits by a court of competent jurisdiction. Here, the prior decision of the zoning board was not a decision by a court, and was not even a decision by a body having sufficient court-like attributes to make the application of the doctrine fair and intellectually articulable.

In its brief at 1, Statement of the Case, the City argumentatively refers to the present appeal as a "chapter" or "saga" in Dortch's efforts to repair her family home without making substantial physical alterations which have never existed before. To the extent the City laments the City's own inconvenience from Dortch's persistence in seeking a merits determination, it is a procedure the City should bear. When the City changes the rules for what can be done with an existing home already squarely falling within the specified use characteristics of the neighborhood and surrounding district, an affected citizen should be able to persist in seeing that there is a correct and fair determination of the actual law and standards which should be applied. The City is losing nothing here, and seeks to have Dortch lose the historical use of her property.

So that the facts are not lost, Dortch had an earlier hearing before the zoning board. Dortch appealed the zoning board's determination in the first proceeding to the Circuit Court. Dortch contended, among other things, outright legal error, misapplication of the law, and

findings contrary to the facts. The Circuit Court dismissed the appeal on technical grounds of timeliness (counting the time for appeal from the alleged date of mailing of the order, with no additions or extension). Dortch filed a motion for reconsideration. The motion was never finally determined.

In its brief at 3, the City implies that this fact of lack of finality has not been established, reciting only that Dortch "asserts" this to be the case. However, in its brief at 6, the City clarifies that there was no prior final determination: "The circuit court has not ruled on her motion for reconsideration of the court's dismissal of her earlier appeal." Because the finality element is not met, re judicata does not apply.

As if the reasons for this nonfinality have any bearing on whether the required element of finality has been met, the City goes on to discuss in various footnotes and other insinuations throughout its brief, that Dortch, "inexplicably" did not seek a ruling on the motion. (E.g., Resp. Brf. at 3, note 1.) In the hearing before the Circuit Judge, despite the Judge's desire to hear no explanation and to consider other matters, Dortch's counsel explained to the court that, while Dortch's appeal of the denial of a repair permit remained pending, the City simultaneously prosecuted Dortch in criminal court for not proceeding with repairs for which the City would not grant a permit. (Tr. of Hrg., 11:24-12:8, R.pp.21-22; see also Dortch 4/11/13 Pet'n at 5, R.p.147.) It indeed can only be surmised, but it is not difficult to surmise, that a judge in the criminal court eventually declared that the criminal matter would not move forward as long as any appeal remained pending and that the City eventually allowed exterior-only repairs, which Dortch thereafter engaged in. Rather than condemn or make any apology for the City's use of prosecutorial authority to effect a relinquishment of rights in a separate regulatory dispute, the City argues that its collateral actions towards Dortch are "not at all germane or relevant to the

current appeal" (Resp. Brf. at 3), and asserts that insufficient explanation has been given for not seeking a ruling on the appeal of the first proceeding.

The fact remains that there was no prior final determination and the reasons for the lack of that element are largely not germane. The fact remains that Dortch did timely file a motion for reconsideration of the prior, technical, Circuit Court ruling.

Application of the doctrine of res judicata as a nonmandatory, technical, procedural means of avoiding a decision on the merits is not a "right" of the City. Dortch has done nothing to undermine any right of the City. Dortch, a non-lawyer, has simply sought to repair her home, by approaching a zoning board, which is a non-judge. It is also not difficult to surmise that Dortch would rather not deal with a zoning administrator at all, would rather not deal with a zoning board at all, would rather not be summoned to the municipal criminal court at all, would rather not deal with the Circuit Court at all, and would rather not deal with other appellate courts at all. What emerges clearly from the facts is that Dortch has a practical, financial, and sentimental motivation to continue owning her family home, to not physically transform it into something it has never been, and to repair it, rather than demolish it.

The City's repeated conjecture and surmise on truly irrelevant issues make it difficult to reply to the City's arguments in a short space. In one instance, in the City's brief at 4, the City argues that it is "clear" why something "may" have been the case. (Id. ("This has nothing to do with the variance request, because it is clear from the record why a permit may have been denied for repair work").)

Here, again, the City avoids the nut of the whole dilemma. Dortch wanted to fix minor fire damage on a home physically configured as an up-and-down duplex. The City required, as a condition of a permit for repair, that Dortch affirmatively, physically, and substantially transform

the house from an up-and-down duplex, to a single-family residence, including tearing out portions of the structure between the two floors, and inserting internal stairs in a building already having a relatively small footprint and small rooms. The City added, long after the duplex was built, certain additional area requirements for certain uses expressly allowed in the district. It was alleged nonconformity with this lot size requirement which was articulated by the City as the basis for not letting Dortch fix her house – located in a duplex and multifamily zone – without re-designing it.

To make matters more complicated, the City asserted at the second zoning board proceeding, that because the home was in an historical overlay district, Dortch would not be allowed to demolish the home even if she wanted to. Thus, Dortch was being required to spend additional money and perform additional substantial transformations to the structure, as a condition of repairing damage to the structure.[2] When Dortch began to contest this situation, and ask for a reasonable variance, the City eventually began to prosecute Dortch for not making repairs.

The City's response in its brief at 4 is that there was nothing wrong with prosecuting Dortch, because "[t]here is nothing, as far as Respondent is aware, preventing Appellant from obtaining a permit to perform work to a single family home." The City's position is thus, that Dortch could extract herself from criminal liability by relinquishing her rights to assert error in the zoning matter. Based upon the City's stated "awareness" of a coerced alternative for Dortch, the City characterizes Dortch's account of the facts as "misleading, at best." There is nothing misleading about Dortch's account, or her counsel's, as demonstrated by the City's arguments.

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[2]The house is in a district which is not only zoned for duplexes, but for higher density multi-family use.

In its brief at 4, the City argues that Dortch "does not submit any argument that the circuit court erred in determining that there had been no substantial change from the earlier application." This is incorrect. In her brief at 4, 16, and 23, Dortch points out that, between the time of her initial application and the alleged "successive" application (which was filed more than a full three years later), Dortch had been prosecuted for not pursuing repairs, Dortch had worked out an arrangement under which to make some exterior-only repairs, Dortch had spent over $35,000 on such repairs, and the City or its representatives had confirmed that demolishing the house was not allowed, and thus, was not even an option. These circumstances confirmed a situation in which the work Dortch sought to do was not simply an option or a desire, but rather, something that had to be done. The only alternative was for the City to affirmatively command Dortch to spend her own money to affirmatively and substantially alter an existing structure. This is no more feasible or fair than ordering Dortch to make her lot bigger.

In its brief at 5, in its "statement of the case," the City also argues that the "high probability of error" by the board in its finding that a variance should not be granted is "not an issue that is before the Court in the present appeal." This argument, too, is incorrect. In Dortch's Appellant's Brief, Dortch identifies as an issue on appeal, "Did the record before the Circuit Court also reveal a high probability of error by the Board of Zoning Appeals and that the use sought by Dortch was either never intended to be prohibited under the ordinance in question or was so consistent with the character of the district as to be a negligible variance from the requirements of the ordinance?" (Appellant's Brf. at 2.)

Pages 9-23 of Dortch's Appellant's Brief discuss the inapplicability of res judicata in instances in which there is not a full and fair opportunity in a judicial or appropriate quasi-judicial forum to litigate a claim. Dortch's Appellant's Brief provides a thorough discussion of

the caution which must be employed in invoking the doctrine of res judicata. Dortch's Appellant's Brief, with citation of authority, clarifies that res judicata should be invoked, "only after careful inquiry" (Appellant's Brf. at 13), and that because res judicata is a means of quickly avoiding an evaluation of the merits, a decision to apply the doctrine should not be "facile or hasty" (id.). With citation of authority, Dortch's Appellant's Brief discusses refusal to apply the doctrine of res judicata "where there is manifest error in the record." (Appellant's Brf. at 16.) Respondent's assertion that the high probability of error of the zoning board decision is not an issue presented on appeal, or should not be considered on appeal, is therefore incorrect, and without any merit.

In a related argument, in its brief at 5, in its "statement of the case," the City also asserts that Dortch did not raise the issue of "manifest error in the record" in the Circuit Court. This argument, too, is incorrect. (See Tr. of Hrg., 20:2-20:4, R.p.30 ("the zoning board was wrong").) The transcript of hearing also reveals Dortch's counsel's persistence in trying to explain to the Circuit Court all of the many reasons why res judicata was not appropriate and all of the many very serious dimensions to the issue. Because of the brevity of the allowed hearing, and the court's equally persistent interjections and questions, the hearing concluded with the Circuit Court asking counsel to present their fuller arguments by way of proposed orders. (Tr. of Hrg., 24:3-24:4, R.p.34.) Dortch's explanation and fuller presentation of the question of manifest error was included in her August 13, 2013 proposed order at pages 2, and 5-8. (R.pp.222 and 225-228.) The issue was raised in the Circuit Court, raised on appeal, and presented on appeal.

II. The City's Argument I

In its brief at 6, Argument I, the City argues that, since there was no prior final determination of the first proceeding in the Circuit Court, the present appeal (of the second

proceeding) should be dismissed. The City cites no case law, nor any statute law, nor any other authority whatsoever for its argument.

In the continuing vein of attacking Dortch for stumbling through the municipal gauntlet in her effort to repair her modest house and to continue the use of a duplex in a district zoned for multifamily use, the City argues that Dortch's two trips to the zoning board three years apart are an abuse of "the system." Dortch's attempts to repair her home and continue its use are straightforward and not an abuse of anything.

The gist of the City's short argument, without authority, is that is if there was anything which Dortch did not do, e.g., push for a ruling on her motion for reconsideration or "inform" the zoning board that the prior matter, to which it was a party, had not been resolved, Dortch is a bad person and "should be estopped" for pursuing the current action, and that this Court "may be without subject matter jurisdiction."

Despite any bad light the City can cast on an affected citizen, the fact remains that res judicata was not raised before the zoning board as an affirmative defense. Estoppel was also not raised before the zoning board as an affirmative defense. Neither of these principles, nor any hybrid of them, deprives a court of jurisdiction. The prior decision of the informal municipal board did not meet the legal elements of res judicata.

The City admits in its brief at 15 that "Appellant correctly cites the elements of the application of the doctrine of res judicata." Respondent simply cannot show that they have been met. This is particularly so with respect to the traditional requirement that the prior determination be one made by a court of competent jurisdiction, rather than by an informal appointed board of a political subdivision. It is also particularly the case with the non-traditional requirement that when the doctrine is applied to the decisions of truly administrative agencies,

the agency in question, and the procedures it employs, be at least sufficiently "courtlike" to justify a thoughtful, nonmechanical, cautious, discretionary application of the doctrine.

In a footnote (page 7, note 4) and elsewhere in its brief (e.g., page 9), the City also argues that as Respondent, the City can raise any additional defenses and arguments on appeal as additional sustaining grounds, regardless of whether these reasons or arguments were presented to or ruled upon by the Circuit Court. Our appellate courts have traditionally been allowed to affirm a lower court decision based upon additional sustaining grounds appearing in the record, but which were not the basis for the lower court's ruling.

However, neither the rules of appellate procedure nor the case law interpreting them have encouraged arguments of grounds never even presented to the lower court, nor available for consideration by the lower court. To raise such issues for the first time, and resolve issues of fact on a closed record, in the appellate court, is imprudent. Routinely engaging in this form of review would negate the requirement of pleadings at the trial level which alert the litigants to the factual issues, and which alert litigants to the need to present evidence on those factual issues and raise other appropriate legal arguments concerning those facts, and would thwart the ability of an appellant to present appellate arguments in a concise and intelligible format.

An additional sustaining ground was traditionally one which was a timely raised issue in the proceeding below, which was available for consideration in the proceeding below, and which was presented and argued in the proceeding below, but one on which the judge in the proceeding below did not base his or her decision. The current view of additional sustaining grounds stops short of allowing presentation on appeal of abandoned arguments, affirmatively waived issues and matters which could not have been raised and presented below. Any broader rule would negate basic rules of pleading, including requirements that counterclaims and affirmative

defenses be raised and set forth.

If, for example, a defendant in a car wreck case proceeded with a trial in which comparative negligence was never raised as a defense, and the plaintiff never presented any evidence or argument on that issue, the plaintiff's later appeal of an issue in the case would not be subject to a finding by the appellate court that the limited evidence the parties chose to present in the case revealed some negligence on the part of the plaintiff, and that a result in the case adverse to the plaintiff could be sustained on the basis of evidence relating to comparative negligence. Similarly, seldom would an appellate court apply the affirmative defense of the statute of limitations when the issue was not pled and not argued below; in a case where the issue was not presented below, it is likely that exceptions to the statute of limitations would not appear in the record, and that the appellant would not have presented evidence on them.

III. The City's Argument II

In its brief at 7, Argument II, the City argues that there was no opportunity to raise the issue of res judicata before the zoning board because of the peculiarities of the way the zoning board is constituted and the peculiarities of its statutory duties and its procedures. Therefore, the City argues, the City should be excused from the traditional requirement that res judicata be raised as an affirmative defense, and that it be raised in the tribunal below in order to be preserved for assertion on appeal. The City's own argument simply reiterates the uncourtlike nature of an appointed municipal board. In turn, this argument highlights the inappropriateness of giving permanent preclusive effect to the decisions of such a body under a nonmandatory doctrine reserved for application to full-fledged litigation in a court, or at least in a body with the attributes and procedural safeguards of a court.

In its brief at 9, the City argues that the Circuit Court, sitting as an appellate court, was

also allowed to affirm the zoning board on "any ground appearing on the record." While the Circuit Court sits as an appellate court in hearing zoning board appeals, the Circuit Court does not receive its appellate procedural authority from the same appellate rules applicable in this Court. If the same appellate court rules which apply in this Court applied in appeals from the zoning board to the Circuit Court, Dortch's appeal of the first proceeding would never have been dismissed based on technical grounds of timeliness. In this Court, the time for appeal runs from the date of receipt of written notice of entry of the subject order, rather than from the date the order was allegedly "mailed." Under traditional views of the power to affirm on additional sustaining grounds, the grounds had to have at least been presented to the lower tribunal.

No ground of res judicata was raised and preserved in the zoning board hearing; this ground therefore did not appear in the record of the second proceeding before the zoning board. As noted earlier, any argument that there was not a proper opportunity to raise the issue in the record before the zoning board is simply another illustration of why a zoning board hearing is not a court or other appropriate forum to which to apply the doctrine of res judicata.

An affirmative defense never pled and never even raised in the lower tribunal cannot be raised for the first time on appeal. The City's arguments simply amount to an assertion that a zoning board is court enough for the application of res judicata, but not court enough to require the issue to be raised fairly in the first instance. In its brief at 11, the City as much as states that the City has no compunction about allowing an applicant to go to the cost and time of a hearing before the zoning board, as well as a subsequent appeal, only to discover – with no notice – a new basis on which to be denied the use of the applicant's property. This is bad policy.

To reiterate the simple facts, the first proceeding before the zoning board resulted in a decision by the zoning board which Dortch contended to be incorrect and which Dortch

contended to have incorrectly perceived the merits. Dortch sought a review and correction of that determination. No final determination of the issues raised by Dortch had been made when, some years later, Dortch applied again, for a different permit. She received a decision from the zoning administrator denying the permit. She appealed that denial to the zoning board. Even if there had been a final determination of Dortch's appeal of the first proceeding before the zoning board, the determination should not have necessarily resulted in preclusion from pursuing the matter again. The zoning board hearing was not the outcome of litigation and the zoning board was not a court. No sacrilege was committed.

If Dortch was to be precluded, it was not to be legally by virtue of res judicata. The City urges this court to create a new law in the form of a hybrid doctrine applicable to appointed boards of municipalities. It is ordinarily the job of the courts to interpret and apply the existing law in accordance with principles of stare decisis. A legislative body such as the General Assembly or a properly constituted city council is ordinarily the body who makes new laws or changes existing laws. The City's argument in its brief at 12, that a case which is admittedly still existing and pending should be "deemed" final, ended, and concluded, is without authority, contrary to fact, and contrary to law.

IV. The City's Argument III

In its brief at 12, Argument III, the City, in summary, argues that the more uncourtlike the tribunal that makes a decision, and the fewer due process protections afforded by that tribunal, and the fewer assurances there are that the actual law will be accurately applied, and the less likely that the actual merits and all remedies will be appropriately considered, the more readily res judicata should be available to preclude reaching the merits in a second proceeding before such a body or any other body. To wit, the City argues that "[t]he doctrine of res judicata should

apply to quasi-judicial zoning board proceedings, and the doctrine should not be subject to the same strict elements of the doctrine as applied in a traditional litigation forum."

This argument is not supported by any direct caselaw, and the only authorities cited are examples of other courts in other states applying the doctrine without full discussion of the dangers Dortch has identified, or worse, courts discussing the doctrine in dicta, and resolving the issues before them on other grounds. The City thus makes the misplaced argument that, the more informal, unsophisticated, and uncourtlike the lower tribunal is, and the fewer the procedural safeguards afforded, and the less representative the proceeding is of an adversarial system, the more deference and permanence should be given to the completeness and correctness of the tribunal's decisions. The cases and authorities discussed in Dortch's Appellant's Brief counsel exactly the opposite, and these include the opinions of the United States Supreme Court.

In its brief at 15, and generally throughout, the City conjures fears of rampant, successive zoning board applications, overrunning hapless zoning boards across the state. These fears are overstated and speculative. Additionally, if such a problem did arise, the problem is one for legislative correction, rather than judicial legislation. The City has already pointed out that the zoning board is a creature of statute. The statutes which create the zoning boards can address the manner in which new applications are made.

In the instant case, the City concedes that the statutes simply require the zoning board to hear the matters presented to it. Dortch simply did what the statutes allowed her to do. After she had already made exterior-only repairs which took a long while, much tedium, and much money, she made another permit application for interior repairs. When it was denied, she did not fail to take the matter up with the zoning board.

In instances in which a zoning board appears to have clearly made the wrong decision, it

is likely that a fair number of applicants would choose to appeal the decision to an actual court, rather than immediately return to the same zoning board which made the erroneous decision. As the law presently stands, no South Carolina court has actually held that the doctrine of res judicata applies to the decision of an appointed municipal board. Yet, as the situation presently stands, the City has adduced no evidence of rampant successive filings with zoning boards.

In its brief at 16, in a footnote, the City argues that, in one respect, the procedures before the zoning board are sufficiently courtlike, because when the zoning staff presents an ex parte briefing to the zoning board, at least part of that briefing is available "by way of hyperlink" if one visits the City's website at the time the zoning board's agenda is published on the web. The City, here, points to no published rule of procedure of the zoning board for "notice by hyperlink" or any published rule of procedure or actual notice given to the applicant regarding such matters. Not even the Administrative Procedures Act provides for notice and service by going on the web and looking for a hyperlink.

In its brief at 17, the City argues that "the home has not been repaired or remodeled since the original application." This statement of alleged fact, upon which the City bases its arguments, is incorrect. Dortch testified at the second proceeding that, since the time of the original application, she has spent approximately $35,000 in exterior-only repairs, which have proven to be both tedious and time-consuming, given the requirement that she comply with the preferences of historical authorities. (Exh. D to City 4/30/13 Mot. and Ret. at BOZA 005 and 020, R.pp.99 and 114; Dortch 4/11/13 Pet'n at 5, R.p.147; and see Exh. D, id., BOZA 044-045, R.pp.138-139.) These were repairs which Dortch was originally prohibited from doing, and for which she was denied a permit, but which she was eventually required to do under threat of prosecution.

V. Conclusion

For all the reasons set forth in Appellant's Brief, the Circuit Court should be reversed. For all the reasons set forth herein, the City's arguments to the contrary are unfounded and incorrect. The matter should be remanded to the Circuit Court with instruction to hear the appeal.

Respectfully submitted,

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Date: October 15, 2014

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CERTIFICATE OF SERVICE AND 211(b) COMPLIANCE

I, M. Baron Stanton, do hereby certify that I have, on October 15, 2014, served the foregoing final Appellant's Initial Reply Brief of Frieda Dortch upon the Respondent by causing a copy thereof to be mailed with proper postage to the address indicated belowand do further certify that the brief complies with Rule 211(b):

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