ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Roger M. Young, Circuit Court Judge
R. Markley Dennis, Jr. Circuit Court Judge

Case No. 2010-CP-10-2695

The Town of Hollywood, ... Appellant-Respondent,

v.

William Floyd a/k/a Jeff Floyd, Troy Readen and
Edward McCracken a/k/a Eddie McCracken, ... Respondents-Appellants.

APPELLANT'S BRIEF OF APPELLANT-RESPONDENT

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SC Court of Appeals

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STATEMENT OF THE CASE

The Appellant-Respondent Town of Hollywood ("Town") appeals from a jury verdict in favor the Respondents-Appellants on their counterclaim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This case arises out of a land use dispute. The Respondents-Appellants William Floyd a/k/a Jeff Floyd, Troy Readen and Edward McCracken a/k/a Eddie McCracken (hereafter referred to as "Developers") entered into a contract in February 2007, to purchase a 13-acre tract located on Bryan Road within the Town of Hollywood, South Carolina. (R. 794-800). The Developers submitted an application for rezoning the property to the Planning Commission for the Town of Hollywood. (R. 804). The Planning Commission considered the rezoning request at its regularly scheduled meeting on June 14, 2007. At that meeting, the Developers presented a rough sketch of the property and indicated their intent to subdivide and develop the tract into seventeen lots. At the conclusion of the Developers' presentation, the Planning Commission informed the Developers that their plans did not require a rezoning. They were further advised that the approval of the subdivision of the tract did, however, require formal approval by the

Planning Commission before they could proceed with the project. The matter was accordingly tabled. (Supp. R. 11-13).

Thereafter, the Developers met with the acting zoning administrator Kenneth Edwards who indicated that he would approve the subdivision himself if the project were divided into two phases. On June 27, 2007, which was two days before Edwards was leaving his employment with the Town, Edwards "approved" two plats for the subdivision of the Bryan Road property. The Developers then closed on the property on the same day. (R. 807-809).

The Town Code of Ordinances do not give the zoning administrator authority to approve a final subdivision plat without approval from the Planning Commission. When the Developers began work on the site, the Town issued a Stop Work Order. Because the Developers indicated that they would not comply with the Stop Work Order, the Town filed this action in the Court of Common Pleas for Charleston County seeking declaratory and injunctive relief. Specifically, the Town sought a declaration that (1) the Developers had no authorization or approval under the Town Code of Ordinances or state law to subdivide the property without approval of the Planning Commission and (2) that the plats signed by Kenneth Edwards were null and void. The Town further sought a permanent injunction to cease further development of the property until the

appropriate approval was sought and received from the Planning Commission. That action was filed on October 12, 2007. (R. 20-25).

In response to the Town's Complaint, the Developers filed counterclaims under 42 U.S.C. § 1983 for alleged violations of equal protection and due process, as well as state law claims. (R. 32-37).

The Town's claims for declaratory and injunctive relief were adjudicated by way of a motion for summary judgment. By order filed September 7, 2010, Circuit Court Judge R. Markley Dennis, Jr. concluded as a matter of law that Kenneth Edwards "lacked authority to either approve Defendants' subdivision or waive the subdivision approval process as set forth in the Town's Municipal Code. Edwards' actions in signing the plats as approved by the Town were without authority and cannot be used to estop the Town from enforcing its ordinances." (R. 7). Judge Dennis further issued a declaratory judgment that "(1) the Defendants have no authorization or approval under the Municipal Code of Hollywood or the laws of the State of South Carolina to subdivide the property or begin development activities on the Bryan Road Property, and (2) the plats signs by Edwards upon which the Defendants have wrongly proceeded to develop the Property are null, void and of no effect." (R. 7-8).

In the interim, while this action was pending, the Town staff continued to work with the Developers to address issues with respect to the project. These

efforts were acknowledged by the Developers' counsel at the August 2008 meeting of the Planning Commission. (R. 859-860). The August 2008 meeting included a discussion of issues that remained including the following: (1) the utilization of engineered septic systems because the proposed development had lots that would not percolate; (2) access issues relative to Bryan Road; (3) a proposed traffic study at the intersection of Bryan Road and Highway 162 because so-called "Brittain's Curve" is a known dangerous intersection; and (4) the failure of the Developers to provide a wetlands certification letter. (R. 873-889). Although there was actually no application for preliminary plat approval pending, at the close of the August 2008 meeting, a motion was passed to "table this project until we have additional information regarding those particular issues." (R. 889-890).

The litigation continued to proceed forward. After Judge Dennis issued his summary judgment order, the case proceeded to trial on the Developers' remaining counterclaims. (R. 8). The case was tried before Circuit Judge Roger M. Young from September 8, 2010 through September 13, 2010. During the course of the trial, the Town made a motion for directed verdict at the close of the Developers' case-in-chief and again at the end of the Town's case-in chief. While a directed verdict was entered on the state law claims, Judge Young denied the Town's motions on the federal constitutional claims, including the equal protection claim.

The federal constitutional claims were submitted to the jury. After initially being deadlocked, the jury returned a verdict for the Town on the procedural and substantive due process counts. (R. 17-18). On the equal protection count, the jury found for the Developers and awarded $450,000.00 in actual damages. (R. 18).

The Town thereafter made post-trial motions including a JNOV motion. Judge Young denied the Town's post-trial motions by order filed October 4, 2010. (R. 9-10).

On March 7, 2011, Judge Young also issued an order denying the Developer's post-trial motions. (R. 12-16). With that order, Judge Young did award to the Developers attorney's fees in the amount of $42,445.00 and costs in the amount of $2,629.20. (R. 16). Judge Young awarded the attorney's fees and costs pursuant to Section 15-77-300. (R. 13).

The Town filed a timely appeal to this Court. The Developers have also filed a cross-appeal.

ARGUMENTS

I. The Circuit Court erred in denying the Town of Hollywood's motion for judgment notwithstanding the verdict and motions for directed verdict on the equal protection counterclaim.

The Town of Hollywood contends that the Circuit Court erred in denying its motion for judgment notwithstanding the verdict (JNOV) and motions for directed verdict on the Developers' equal protection counterclaim. The Town submits that there is no evidence in the record to support a finding of an equal protection violation. Specifically, the evidence does not support a finding that the Developers were treated differently from the developers of other proposed subdivisions.

The Equal Protection Clause "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose. But this does not mean that persons in different circumstances cannot be treated differently under the law." *Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir 1995). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

This Court has similarly explained that "[t]he *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate

treatment." *Olson v. South Carolina Department of Health and Environmental Control*, 379 S.C. 57, 663 S.E.2d 497, 504 (Ct. App. 2008). The Equal Protection Clause "does not prohibit different treatment of people in different circumstances under the law." *Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776, 782-83 (Ct. App. 2008). *See also*, *Town of Iva ex rel. Zoning Administrator v. Holley*, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007).

The Eleventh Circuit case of *Campbell v. Rainbow City*, 434 F.3d 1306 (11th Cir. 2006), is particularly instructive given its factual similarity to the present case. In *Campbell*, the plaintiffs attempted to develop an apartment complex. They sought tentative approval for their project from the city council and the planning commission on numerous occasions, and each time the matter was tabled for further discussion and consideration. The plaintiffs alleged that they were treated differently than other developers because one of the plaintiffs had run for mayor against the incumbent mayor in a prior election. The plaintiffs identified eight separate construction projects or developments that they believed were similarly situated. The case went to trial, and the jury returned a verdict for the plaintiffs. On appeal, the Eleventh Circuit reversed the jury verdict. The Court concluded that the district court should have granted the City's directed verdict motion because "Plaintiffs have not offered any evidence to support an equal

protection claim of similarly-situated individuals who were treated differently." 434 F.3d at 1309.

The Eleventh Circuit in *Campbell* explained that "[t]he analysis of Plaintiffs' equal protection claim requires a finding that there were developments which were similarly situated to the Campbells' proposed development, because different treatment of dissimilarly situated persons does not violate the equal protection clause." 434 F.3d at 1314. Moreover, the Court held that "[a] showing that two projects were similarly situated requires some specificity." *Id.* Citing the Seventh Circuit case of *Racine Charter One, Inc. v. Racine Unified School District*, 424 F.3d 677 (7th Cir. 2005), the Court further explained: "in order for any development to be similarly situated to Plaintiffs' proposed project, it must be *prima facie* identical in all relevant respects." *Id.*

While the plaintiffs in *Campbell* identified several projects as being similarly situated, the evidence was not sufficient. The Eleventh Circuit explained:

> Plaintiffs must have shown that the other development sought and received tentative approval of its site from the City. Without a showing that a development sought and received tentative approval, a jury could not conclude that the development was similarly situated to Plaintiffs' development, nor could a jury conclude that the parties were treated differently. With regard to three of the developments that the Plaintiffs contend were similarly situated, Plaintiffs did not provide sufficient evidence showing that development sought and obtained tentative approval.

434 F.3d at 1315. Ultimately, in reversing the verdict for the plaintiffs, the Eleventh Circuit concluded as follows: "Because Plaintiffs have not given any evidence of Defendant's different treatment of a development that was similarly situated to their proposed development, they have not met their evidentiary burden in bringing a successful equal protection claim." 434 F.3d at 1317.

The same should be the result in the present case. Indeed, the plaintiffs in *Campbell* at least *attempted* to proffer what they believed to be similarly situated developers or developments. The Developers in the case at bar offered no such evidence. The trial record is simply devoid of evidence of what the Developers contend were similarly situated developments or projects which they contend the Town treated differently in the subdivision approval process.

There is scant mention even of any other construction projects or developments. The record must be carefully dissected to even find a brief reference to other projects, and certainly the record does not contain evidence of any comparators with the level of specificity required to allow the jury to determine whether there was disparate treatment.

The record includes brief mention of the Wide Awake Park in the testimony of Mayor Jacqueline Heyward. That testimony was not offered in the Developers' case-in-chief and was not admitted at the initial directed verdict motion. Mayor Heyward testified that the Town had purchased the 7.2 acre park which had

already been developed as such. The Developers suggested that the Town had treated the park differently from the Developers' property because a traffic study was not required. The Developers are incorrect in suggesting that Wide Awake Park is an appropriate comparator for an equal protection analysis. As the Mayor testified, it is a park and not a subdivision. (R. 720). There is no similarity between the projects. Second, the park was already developed when it was acquired by the Town. (R. 718) Thus, the lack of a traffic study post-development is clearly a distinguishing factor. Third, and most significantly, the Developers presented no evidence whatsoever regarding the Town's approval process at the time the park was developed. Thus, it was impossible for the jury to examine the Town's approval process for the park property as compared to the Developers' project.

The record also includes brief mention of the Holly Grove project, which is a low income housing complex consisting of nineteen duplexes on a six acre tract. That property was developed by the Town as a joint venture with the Charleston Bank Consortium. (R. 721-723). Again, the Developers suggest that the Town treated the Holly Grove project differently from the Developers' property because a traffic study was not required. However, the Holly Grove project was a planned development (PD) which is different from the Developers' project. Moreover, there is no evidence that the Holly Grove project, given its location, presented the

same traffic and safety concerns as the Bryan Road project such that a traffic study was even needed. (R. 731). Further, the record simply does not include any evidence as to the development approval process for the Holly Grove project with the specificity required to allow the jury to compare that process to the approval process for the Developers' project.

The testimony regarding the Holly Grove project was not submitted during the Developers' case-in-chief, and thus was not in the record at the initial motion for directed verdict. In fact, the Developers made no attempt to offer any evidence of similarly situated developers or developments during their case-in-chief. This is obvious from a review of the directed verdict arguments. After the Town's counsel moved for a directed verdict on the equal protection claim, the Developers' counsel was unable to point to any evidence in their case-in-chief that showed disparate treatment in the subdivision approval process. The Developers' counsel did not cite to the Wide Awake Park or the Holly Grove project. Instead, he stated that "[t]he obvious disparity is in the adjoining subdivision, which is Stono Plantation." (R. 687). He further argued:

> No one has required Stono Plantation to provide a traffic study or to prove that they have access, and, in fact, the two subdivisions sit side by side and utilize the same access, so it is abundantly clear in this record that the two similarly situated property owners are being held to different standards.

(R. 687). The fallacy in that argument, however, is that the record *does not include any evidence regarding the development of Stono Plantation.* That is clear from the colloquy that followed. Judge Young began asking questions regarding the development of Stono Plantation such as when it was developed. The Developers' counsel could not provide a definitive answer. (R. 688). The reason: as the Town's counsel argued, the record does not include *any information* on the development of that subdivision nor any evidence of the subdivision approval process relative thereto. (R. 690). Without any evidence as to the development of Stono Plantation and, more importantly, the approval process by the Town for that development, a jury cannot make the comparative analysis required for finding an equal protection violation.

When this lack of evidence was raised by the Town, the Developers' counsel insisted that "it's unnecessarily complicated." (R. 690). He then insisted that "[t]here are several plats in the record that show various subdivisions along Bryan Road and the town has never required anybody to furnish anything other than what is required in the ordinance." (R. 690). That is a mere assertion by counsel which does not qualify as evidence. *See, Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588, 590 (Ct. App. 2001) ("arguments of counsel are not evidence"); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (same). The trial record includes no evidence to support that assertion. There is no

evidence that the Town treated the Developers differently from other developers under similar circumstances.

Contrary to the Developers' position at directed verdict, this is not "unnecessarily complicated." Instead, the Town is asking the Court to determine whether the Developers satisfied the burden of proof necessary to prevail on an equal protection claim of disparate treatment. As in the *Campbell* case, the Developers here did not meet their burden of proof. In fact, they have not come remotely close to meeting their burden of proof. The jury quite simply did not have the evidentiary basis for concluding that the Town violated the Developers' equal protection rights. That verdict should be reversed, and judgment as a matter of law should be entered for the Town.

II. The Circuit Court erred in granting attorney's fees and costs to the Respondents-Appellants under S.C. Code Ann. § 15-77-300.

Following the jury verdict and the denial of post-trial motions, the Developers made a motion for attorney's fees and costs. On March 7, 2011, Judge Roger Young issued an order granting attorney's fees in the amount of $42,445.00 and costs in the amount of $2,629.20. (R. 16). Judge Young awarded the attorney's fees and costs pursuant to Section 15-77-300. Specifically, he ruled as follows:

> This Court finds that Plaintiff is entitled to recover attorney's fees in this action. Plaintiff argues that he is entitled to an award of attorney's fees under S.C. Code Ann. § 15-77-300, which allows recovery by a prevailing party where a state agency, or other certain entities, has acted without substantial justification in pressing its claim and special circumstances did not exist that would make an award unjust. The Plaintiff is entitled to fees under this section because he was the "prevailing" party under the statute.

(R. 13-14).[1]

In accordance with Section 15-77-300, the prevailing party to a civil action may recover attorney's fees against governmental entity only if the entity "acted without substantial justification in pressing its claim against the party" and there are no "special circumstances that would make the award of attorney's fees unjust." *See*, S.C. Code Ann. § 15-77-300. The Supreme Court has defined "substantial justification" to mean "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709, 712 (1990). This Court has further explained that "[i]n deciding whether a state agency acted with substantial justification, the courts look to the agency's position in litigating the case to determine whether it one which has a reasonable basis in law and fact." *Video Gaming Consultants, Inc. v. South Carolina Department of Revenue*, 358 S.C. 647, 595 S.E.2d 890, 891-92 (Ct. App. 2004). However, "an agency's loss on

[1] Judge Young did not make an award of attorney's fees and costs pursuant to 42 U.S.C. § 1988, and that ruling has not been appealed.

the merits does not create a presumption that its position was not substantially justified." 595 S.E.2d at 892. In other words, the governmental entity "could take a position that is substantially justified, yet lose." *Id.*

The Town submits that the award of attorney's fees and costs was in error because, for the reasons addressed above, the Developers should not have prevailed on their equal protection claim, and hence, if that verdict is reversed, then the Developers will not qualify as "prevailing parties."

Nonetheless, even if the Court affirms the verdict on the equal protection claim, the Developers are still not entitled to an award of attorney's fees under Section 15-77-300. Judge Young assumed without deciding that the Town had acted without substantial justification in prosecuting its declaratory and injunctive relief claims and in defending the Developers' federal constitutional counterclaims. There is no indication that the Circuit Court exercised any discretion. It is well settled that "[w]hen the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Callen v. Callen*, 365 S.C. 618, 620 S.E.2d 59, 64 (2005). That error of law requires a reversal.

If discretion had been properly exercised, the Court should have denied the award of attorney's fees under Section 15-77-300 because clearly the Town was justified in taking the positions that it did throughout this litigation – despite the

fact that it did not prevail on one of the constitutional claims asserted by the Developers. The Town prevailed in its entirety on its declaratory and injunctive relief claims and, in fact, was granted summary judgment on those claims. (R. 1-8). Moreover, the jury ruled in the Town's favor on the procedural and substantive due process claims. (R. 17-18). There simply is no basis for finding that the Town's defense of the equal protection claim was without substantial justification. Judge Young's order certainly does not explain how or why the Town was not justified in taking the position that no equal protection violation had been shown.

For each of these reasons, the Town submits that the Circuit Court erred in granting attorney's fees and costs under Section 15-77-300.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Town of Hollywood respectfully requests that this Court reverse the order of Judge Roger M. Young denying the Town's motion for JNOV and motions for directed verdict on the equal protection counterclaim. The Appellant-Respondent Town of Hollywood further requests that this Court reverse Judge Young's order awarding attorney's fees and costs to the Respondents-Appellants.

Respectfully submitted,

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July 9, 2012

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent Town of Hollywood certifies that the Final Appellant's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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July 9, 2012

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant-Respondent Town of Hollywood certifies that the Final Appellant's Brief of Appellant-Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant-Respondent Town of Hollywood, does hereby certify that service of the **Appellant's Brief of Appellant-Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of July 2012:

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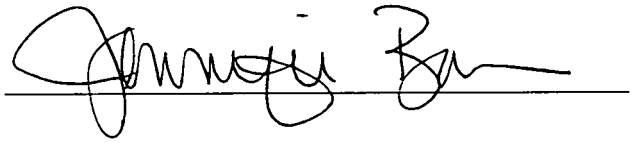

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SCCA Tracking Number: 2010-174946
Civil Action Number: 2010-CP-10-2695
Claim Number: 54721
Our File Number: 103.8743

Dear Ms. Kitchings:

Please find enclosed for filing the originals and fifteen copies each of the below listed documents in the above referenced matter.

1. Appellant's Brief of Appellant-Respondent
2. Respondent's Brief of Appellant-Respondent
3. Reply Brief of Appellant-Respondent
5. Supplemental Record on Appeal

Please file the originals and return one clocked-in copy of each document to me by way of my courier.

By copy of this letter, I am serving a copy of the Supplemental Record on Appeal on counsel for the Appellants-Respondents. I am also serving copies of the briefs on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Thomas R. Goldstein, Esquire *(w/ Enclosures)*
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