THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2015-002297

RECEIVED
FEB 18 2016
SC Court of Appeals

John Doe, Appellant,

v.

Board of Zoning Appeals (BZA) and Town of Sullivan's Island (S.I.), S.I. Zoning Administrator, and S.I. Building Dept., Individually and in Official Capacity, Respondents

---

INITIAL BRIEF OF RESPONDENTS

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar #79130)
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2200
Attorneys for Respondent

February 16, 2016
Charleston, South Carolina

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Standard of Review 6

Argument 7

I. The trial court correctly dismissed Appellant's Notice of Appeal and Request for Pre-Litigation Mediation of the Board of Zoning Appeals decision, because the Appellant, is not, and does not contend that she is, the property owner whose land is the subject of the decision of the Board of Zoning Appeals and the clear and unambiguous language of South Carolina Code Section 6-29-825(B)(2) only allows the owner of the property that is the subject of a board of zoning appeals appeal to appeal a decision of a board of zoning appeals by filing a notice of appeal and request for pre-litigation mediation 7

II. As an additional affirming ground, Holmes' Notice of Appeal and Request for Pre-Litigation Mediation should have been dismissed because she failed to file a petition setting forth plainly, fully, and distinctly why the Board of Zoning Appeals decision is contrary to law 10

III. The circuit court correctly enforced the express requirements of South Carolina statutory law providing that only the property owner whose land is the subject of a board of zoning appeals decision can initiate an appeal by filing a notice of appeal and request for pre-litigation mediation, instead of adopting Appellant's unsupported argument that South Carolina public policy is contrary to the express language of the applicable South Carolina statutes 11

IV. The circuit court correctly found that Holmes' arguments that the circuit court Order filed April 29, 2015 and Form 4 Order filed April 10, 2015 were wrongfully entered were moot because the circuit court had rescinded those orders 12

V. The circuit court correctly rescinded the Order filed April 29, 2015 and Form 4 Order filed April 10, 2015 and correctly rejected Appellant's arguments as to any wrongdoing with respect to the entry of the Order filed April 29, 2015 and Form 4 Order filed April 10, 2015, because there was no basis for finding any wrongdoing, fraud on the court, or prejudice and Appellant's arguments were based upon unsupported allegations of improper ex-parte communications, unsupported allegations of wrongful

activity by Respondents' counsel and the circuit court, and incorrect allegations of prejudice.....14

VI. Holmes' arguments with respect to the zoning administrator's decision, which were not presented to or ruled on by the court below, are not preserved for appeal and should be disregarded by this Court.....16

VII. The circuit court had subject matter jurisdiction to dismiss Holmes' Notice of Appeal and Request for Pre-litigation Mediation because the Notice of Appeal and Request for Pre-Litigation Mediation that Holmes filed with the circuit court did not meet the applicable statutory requirements.....17

Conclusion.....19

TABLE OF AUTHORITIES

CASES

Donevant v. Town of Surfside Beach, 414 S.C. 396, 414-415, 778 S.E.2d 320, 330 (Ct. App. 2015).....11

Elam v. S.C. DOT, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004).....17

Flateau v. Harrelson, 355 S.C. 197, 201-03, 584 S.E.2d 413, 415-16 (Ct. App. 2003).....7

Grimsley v. S.C. Law Enforcement Div., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012).....7

Newton v. Zoning Bd. of Appeals for Beaufort County, 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011).....10

Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006).....13, 16

Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008).....17

Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).....13

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006).....9, 10

Sutton v. Catawba Power Co., 101 S.C. 154, 157, 85 S.E. 409, 410 (1915).....11

STATUTES

S. C. Code § 6-29-820.....6, 7, 8, 9, 10, 11, 12, 17, 18

S. C. Code § 6-29-825.....6, 7, 8, 9, 11, 18

OTHER

S.C. Const. art. V, § 11.....17

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court correctly dismissed Appellant's Notice of Appeal and Request for Pre-Litigation Mediation of the Board of Zoning Appeals decision, when the Appellant, is not, and does not contend that she is, the property owner whose land is the subject of the decision of the Board of Zoning Appeals and the clear and unambiguous language of South Carolina Code Section 6-29-825(B)(2) only allows the owner of the property that is the subject of a board of zoning appeals appeal to appeal a decision of a board of zoning appeals by filing a notice of appeal and request for pre-litigation mediation.

II. As an additional affirming ground, whether Appellant's Notice of Appeal and Request for Pre-Litigation Mediation should have been dismissed because Appellant failed to file a petition setting forth plainly, fully, and distinctly why the Board of Zoning Appeals decision is contrary to law.

III. Whether circuit court correctly enforced the express requirements of South Carolina statutory law providing that only the property owner whose land is the subject of a board of zoning appeals decision can initiate an appeal by filing a notice of appeal and request for pre-litigation mediation, when Appellant presented unsupported arguments that South Carolina public policy is contrary to the express language of the applicable South Carolina statutes.

IV. Whether the circuit court correctly found that Appellant's arguments that a circuit court decision was wrongfully rendered were moot when the circuit court had rescinded the challenged decision.

V. Whether the circuit court correctly rescinded a prior decision and correctly rejected Appellant's arguments as to any wrongdoing with respect to the prior decision when there was no basis for finding any wrongdoing, fraud on the court, or prejudice and Appellant's arguments were based upon unsupported allegations of improper ex-parte communications, unsupported allegations of wrongful activity by Respondents' counsel and the circuit court, and incorrect allegations of prejudice.

VI. Whether Appellant's arguments with respect to the zoning administrator's decision, which were not presented to or ruled on by the court below, are preserved for appeal.

VII. Whether the circuit court had subject matter jurisdiction to dismiss Appellant's Notice of Appeal and Request for Pre-litigation Mediation when the Notice of

Appeal and Request for Pre-Litigation Mediation that Appellant filed with the circuit court did not meet the applicable statutory requirements.

STATEMENT OF THE CASE

On February 9, 2015 Appellant John Doe ("Appellant" or "Cynthia Holmes" or "Holmes")[1] filed a "Notice of Appeal and Request for Pre-Litigation Mediation." **(Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015).** The Notice of Appeal and Request for Pre-Litigation Mediation stated, in total, as follows:

> Pursuant to South Carolina statutory and case law, plaintiff respectfully requests permission to proceed under the current caption anonymously as John Doe regarding the BZA appeal of Permit Number 2014-2899 for 1607 Poe Avenue, Sullivans Island (SI), SC. In accordance with South Carolina Code, Section 6-29-825, notice of appeal and request for pre-litigation mediation is hereby timely filed.

(Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015). The Notice of Appeal and Request for Pre-Litigation Mediation was signed as J. Doe and gave the address "2061 Middle St. S.I., SC 29482-0187." **(Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015).** In response, Respondents filed and served a Motion to Dismiss. **(Motion to Dismiss, filed March 9, 2015).** The Motion to Dismiss was served on March 5, 2015 on "John Doe, pro se 2061 Middle Street Sullivans Island, SC 29482-0187," the address provided under the signature on the J. Doe signature on the Notice of Appeal and Request for Pre-Litigation Mediation. **(Motion to Dismiss Certificate of Service); (Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015).**

---

[1] Cynthia Holmes appeared as a pro se litigant at the hearing on September 2, 2015. **(September 2, 2015 Hr'g Tr. pp. 1-9).**

On April 7, 2015 the circuit court held a hearing on Respondents Motion to Dismiss. Appellant was not present at the hearing and no one appeared on Appellant's behalf; the Court confirmed with the Non-Jury Docket Coordinator that Appellant was sent notice of the hearing at the address listed for J. Doe on the Notice of Appeal and Request for Pre-Litigation Mediation, 2061 Middle Street. S.I., SC 29482-0187; and granted Respondents' Motion to Dismiss. **(Order filed April 29, 2015 (rescinded by Form 4 Order dated May 6, 2015)); <u>see also</u> (Form 4 Order dated April 10, 2015 (rescinded by Form 4 Order dated May 6, 2015)).**

After the hearing and after submission of a proposed order, Respondents' counsel's office was notified by the United States Post Office on Sullivan's Island that the mail being sent to the address on the Notice of Appeal and Request for Pre-Litigation Mediation had not been delivered to any particular person. **(Correspondence dated April 30, 2015, copy filed September 30, 2015).** Respondents' counsel sent a letter dated April 30, 2015 to Judge Dennis fully informing the court of the situation:

> On April 7, 2015, the Court had a hearing on Defendants/Respondents' Motion to Dismiss this matter. No one appeared on behalf of Plaintiff/Appellant John Doe. The Court inquired with the clerk as to whether notice of the hearing was sent to Plaintiff/Appellant John Doe. The Clerk confirmed that notice was sent to the address on the Notice of Appeal and Request for Pre-Litigation Mediation. (John Doe, 2061 Middle Street, S.I., SC 29482-0187). Your Honor granted the motion, asked our office to prepare a formal order, and later entered a Form 4 order granting the motion.
>
> On April 21, 2015, our office sent the Court and Plaintiff/Appellant John Doe a proposed order via U.S. Mail. Since sending that proposed order our office has been contacted by the U.S. Post Office on Sullivan's Island. The Post Office has informed us that the mail being sent to John Doe by both the clerk's office and our office has not been reaching any particular recipient or post office box. Our office confirmed the address on the Notice of Appeal and Request for Pre-Litigation Mediation. However, it appears additional information was included in the civil action cover sheet (J. Doe, 2061 Middle Street, *PO Box 187,* Sull. Isd. , SC 29482-0187). Our office

> has requested that the mail from the Court and our office to John Doe at 2061 Middle Street, Sullivan's Island, SC be placed in PO Box 187.
>
> I wanted to bring this to the Court's attention before any formal order was entered in that matter. I have also contacted the clerk's office to inform them that it appears John Doe may not have received notice of the hearing.

By Form 4 Order filed May 6, 2015, the circuit court rescinded the Form 4 Order and formal Order granting Respondents' Motion to Dismiss and ordered that the case be reopened for rehearing of the Motion to Dismiss. **(Form 4 Order, filed May 6, 2015).** Holmes filed Rule 59(e) Motions on May 7, 2015 and June 19, 2015. **(Notice of Motion and Rule 59(e), SCRCP, Motion, filed on May 7, 2015); (Notice of Motion and Rule 59(e), SCRCP, Motion, filed on June 19, 2015).**

On September 2, 2015, the circuit court held a hearing on Respondent's Motion to Dismiss. See **(September 2, 2015 Hr'g Tr. p. 1)**. Holmes appeared as a *pro se* litigant. **(September 2, 2015 Hr'g Tr. p. 1).** After hearing arguments on the Motion to Dismiss, the lower court granted the Motion to Dismiss; dismissed the Appeal and Request for Pre-Litigation Mediation; and found that Holmes' two Rule 59(e) Motions were moot. **(Order filed September 23, 2015);** see also, **(Order filed September 29, 2015); (Form 4 Order, filed September 11, 2015).**[2]

Cynthia Holmes then filed a Notice of Appeal, purporting to appeal "the order of the Honorable R. Markley Dennis, Jr., entered September 23, 2015." **(Notice of Appeal, file at the Court of Appeals November 5, 2015).** This appeal followed.

---

[2] Holmes also filed a Notice of Motion and Motion for Sanctions as to Defendants' Counsel on October 14, 2015 and an additional Notice of Motion and Rule 59 (e), SCRCP, Motion on October 21, 2015. See **(Notice of Motion and Motion for Sanctions as to Defendants' Counsel, filed on October 14, 2015); (Notice of Motion and Rule 59 (e), SCRCP, Motion, filed on October 21, 2015).**

FACTS

Cynthia Holmes, proceeding as a *pro se* litigant under the pseudonym John Doe, filed a Notice of Appeal and Request for Pre-Litigation Mediation purporting to seek mediation of a Town of Sullivan's Island Board of Zoning Appeals ("BZA") decision. The Notice of Appeal and Request for Pre-Litigation Mediation stated, in total, as follows:

> Pursuant to South Carolina statutory and case law, plaintiff respectfully requests permission to proceed under the current caption anonymously as John Doe regarding the BZA appeal of Permit Number 2014-2899 for 1607 Poe Avenue, Sullivans Island (SI), SC. In accordance with South Carolina Code, Section 6-29-825, notice of appeal and request for pre-litigation mediation is hereby timely filed.

(Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015). The BZA decision referred to in Holmes' Notice of Appeal and Request for Pre-Litigation Mediation concerned a property located at 1607 Poe Avenue, Sullivan's Island, S.C. **(Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015).** Holmes did not allege or assert that she is owner of that property. In fact, the only other address included in the Notice of Appeal and Request for Pre-Litigation Mediation was the address given for J. Doe at "2061 Middle St. S.I., SC 29482-0187." **(Notice of Appeal and Request for Pre-Litigation Mediation, filed February 9, 2015).** At the September 2, 2015 hearing on Respondents' Motion to Dismiss the Notice of Appeal and Request for Pre-Litigation Mediation, Holmes confirmed to the circuit court that she is not the owner of 1607 Poe Avenue, Sullivan's Island, S.C.[3] See **(September 2, 2015 Hr'g Tr. 8:4-6)**

[3] In several filings, Holmes has asserted that she is the owner of property *adjacent* to 1607 Poe Avenue, Sullivan's Island, S.C. See **(Notice of Motion and Rule 59(e), SCRCP, Motion, filed on May 7, 2015, p. 4); (Notice of Motion and Rule 59(e), SCRCP, Motion, filed on June 19, 2015, p. 4).**

("THE COURT: . . . you are not the property owner of this particular lot, correct? . . . MS. HOLMES: I'm not the property owner of that lot. . . .").

By order dated September 23, 2015, the circuit court granted Respondents' Motion to Dismiss. **(Order filed September 23, 2015);** see also, **(Form 4 Order, filed September 11, 2015).** In the Order, the circuit court explained that because Holmes's Notion of Appeal and Request for Pre-Litigation Mediation did not meet the requirements of South Carolina Code Section 6-29-820(B), which only allows a property owner whose land is the subject of a decision of the board zoning appeals to appeal the decision by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825 it must be dismissed:

> . . . the Notice of Appeal and Request for Pre-Litigation Mediation does not include any information as to the identity of the Plaintiff/Appellant except an address, which is not the address that was the subject of the BZA appeal referenced in the Notice of Appeal and Request for Pre-Litigation Mediation. Therefore, the Notice of Appeal and Request for Pre-Litigation Mediation is insufficient to satisfy the statutory requirement in S.C. CODE § 6-29-820(B)(2) for initiating an appeal of a decision of a board of zoning appeals decision by filing a notice of appeal accompanied by a request for litigation mediation. Additionally, it is worth noting that Plaintiff/Appellant confirmed at the hearing that she, the *pro se* litigant, is not the owner of the property that was the subject of the BZA decision.

(Order filed September 23, 2015). This appeal followed.

STANDARD OF REVIEW

Under South Carolina Rule Civil Procedure 74, proceedings on appeal of a board of zoning appeals decision to the circuit court shall be governed by the South Carolina Rules of Civil Procedure. On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause

of action in the pleadings filed with the court. See Grimsley v. S.C. Law Enforcement Div., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); Flateau v. Harrelson, 355 S.C. 197, 201-03, 584 S.E.2d 413, 415-16 (Ct. App. 2003). The Court is required to view the allegations in the plaintiff's filing in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case. Grimsley, 396 S.C. at 281, 721 S.E.2d at 426. The Court may sustain the dismissal when the facts alleged in the plaintiff's pleading do not support relief under any theory of law. Flateau, 355 S.C. at 202, 584 S.E.2d at 416.

ARGUMENT

I. The trial court correctly dismissed Appellant's Notice of Appeal and Request for Pre-Litigation Mediation of the Board of Zoning Appeals decision, because the Appellant, is not, and does not contend that she is, the property owner whose land is the subject of the decision of the Board of Zoning Appeals and the clear and unambiguous language of South Carolina Code Section 6-29-825(B)(2) only allows the owner of the property that is the subject of a board of zoning appeals appeal to appeal a decision of a board of zoning appeals by filing a notice of appeal and request for pre-litigation mediation.

Holmes purported to appeal the BZA decision by filing a Notice of Appeal and Request for Pre-Litigation Mediation. South Carolina Code Section 6-29-820 provides the statutory requirements for the initiation an appeal from a board of zoning appeals decision. See S.C. Code § 6-29-820. Section 6-29-820 provides as follows:

> (A) A person who may have a ***substantial interest*** in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

> (B) A property owner ***whose land is the subject of a decision of the board of appeals*** may appeal either:
>
> (1) as provided in subsection (A); or
>
> (2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.
>
> Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.
>
> (C) Any filing of an appeal from a particular board of appeals decision pursuant to the provisions of this chapter must be given a single docket number, and the appellant must be assessed only one filing fee pursuant to Section 8-21-310(11)(a).

S.C. Code § 6-29-820 (double emphasis added). The language of the statute is clear. A person (who is not the owner of the land which is the subject of the board of zoning appeals decision) with a substantial interest in a decision of a board of zoning appeals may initiate an appeal by one method: by filing within thirty days "a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law." S.C. Code § 6-29-825(A). Here, Holmes did not file such a petition. In fact, she did not file any petition at all. See Arguments, Sec. II, *infra*.

The second method of initiating an appeal of a decision of board of zoning appeals is by filing, within thirty days of the mailing of the board of zoning appeals decision, "a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825." S.C. Code § 6-29-820(B)(2). However, this method is only available to ***"[a] property owner whose land is the subject of a decision of the board of appeals . . ."*** Id. (double emphasis added).

Here, the Notice of Appeal and Request for Pre-Litigation Mediation did not include any information as to the identity of the Appellant except an address, which is not

the address that was the subject of the BZA appeal referenced in the Notice of Appeal and Request for Pre-Litigation Mediation. Moreover, Holmes specifically confirmed to the circuit court and that she is not the owner of the property that was the subject of the BZA decision. See **(September 2, 2015 Hr'g Tr. 8:4-6)** ("THE COURT: . . . you are not the property owner of this particular lot, correct? . . . MS. HOLMES: I'm not the property owner of that lot. . . ."). Therefore, she does not meet the statutory prerequisite for appealing a decision of the BZA by filing a notice of appeal and request for pre-litigation mediation and the circuit court properly dismissed the appeal on that basis.

Presumably, Holmes argues that the owner of any property, that said owner asserts is affected by the decision of the board of zoning appeals, has the right to file an appeal requiring mediation by the landowner and the municipality. Such an argument is contrary to the language of the statute, which specifically distinguishes between a "person who may have a substantial interest in any decision of the board of appeals" and a "property owner whose land is the subject of a decision of the board of appeals."[4] S.C. Code § 6-29-820.

Because Holmes' argument is contrary to the plain language of the statute, it should be rejected and the circuit court affirmed. "It is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the Legislature." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606

[4] It is worth noting that South Carolina Code Section 6-29-825 presupposes that pursuant to Section 820, only the owner of the property which is the subject of a board of zoning appeals decision may appeal by requesting mediation. See S.C. Code § 6-29-825(A) ("If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of appeals.")

(2006) (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987)). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Id. (citing Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)).

Therefore, the Court should affirm the circuit court because it correctly applied the clear and unambiguous meaning of Section 6-29-820—only the owner of the land which is the subject of a board of zoning appeals appeal can appeal to the circuit court by filing a request for pre-litigation mediation.

II. As an additional affirming ground, Holmes' Notice of Appeal and Request for Pre-Litigation Mediation should have been dismissed because she failed to file a petition setting forth plainly, fully, and distinctly why the Board of Zoning Appeals decision is contrary to law.

As noted above, one does not have to be an owner of the property that is the subject of an appeal in order to appeal a ruling. The South Carolina Code provides that a person who may have a substantial interest in any decision of the board of appeals may appeal from a decision of the board to the circuit court by, within thirty days of the mailing of the decision of the board, "filing with the clerk of the court ***a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law***." S.C. Code § 6-29-820(A) (double emphasis added). Compliance with the statutory requirement of filing a petition setting forth the reason(s) why the decision is contrary to law is significant because it is this action, required by statute, that preserves an appellant's issues for appeal. See Newton v. Zoning Bd. of Appeals for Beaufort County, 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) (holding that "the sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written

petition and file that petition with the circuit court before the thirty-day filing period expires."). Appellant did not file any petition with her Notice of Appeal and Request for Pre-Litigation Mediation, so no issues have been preserved for her appeal and the circuit court should be affirmed for the this alternative reason for dismissal.

To be clear, if Holmes is indeed a person with a substantial interest in the board of zoning appeals decision, as she appears to assert, then she was not without the right to appeal the decision of the BZA. See S.C. Code § 6-29-825(A); See **(September 2, 2015 Hr'g Tr. 7:22-23)** (Holmes asserting that while she is not the owner of the property that is the subject of the BZA decision, she is the "owner of property that is affected by the decision"). Pursuant to Section 6-29-820(A), she could have filed a petition stating the reasons the board of zoning appeals decision was wrong as matter of law. See Id. However, she did not file the required petition and the time has long passed. Id. Therefore, the Court should affirm the circuit court's order dismissing the appeal on the additional ground that Holmes, who asserts that she is "affected" by the decision, failed to file a petition as required under the statute.

III. The circuit court correctly enforced the express requirements of South Carolina statutory law providing that only the property owner whose land is the subject of a board of zoning appeals decision can initiate an appeal by filing a notice of appeal and request for pre-litigation mediation, instead of adopting Appellant's unsupported argument that South Carolina public policy is contrary to the express language of the applicable South Carolina statutes.

The public policy of South Carolina comes from the General Assembly. See e.g. Sutton v. Catawba Power Co., 101 S.C. 154, 157, 85 S.E. 409, 410 (1915) (". . . indeed, the legislature has the right to fix public policy."); Donevant v. Town of Surfside Beach, 414 S.C. 396, 414-415, 778 S.E.2d 320, 330 (Ct. App. 2015) (stating that in context of the at will employment doctrine that the public policy of this state, should emanate from the

General Assembly). In this case, the General Assembly has specifically enumerated who may appeal a decision of a board of zoning appeals using the pre-litigation mediation process. Because the plain language of the statute does not permit Cynthia Holmes, as a person who does not allege, and in fact concedes, that she is not the owner of the land that was the subject of the BZA decision, to appeal by filing a notice of appeal and request for pre-litigation mediation, Holmes' "public policy" argument should be rejected in favor of the clear statutory language.

Additionally, it is worth noting that Holmes' position (which is contrary to the plain terms of the statute) could have a disastrous impact on landowners and municipalities alike. Under Holmes' argument, any person, group, property owner that is "affected" by a decision of a board of zoning appeal would be able to appeal a decision and require mediation, simply by filing a one-page document that does not explain why the decision was incorrect. The General Assembly clearly did not envision such a process and it expressly required those who assert they have a substantial interest in any decision of the board of appeals to appeal by filing a "petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law." S.C. Code § 6-29-820(A).

IV. The circuit court correctly found that Holmes' arguments that the circuit court Order filed April 29, 2015 and Form 4 Order filed April 10, 2015 were wrongfully entered were moot because the circuit court had rescinded those orders.

Holmes' first and second issues on appeal are moot; the Court should affirm the circuit court's order finding them moot; and the Court should disregard her arguments. Holmes' first and second issues on appeal concern her arguments that the Order filed April 29, 2015 and Form 4 Order filed April 10, 2015 were wrongfully entered because Holmes did not receive the notice of the hearing that was sent. Her arguments on appeal (and at

the lower court) ignore that both the Order and Form 4 Order were rescinded soon after Respondents' counsel and the court became aware that the mail being sent to the address included on the Notice of Appeal and Request for Pre-Litigation Mediation had not been received. See **(Form 4 Order filed May 6, 2015); (Correspondence dated April 30, 2015, copy filed September 30, 2015).**

Holmes' arguments are moot because the Order and Form 4 Order were rescinded and the Motion to Dismiss restored to the docket and set for hearing at which she was able to present any arguments she wished in opposition to the Motion to Dismiss. See e.g., Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court."). There would be no practical legal effect to a ruling that the Order and Form 4 Order were wrongfully entered because said Order and Form 4 Order were rescinded.

Holmes presented these arguments to the circuit court via two Rule 59(e) Motions, both of which the circuit court decided were moot.[5] See **(Notice of Motion and Rule 59(e), SCRCP, Motion, filed on May 7, 2015); (Notice of Motion and Rule 59(e), SCRCP, Motion, filed on June 19, 2015); (Order, filed September 23, 2015); (Order, filed September 29, 2015); (Form 4 Order, filed September 11, 2015).** The two Rule 59(e) Motions and Holmes' arguments on appeal are moot because a ruling on her favor

[5] To the extent Holmes asserts that her issues on appeal are broader than those raised in these two Rule 59(e), the issues would not be preserved for appeal. See e.g. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court.").

on those motion would have had no practical legal effect. Holmes argues that her arguments are not moot. She relies upon cases involving motions for sanctions for discovery abuse, which are clearly distinguishable from her two Rule 59(e) Motions. Additionally, as explained above, her arguments in this case are indeed moot, because the order she challenged was rescinded.

Therefore, the Court should find that Holmes' first and second issues on appeal are moot; affirm the circuit court's order finding her two Rule 59(e) Motions moot.

V. The circuit court correctly rescinded the Order filed April 29, 2015 and Form 4 Order filed April 10, 2015 and correctly rejected Appellant's arguments as to any wrongdoing with respect to the entry of the Order filed April 29, 2015 and Form 4 Order filed April 10, 2015, because there was no basis for finding any wrongdoing, fraud on the court, or prejudice and Appellant's arguments were based upon unsupported allegations of improper ex-parte communications, unsupported allegations of wrongful activity by Respondents' counsel and the circuit court, and incorrect allegations of prejudice.

To the extent the Court considers Holmes' arguments that the Order filed April 29, 2015 and Form 4 Order filed April 10, 2015 were wrongfully entered, which are moot, the record is clear. Notices were sent by the circuit court and Respondents to the address provided on Notice of Appeal and Request for Pre-Litigation Mediation. **(Correspondence dated April 30, 2015, copy filed September 30, 2015); (Order filed April 29, 2015 (rescinded by Form 4 Order dated May 6, 2015).** The circuit court specifically confirmed that notice was sent to that address at the hearing on April 7, 2015, when no one appeared for John Doe. **(Correspondence dated April 30, 2015, copy filed September 30, 2015); (Order filed April 29, 2015 (rescinded by Form 4 Order dated May 6, 2015).** There was no improper ex-parte communication and nothing suggesting that Respondents' counsel induced the court to enter an order it should not enter. In fact,

quite the opposite is true. Upon learning that the notices and other documents being served on John Doe were not being received, Respondents' counsel informed the circuit court via letter. **(Correspondence dated April 30, 2015, copy filed September 30, 2015).** As stated in the letter, Respondents' counsel also informed the clerk's office. **(Correspondence dated April 30, 2015, copy filed September 30, 2015).** The letter speaks for itself and illustrates that Respondents counsel was concerned that Appellant did not receive notice of the hearing and wanted to make sure the court was aware the problem:

> On April 7, 2015, the Court had a hearing on Defendants/Respondents' Motion to Dismiss this matter. No one appeared on behalf of Plaintiff/Appellant John Doe. The Court inquired with the clerk as to whether notice of the hearing was sent to Plaintiff/Appellant John Doe. The Clerk confirmed that notice was sent to the address on the Notice of Appeal and Request for Pre-Litigation Mediation. (John Doe, 2061 Middle Street, S.I., SC 29482-0187). Your Honor granted the motion, asked our office to prepare a formal order, and later entered a Form 4 order granting the motion.
>
> On April 21, 2015, our office sent the Court and Plaintiff/Appellant John Doe a proposed order via U.S. Mail. Since sending that proposed order our office has been contacted by the U.S. Post Office on Sullivan's Island. The Post Office has informed us that the mail being sent to John Doe by both the clerk's office and our office has not been reaching any particular recipient or post office box. Our office confirmed the address on the Notice of Appeal and Request for Pre-Litigation Mediation. However, it appears additional information was included in the civil action cover sheet (J. Doe, 2061 Middle Street, *PO Box 187,* Sull. Isd., SC 29482-0187). Our office has requested that the mail from the Court and our office to John Doe at 2061 Middle Street, Sullivan's Island, SC be placed in PO Box 187.
>
> I wanted to bring this to the Court's attention before any formal order was entered in that matter. I have also contacted the clerk's office to inform them that it appears John Doe may not have received notice of the hearing.

(Correspondence dated April 30, 2015, copy filed September 30, 2015). In response to the letter informing the court of the issue, the circuit court rescinded the Form 4 Order and formal Order granting the Motion to Dismiss and ordered that the case be reopened for rehearing of the Motion to Dismiss. **(Form 4 Order, filed May 6, 2015).**

In addition to the fact that it is clear there was no wrongdoing or fraud on the court, as has been explained, Holmes was not prejudiced. After rescinding the Order and Form 4 Order previously entered, the circuit court restored the Motion to Dismiss to the roster and held a hearing on September 2, 2015. **(Order, filed September 23, 2015); (September 2, 2015 Hr'g Tr. p. 1).** Holmes appeared as a *pro se* litigant and made arguments in opposition to the Motion to Dismiss. **(September 2, 2015 Hr'g Tr. p. 1).** Holmes received notice of the hearing and an opportunity to oppose the Motion to Dismiss.

Therefore, for the reasons above, Holmes' first two arguments on appeal should be rejected and the circuit court decision affirmed.

VI. Holmes' arguments with respect to the zoning administrator's decision, which were not presented to or ruled on by the court below, are not preserved for appeal and should be disregarded by this Court.

Cynthia Holmes' sixth issue on appeal and corresponding section in her brief concern her alleged "substantive rights" and the zoning administrator's actions. Holmes' arguments have no support in the record and should be disregarded by the Court. As stated above, Holmes did not file any petition regarding the BZA decision or any decision of the zoning administrator, which was on appeal to the BZA. In other words, Holmes did not preserve any complaint she has with the zoning administrator or the BZA decision for this appeal because she did not file a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law, as required by the statute. See Argument, Sec. II, *supra.*

Additionally, the issues raised in Holmes' sixth issue on appeal were not raised to and ruled upon by the circuit court and are not preserved for review. See e.g. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d

902, 919 (Ct. App. 2006) ("In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court."); Elam v. S.C. DOT, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004).

VII. The circuit court had subject matter jurisdiction to dismiss Holmes' Notice of Appeal and Request for Pre-litigation Mediation because the Notice of Appeal and Request for Pre-Litigation Mediation that Holmes filed with the circuit court did not meet the applicable statutory requirements.

Holmes argues that the circuit court did not have jurisdiction to dismiss the Notice of Appeal and Request for Pre- Litigation Mediation that she filed with the circuit court.[6] Holmes' argument is contrary to the plain meaning of the statue governing the appeal of board of zoning appeals decisions. See S.C. Code § 6-29-820. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. See e.g., Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (stating, in the context of an appeal to the circuit court from the workers compensation commission, the general proposition that subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong). South Carolina circuit courts are vested with "such appellate jurisdiction as provided by law." See S.C. Const. art. V, § 11. Here, the statute clearly vest the circuit court with appellate jurisdiction—the circuit court has jurisdiction to hear all appeals from boards of zoning appeals, including those appeals that are initiated by the filing of a notice of appeal and request for pre-litigation mediation by a property owner of the land that was the subject of the board of zoning appeals decision.

[6] If Holmes were correct and the circuit court did not have jurisdiction over the matter, then the circuit court should have dismissed the appeal for the additional reason that it lacked jurisdiction. If this Court were to reach such a conclusion, it should order the appeal dismissed for the same reason.

South Carolina Code Section 6-29-820 plainly requires that appeals from a board of zoning appeals be filed in the circuit court. See S.C. Code § 6-29-820. Section 820's requirement applies to all appeals, including appeals by a property owner whose land is the subject of a decision of the board of appeals that can be initiated by the filing of a notice of appeal and request for pre-litigation mediation. See S.C. Code § 6-29-820.

Holmes appears to argue that the circuit court had no jurisdiction over the Notice of Appeal and Request for Pre-Litigation Mediation because South Carolina Code Section 6-29-825(F) provides that after an unsuccessful mediation process a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. However, Holmes misreads the statute, which specifically provides that a notice of appeal and request for pre-litigation mediation must be initiated in the circuit court. It is also worth noting that Section 6-29-825 contemplates jurisdiction with the circuit court upon the filing of a notice of appeal and request for pre-litigation mediation in that it provides that "[a] person who is not the owner of the property may petition to intervene as a party, and this ***motion*** must be granted if the person has a substantial interest in the decision of the board of appeals." See S.C. Code § 6-29-825(A).

Therefore, for the reasons stated above, jurisdiction was proper in the circuit court. The circuit court correctly found that Holmes' Notice of Appeal and Request for Pre-Litigation Mediation did not meet the statutory requirements for initiating an appeal under that process. The circuit court had subject matter jurisdiction to consider appeals from boards of zoning appeals, and thus had jurisdiction to enter the order dismissing the appeal when the appeal did not satisfy the statutory requirements.

CONCLUSION

Therefore, for the reasons explained above, the court should affirm the circuit court's Order dated September 23, 2015 in full.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA

G. Trenholm Walker (S.C. Bar #5777)
John P. Linton, Jr. (S.C. Bar #79130)
P.O. Drawer 22247 (29413-2247)
16 Charlotte Street
Charleston, SC 29403
Phone: (843) 727-2200
Email: gtw@p-tw.com; jpl@p-tw.com

February 16, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 18 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2015-002297

John Doe, Appellant,

v.

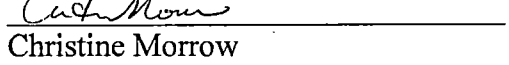
Board of Zoning Appeals (BZA) and Town of Sullivan's Island (S.I.), S.I. Zoning Administrator, and S.I. Building Dept., Individually and in Official Capacity, Respondents

---

PROOF OF SERVICE

I certify that I served Initial Brief of Respondents and Respondents' Designation of Matter via United States Mail, First Class, prepaid, to the Appellant at the address below on February 16, 2016:

John Doe
Cynthia Holmes
P.O. Box 187
Sullivan's Island, SC 29482-0187



Christine Morrow
Paralegal

PRATT-THOMAS | WALKER
ATTORNEYS AT LAW
PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200
FAX: 843.727.2238

WWW.P-TW.COM

JOHN P. LINTON, JR.
Email: jpl@p-tw.com
Direct: (843) 727-2252

February 16, 2016

RECEIVED
FEB 18 2016
SC Court of Appeals

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

Re: John Doe, Appellant, v. Board of Zoning Appeals (BZA) and Town of Sullivan's Island (S.I.), S.I. Zoning Administrator, and S.I. Building Dept., Individually and in Official Capacity, Respondents
Appellate Case No. 2015-002297

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal in the above referenced matter.

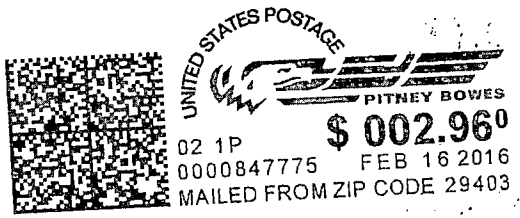
Also enclosed is a Proof of Service upon the Appellant.

Thank you for your consideration.

Sincerely,
PRATT-THOMAS WALKER, P.A.

Christine A. Morrow
Paralegal to John P. Linton, Jr.

JPL/cam
Enclosures
C: John Doe (w/encl.)
Cynthia Holmes
P.O. Box 187
Sullivan's Island, SC 29482-0187



PRATT-THOMAS | WALKER
ATTORNEYS AT LAW
PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247

RECEIVED
FEB 18 2016
SC Court of Appeals

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