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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
The Honorable Benjamin H. Culbertson

RECEIVED

Appellate Case No. 2013-000712

SEP 30 2015
SC Court of Appeals

Bonnie N. Charlton, Robert L. Charlton, and Bayside
Property, Inc., Plaintiffs

v.

South Bay Properties, LLC, Stantec Consulting Services,
Inc., f/k/a Trico Engineering Consultants, Ind., Milone &
MacBroom, Inc., John Steven Goodwin, Louise C. Goodwin,
Thomas I. Puckett, Brenda C. Puckett, Robert Nahama,
Jeanne E. Nahama, Thomas Holland, Sharon Louise
Holland, Joyce K. Sobel, Robert W. Waruszewski, Richard
N. Taylor, Robert K. Spillers, (a/ka Robert Spillers), Deborah
T. Spillers (a/k/a Deborah Spillers), Patrick A. DiAngelo,
Deborah A. DiAngelo, Gary E. Owens, Joyce M. Owens,
Fount L. Shults, Lynda M. Shults, Dennis Ridgeway, Teresa
Lynn Ridgeway and Georgetown County Forfeited Land
Commission, Defendants,

Of Whom

John Steve Goodwin, Louise C. Goodwin, Gary E. Owens,
and Joyce M. Owens, Appellants,

v.

Bonnie N. Charlton, Ronald L. Charlton, and Bayside
Property, LLC, South Bay Properties, LLC, Stantec
Consulting Services, Inc., f/k/a Trico Engineering
Consultants, Inc., Milone & MacBroom, Inc., Patrick A.
DiAngelo, Deborah A. DiAngelo, and Georgetown County
Forfeited land Commission, Respondents.

RETURN AND CROSS MOTION FOR COSTS

K. Douglas Thornton
1025 Third Avenue
Conway, South Carolina 29526

and

John M. Leiter
1203 48th Avenue North, Suite 109
Myrtle Beach, South Carolina 29577

Attorneys for Appellants

Conway, South Carolina

September 28, 2015

Appellants John Steven Goodwin, Louise C. Goodwin, Gary E. Owens and Joyce M. Owens, pursuant to South Carolina Appellate Court Rule 240(e), submit the following Return and Cross Motion to Respondent's "Motion for Costs," filed and served in this matter on September 17, 2015. Appellants request that Respondents' Motion for Costs be denied, and that Appellants be awarded all costs and fees incurred, in accordance with the attached itemized Statement of Costs. In support hereof, Appellants respectfully show this Honorable Court as follows:

1. Respondents initially filed an itemized Statement of Costs with no accompanying Motion, on September 1, 2015. Thereafter, pursuant to notification from the Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, of this deficiency, Respondents filed a "Motion for Costs," on September 17, 2015, which failed to comply with SCACR Rule 240, which in relevant part, provides:

(A) *"A Memorandum with citation of authorities in support of the motion"* to be filed with the motion.

Respondents failed to file any such Memorandum; failed to even cite S.C. Appellate Court Rule 222; failed to provide any other legal basis for their entitlement to costs; and failed to provide any citation of authority supporting their "motion" in any way; and,

(B) Rule 240(g) provides that: *Failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the Motion or Petition.*

As this Court has long recognized: *An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a Brief but not supported by authority. Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. Ap. 2008) See also: Jones v. Leagan, 384 S.C. 1, 20-21, 681 S.E.2d 6, 16-17 (Ct. Ap. 2009). "...a party*

abandoned an argument on appeal when he cited no legal authority to support the argument."

2. South Carolina Appellate Court Rule 222(a) provides, in pertinent part, that: *"Unless otherwise ordered by the appellate court or agreed by the parties, costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed.* In the present case, however, Appellants respectfully submit that it would be inequitable, and therefore improper, to award costs to Respondents, for the following reasons:

(a) Although this appeal was dismissed, this occurred only when, during Oral Argument on Appeal, the Respondents stipulated for the first time¹ that Appellants would not be bound by Judge Culbertson's apparent ruling that:

"Even though the Appellants have a pending Motion to Amend Answer so that they can assert counterclaims, the deadline for requesting a jury trial has expired and, therefore, the defendants have waived their right to a jury trial. See Rule 38(b) and 38(d), SCRCP. See also King v. Shorter, 291 S.C. 501, 354 S.E.2d 402 (Ct. App. 1987.)

Appellants therefore reasonably believed that, had they not appealed this Form 4 ruling by the Trial Court, this ruling would have become the law of the case. See *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011), holding that: *An unchallenged ruling, right or wrong, becomes the law of the case.* (Citing: *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973).)

3. Appellants are informed and believe that this Court recognized Appellants' legal predicament when, in its Order dismissing this appeal and remanding the case to the Circuit Court, the Court held:

At oral argument before this Court, it became clear that the Order being appealed was in fact, not appealable.

¹ There was no such stipulation or argument in the Respondents' Briefs. As noted hereinbelow, the Respondents' acknowledgement that this language should not, and would not be binding upon the Appellants, was not revealed until after Appellants presented their Oral Argument on Appeal.

All parties were in agreement at the time the Circuit Court ruled to deny reconsideration of the Order of Reference in the Form 4, the right to a jury trial did not exist, because there were no causes of action at that time for which a jury trial could have been demanded, and that the Motion to Amend – which has yet to be ruled on – if granted, would then allow the Goodwins and Owens to demand a jury trial. Therefore, we dismiss the appeal. The case is remanded to the circuit court, and no party is prohibited from bringing any position before the Circuit Court. The case resumes the precise position it occupied on March 21, 2013. For any necessary clarification, the parties and the Circuit Court should listen to the discussion this Court had with counsel at oral argument. The clerk of this court shall transmit an audio recording of oral argument to the circuit court clerk with the remittitur. (Emphasis added.)

4. The Court did not recite any language from any of the Respondents' Briefs, as there was no such stipulation or argument made by the Respondents prior to the Oral Argument. This Court further acknowledged these circumstances at the following intervals² of Oral Argument:

(a) This Court, 5:40 *"You were told that you waived your right to a trial by jury, by failing to request a right that you did not have until later?"*

(b) Although Respondents' counsel, Charles Smith, argued that Judge Culbertson: *"Of course, was speaking to the record as it stood at that point in time..."* (Oral Transcript, 12:45). Judge Culbertson's Form 4 Order itself, does not state this. At 21:30, this Court asked Mr. Smith: *"Well let me ask you this question, did Judge Culbertson rule that the folks who bought these properties in these pre-sales, have no right to a trial by jury on their cross-claims and counterclaims?"*

Mr. Smith responded: *"He states that in the..."*

This Court: *"Well I, I heard he states that. Did he rule that?"*

Mr. Smith: *"I don't think so your Honor. I think his ruling was he was not going to reconsider his Order of Reference. That's it."*

This Court: *"But if you don't think he ruled that, then it does sound like there is no appealable Order. We would send it back, and you would then litigate this on the merits."*

² "Intervals," as used herein, connote the minute and second designations when each cited statement occurred, as imprinted on the audio transcript delivered to the circuit court clerk.

(b) At interval 24:36, in response to this Court's question about Appellants' position regarding dismissal of the appeal and remand on this basis, Appellants' attorney stated: *"I think it was a simple question, and I think there is a simple answer, and it's called the "law of the case." I mean let's assume that the Court adopts the position of the Respondents and sends it back, and let's assume further that the trial judge that originally heard this is not hearing it now. I expect, because it was raised in this appeal by the Respondents, that we will hear it again, that the Court's ruling below is now the law of the case."*

This Court noted: *"I don't think so. I, will let Mr. Smith answer, he's shaking his head 'no'" If we do what Mr. Smith and the Court just discussed, then you go back to right where you hoped you were when you filed your motion to amend. The only way that you get denied your right to a trial by jury is if these counterclaims are not compulsory."*

The Court then asked Mr. Smith to confirm this stipulation at interval 27:25, which he did.

Mr. Smith again affirmed this stipulation in response to a repeated request by this Court at interval 27:46: *"So if we were to send this back, y'all would go before Judge Culbertson, y'all would, you would advance the position that these counterclaims are not compulsory, and that therefore they waived their right to a jury trial by filing non-compulsory counterclaims in a foreclosure action, but you would not address the claim that they waived them because they didn't file them in their initial answer?"*

Mr. Smith: *"Exactly, your Honor."*

(c) These facts and stipulations were again affirmed at interval 32:57 through 33:14.

The above cited language in Judge Culbertson's Form 4 Order was, at best, ambiguous, and therefore placed Appellants in the position of having to appeal the order in order to avoid being bound by the ruling that Appellants had waived their right to a jury trial on their Amended Answer, Counterclaims, Cross-claims, and Third Party Claims. The Respondents' recognition for the first time at Oral Argument on Appeal, that this ruling was limited to the status of the pleadings as they existed at the time Respondents' Motion for Order of Reference was granted, was clearly not articulated in

the order, nor by Respondents prior to oral argument. Had such stipulation been made by the Respondents at any time prior to oral argument, the necessity of this Appeal would have been obviated. In this sense, therefore, Appellants were the "prevailing parties." This was the only relief Appellants sought on Appeal.

5. As noted above, Respondents initially filed a request for costs without an accompanying motion, and subsequently filed a "Motion for Costs," which failed to comply with Rule 240, or to otherwise cite any authority in support of their Motion. Appellants contend that Respondents' Motion is disingenuous, at best, and was pursued in bad faith, at worst.

Appellants respectfully submit that, but –for the Respondents' stipulation, this Court would have reversed so much of Judge Culbertson's Order as may have been construed to bar Appellants from pursuing their right to a jury trial at the time their motion to amend is finally heard. Appellants therefore believed that neither they, nor the Respondents, would be entitled to costs on appeal. The filing of the Motion for Costs by Respondents forced Appellants to file and serve this Return. Respondents' decision to seek to recover these costs on appeal, under the facts and circumstances of this case, constitute extraordinary circumstances under Rule 222(b).

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that Respondents' Motion for Costs should be denied, and that Appellants should be awarded all costs and fees incurred by them in preparing, filing and serving the within Return, in accordance with Rule 222(b).

Respectfully submitted:

/s/K. Douglas Thornton

K. Douglas Thornton
Thornton Law, LLC
1025 Third Avenue
Conway, SC 29526
Telephone: (843) 488-5858

and

/s/John L. Leiter

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Avenue North, Suite 109
Myrtle Beach, South Carolina 29577
Telephone: (843) 449-1451

Attorneys for Appellants

Thornton Law, LLC
K. Douglas Thornton

kdouglasthornton@gmail.com

1025 Third Avenue
Conway, SC 29526

PHONE: 843-488-5858

FAX: 843-488-5859

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Bonnie N. Charlton, et al. v. South Bay Properties, LLC, et al.
Appellate Case Number: 2013-000712

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of a Return and Cross Motion to Respondents' Motion requesting that costs be assessed under Rule 222, SCRAP. Also attached is the original and six copies of Appellants' Itemized Statement of Costs. By copy of this letter, a copy of the Return and Cross Motion and Appellants' Itemized Statement of Costs are being served upon opposing counsel, Charles T. Smith, Esquire.

With kind regards, I remain

Yours very truly,

THORNTON LAW, LLC



Regina R. Cagle
Paralegal to K. Douglas Thornton

Enclosures as stated

cc: John S. Goodwin
Louise C. Goodwin
Gary E. Owens
Joyce M. Owens
Charles T. Smith, Esquire

Thornton Law, LLC
1025 3rd Avenue
Conway, SC 29526



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