THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE DEANDREA GIST BENJAMIN
CIRCUIT COURT JUDGE

Appellate Case No. 2016-001871

Opinion No. 2016-UP-261 (S.C. Ct. App., filed June 8, 2016)

Samuel T. Brick

PETITIONER,

versus

Richland County Planning Commission and
Fairways Development, LLC, Intervenor **RESPONDENTS**

REPLY TO RETURN OF INTERVENOR TO PETITION FOR WRIT OF CERTIORI

Samuel T. Brick, Pro Se, Appellant and Petitioner
124 Runneymede Drive
Columbia, South Carolina 29016
803 546 4895
sbrick2011@gmail.com
Pro Se

INDEX

STATEMENT OF THE CASE

The statement of the case has been provided in Petitioner's Request for Certiorari and the Intervenor's Return to the petition as well as in several other filings. Petitioner filed his motion for this Court to grant certiorari on September 13, 2016. Intervenor Fairways Development, LLC filed a Return to the Petition on October 13, 2016, received by Petitioner on October 18, 2016. As of October 18, 2016, the South Carolina Appellate Case Management System has no record of Respondent Richland County Planning Commission filing a return in the matter or of filing a request for further time to file such a return.

Petitioner replies to three issues raised by Intervenor's Return below.

ARGUMENT IN REPLY

1. *Reply to Argument that this Honorable Court Has No Reason to Exercise its Discretion and Grant Certiorari in this Matter.*

Petitioner argued in his Petition for Certiorari that the Court of Appeals is erroneously applying this Court's precedent in *Spanish Wells Prop. Owners Ass'n v. Bd. of Adjustment of Town of Hilton Head Island*, 295 S.C. 67, 376 S.E.2d 160 (1988) (hereinafter referred to as Spanish Wells). Intervenor seeks this Court to accept the reasoning of the vacated[1] decision of *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008). In vacating the Friends Court of Appeals opinion, this Court said it granted petitioner's request for a writ of certiorari (having done so in 2008). The decision was vacated due to the Friends parties arriving at an agreement making the matter moot. The issue as to whether the requirement for joinder as dictated in Spanish Wells is jurisdictional rather than equitable as being based on judicial economy that was before Friends still has not been determined by this Court and begs clarification. This is an important decision that affects not only petitioner but numerous other

[1] Decision vacated at 384 S.C. 438, 682 S.E.2d 488 (2009).

persons involved with appeals to land development issues. Petitioner argues the Court of Appeals fails to follow the spirit of Spanish Wells and it decision by rejecting petitioner's appeal based on a mandatory time period for joinder. The circuit court provided Spanish Wells a period of time to join the permittee well beyond the jurisdictional requirement for bringing the matter to the circuit court. Spanish Wells declined to join stating it was unnecessary to do so thereby making it easy for the Court to determine the issue of judicial economy.

Rule 268(d)(2), SCACR, as cited in the Court of Appeals decision, relates to memorandum opinions and unpublished orders. Paragraph (d)(1) of such Rule relates to an opinion that does not appear in a reporter. The Court of Appeals action in this matter is not a memorandum opinion or an unpublished order. As to Intervenor's contention that the Court of Appeals Decision is not published and thus is unimportant, Petitioner notes that the opinion is published and available in on-line legal research for citation as legal authority in South Carolina[2]. Such legal research is available not just to the legal community but to the public at large. That is an important part of a stare decisis form of jurisprudence. The public's right to know the law and its workings are an integral part of any legal system. Surprises under the law should be minimized. If the Court of Appeals decision in this matter is allowed to stand, petitioner contends an unclear developer could lurk in the background among many options as to a proper developer until the jurisdictional period for bringing an appeal of a local governmental action to the Circuit Court has passed and then present itself as to what it contends is a necessary party. Notwithstanding that it was brought on time against the local government, as in the instant matter, the appeal would be dismissed under the Court of Appeals decision because such party was not "joined" within that period.

[2] See SC: Court of Appeals, 2016 – Goggle Scholar. This is but one internet publication that will bring up the Court of Appeals decision in this matter as a reference for stare decisis.

The Court of Appeals *per curiam* decision (a page and a half by Justice A.C. Huff, concurred in by two other Court of Appeals Justices), to which petitioner requests this Court to examine, does not address joinder as did Spanish Wells but instead relies on Rule 74, SCRCP (App. p. 2). In doing so the Court of Appeals recognized that the statutory procedure for relevant appeals controls with the exception that under Rule 74, SCRCP, notice of appeal shall be served on all parties within thirty (30) days after receipt of written notice of the judgment. Justice Huff for the Court of Appeals panel examining the matter determined that a party in such an instance includes a future litigant, whether it is a party of record, a participant in the administrative process, an entity recognized in the fact finding administrative process as a permittee or developer, or otherwise. This procedural mandate could affect numerous proceedings where litigants are directly involved in the broad application of the term "parties" under Rule 74, SCRCP. Petitioner contends this is an important matter that needs resolution especially considering the mirror provision to Rule 74, SCRCP, regarding appeals from administrative tribunals directly to the Court of Appeals or this Court, Rule 203(b)(6), SCACR,. Under such Paragraph (b)(6), notice is required "on the agency, the administrative law court (if it has been involved in the case) and ***all parties of record*** within thirty (30) days ....." (Emphasis added).

The meaning of the term "parties" as applied in the *per curiam* decision by the Court of Appeals under the guise of Rule 74, SCRCP, begs clarification. See further argument on this issue in Petitioner's motion for certiorari. (Petitioner's Motion, at pp. 18-20).

2. *Reply to Argument that the Court of Appeals Dismissal Was Based on a Failure to Join.*

Intervenor Fairways Development, LLC argues that the Court of Appeals based its decision on failure of joinder as required by Spanish Wells. The Court of Appeals did cite Spanish Wells, but not for purposes of joinder. Its citation was to support the requirement that

the permittee is a necessary party to an appeal from a planning commission. (Para 2, App. 2). The Court of Appeals ignored the findings of the administrative fact finding bodies[3] that others were the developers and instead followed the circuit court and determined Fairways to be the development permittee and accordingly a party that had to be notified of the appeal under Rule 74, SCRCP. It also ignored that Fairways had been a party to these proceedings since before and actions were taken thereon (App. p. 31) and will be bound by the Court's findings[4].

Intervenor Fairways argues that the Court of Appeals based its opinion on the Spanish Wells ruling regarding joinder. Petitioner does not argue that Spanish Wells' requirement for joinder on the basis of judicial economy is misplaced or otherwise incorrect. Petitioner argues again that Fairways' Intervention has the same effect as a joinder and that there is no specified time for such a joinder[5]. Petitioner reiterates that his interpretation of Spanish Wells is that a permittee is a necessary party to an action to revoke a development permit. Petitioner also argues that the basis for this is judicial economy, an equitable rather than jurisdictional issue. Spanish Wells recognized this in dicta by affirming the circuit court's order after stating, "The circuit court granted the motion to dismiss, but allowed Spanish Wells fifteen days leave to join

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[3] See discussion of the role of developer at Petioner's Motion, pp. 3-4.

[4] In Judge Benjamin's Order on intervention she noted petitioner's consent to the intervention (App. p. 30) but more importantly, she based her Order granting intervention on the fact that as the owner of the property at issue, Fairways has an interest in the property. (App. p. 31). That finding was based on a representation by Intervenor in its Motion to Intervene that Fairways owns the property (App. p. 111). Fairways, however, sold the portion of the property (App. pp. 263-265) that was the first phase scheduled for development (App. pp. 267-268). Fairways as of October, 2014, still owned the remaining portion of the permitted track. S.C. Code Ann.§ 6-29-1190 (1994) prohibits sales of any property being developed unless it has been approved by the county and an approved plan was recorded in the office for the recording of deeds. Appellant/Petitioner could find no record of such a recording. Fairways is now *an* owner of the property, not *the* owner of the property, an important distinction that had Judge Benjamin known of may have altered her finding that it was developer. Petitioner had no cause to examine such change of ownership based on the prohibition of change and Fairways' representations.

[5] See Petitioner's Motion at p. 19 in which he refers to the Reporter's Note regarding the last sentence in Rule 17(a) that specifically is designed to prevent forfeiture in those cases in which determination of the proper party to sue is difficult or where there is an honest mistake.

Calibogue." Had the issue been jurisdictional, the circuit court's order would have been incorrect[6]. As it was, Spanish Wells decided not to join instead appealing the order and losing.

3. *Reply to Argument that the Issue of Collateral Estoppel Was not Preserved for Review and Lacks Merit.*

Intervenor Fairways Development, LLC's return does not address the Court of Appeals application of *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1988). Petitioner addressed the Wilder issue in his petition. See Page 14 of Petitioner's motion with reference to the Wilder decision's citation of and adoption of the *Hubbard v. Rowe*, 192 S.C. 12, pp.19-20, 5 S.E.2d 187 (1939) reasoning that when there is a specific result contrary to what was being offered, it is unnecessary to make a post-trial motion to preserve the issue. The instant matter had such a specific denial of the matter with the circuit court's determination that Fairways was the development permittee that Spanish Wells requires to be joined. That determination is based on an interest in the proceedings which was litigated in the collateral matter with an opposite result.

Intervenor in its Return addressed application of the collateral estopple issue. Petitioner only points out a few matters in reply, having previously argued this in his petition and throughout his appeal. Intervenor speaks to apples and oranges with the idea that the two cases were so different as to negate an application of the cases being collateral. Intervenor refers to Judge Alison Lee's action on the FOIA case (App. pp. 37-38) in which it states she granted Fairways Motion to Dismiss because there is no FOIA violation alleged against it. Judge Lee, however only dismissed the complaint, "to the extent that any FOIA violation is alleged against Fairways in the original complaint..." (App., p. 38). Petitioner. Plaintiff in the FOIA case, joined Fairways for purposes other than FOIA violations. Petitioner understands that FOIA does

[6] See Petitioner's argument regarding this in his Motion for Writ of Certiorari at pages 8-13. It is obvious that the circuit court's action on the Spanish Wells appeal was well past the thirty day requirement required to take the appeal to the circuit court.

not apply against private individuals and joined Fairways because there was a jurisdiction requirement to do so (as opposed to joinder for purposes of judicial economy as in the instant matter). When FOIA relief in the nature of declaratory judgment is requested, any party who has an interest which would be affected by the declaration is required to be made a party[7]. Judge Lee understood this in her denial of sanctions where she stated,

> "At the hearing, Plaintiff explained that Fairways was named as a party pursuant to Rule 19, SCRCP or Rule 20, SCRCP, and the Declaratory Judgment Act. It is clear that Plaintiff's purpose in naming Fairways in this action was not to delay the project but was instead based upon Fairways as a party in interest." (App. p. 37).

After Judge Lee's action providing only a partial dismissal, Fairways continued to seek sanctions and dismissal of that part of the complaint which involved its participation and interest in the permit process. Judge G. Thomas Cooper heard and granted Fairways' subsequent motion for total dismissal. He denied sanctions. Petitioner prepared and filed his appeal to the circuit court in this matter while litigating Fairways' motions for sanctions and dismissal of its inclusion to the FOIA case.

Accordingly, it was not apples and oranges. Judge Lee called it correctly and dismissed Fairways from any violations of FOIA law but not from the other aspects of the matter. The dismissal had nothing to do with violations of FOIA other than as required by the Declaratory Judgment Act for an interested party's joinder pursuant to a FOIA request for relief. The matter was collateral to the instant matter as the issue of Fairway's interest as required by joinder provisions of the Declaratory Judgment Act matter is the same as might be required for judicial economy in the instant matter. In the first case, Fairways litigated its dismissal citing lack of interest and in the subsequent case it is litigating that it was not so joined because of such interest. Petitioner argues that Fairways should be estopped from basing its dismissal of the

[7] SC Code of Laws Ann. § 15-53-80 (2014).

current matter by pleading it was not joined as an interested party. The circuit court's decision that Fairways was such an interested party that if not joined the appeal should be dismissed is a specific rejection of the collateral estopple argument that was made to her throughout the proceedings before the circuit court.

CONCLUSION

Intervenor's Return states that the Court of Appeals decision does not conflict with precedent but it does. It undercuts and throttles the equitable basis for judicial economy as required by Spanish Wells by initiating an entirely new line of litigation as to who might be interested parties in land development appeals. Under the Court of Appeals' decision an appellant from a land development matter would need to include any possible party within range of the administrative action to insure the appeal is not dismissed because of the failure to provide notice of appeal to a possible interested party.[8] The time for considering this is constrained because of the jurisdiction requirement to bring the action within thirty days of receipt of the decision. Under the Court of Appeals decision, a careful appellant would include all possible parties; i.e., all engineers, all contractors, all investors, all owners, etc. In the instant matter this might include such entities as represented by the "Longcreek Plantation Development Team" that purports to be developing the property the Development Review Team permitted. (App. p. 267). The listing of owner in that team is yet another corporation (LongCreek Development LLC) for whom the sketch plans were prepared (Longcreek Associates, LLC) (App. p. 293) and from the party who now owns the first phase of the development (SPPLA LLC or maybe SPPLA INC) (App. p. 263). Another possibility is Sustainable Design Consultants, Inc. with John

[8] Petitioner has argued consistently in its Petition and otherwise and the circuit court found that such notice was so provided Fairways, albeit by an email to its attorney, a fact ignored by the Court of Appeals. (App. p. 24). The circuit court states that although Petitioner sent a copy of the appeal to Fairways within thirty days, petitioner as appellant, failed to join Fairways within that period. (Id.)

Champoix as an officer also might be joined. John Champoix is the landscape architect for the sketch plans. (App. p. 293). John Champoix is the name on the permit (App. p. 74) so he probably should be joined individually although he obviously is no more than a scrivener in the sketch plan. The Planning Commission's findings have Mr. Ronald Johnson as "a responsible developer" of the project and he should be included. The point is this is not judicial economy. The joinder rules do not provide a specified period within which a plaintiff must make joinder. Judge Benjamin and the Court of Appeals would require it as a jurisdictional matter obviating any equitable considerations. This is not what judicial economy is all about. Your petitioner, the appellant, has made it clear he does not object to a party who presents itself as the proper developer being joined in the appeal. His action in the collateral FOIA joining Fairways matter substantiates that.

Clarification of what is meant by "parties" under Rule 74, SCRCP, as it applies to Spanish Wells joinders is important as is clarification of the *Wilder Corp. v. Wilke*, 330 S.C. 70, 49 S.E. 2d 731 (1998) as applied by the Court of Appeals. The collateral estopple matter was brought up below throughout the civil court litigation (App. pp. 8-9). The circuit court saw it and understood the issue but disregarded the premise that Fairways had insufficient interest in the matter as to be a jurisdictionally required party in the proceedings

Petitioner requests this Honorable Court to grant certiorari in order that it can examine these issues in further depth.

Respectfully submitted,

Samuel T. Brick, Petitioner, Pro Se
124 Runneymede Drive
Blythewood, SC 29016
803 546 4895
sbrick2011@gmail.com

OCT 21, 2016

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PROOF OF SERVICE

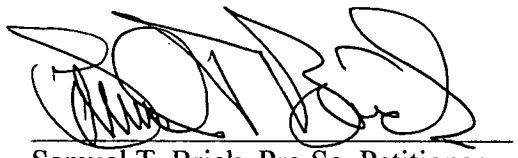
The undersigned hereby certifies that on the date indicated below he served counsel for the Respondents with a copy of the Reply to Return of Intervenor to Petition for Writ of Certerori by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

Michael B. Wren, Esq.
Andrew F. Lindemann, Esq.
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, SC 29202-8568,

(803) 806-8222
Attorneys for Richland County Planning Commission, Respondent

Tobias G. Ward, Jr., Esq.
J. Derrick Jackson, Esq.
Tobias G. Ward, PA
Post Office Box 6138
Columbia, SC 29260,

(803) 708-4200
Attorneys for Fairways Development LLC, Intervenor, Respondent



Samuel T. Brick, Pro Se, Petitioner
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Columbia, South Carolina 29016
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Tobias G. Ward, Jr., Esq.
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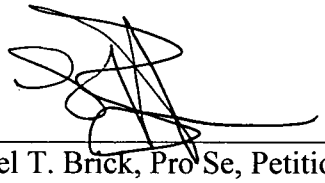
Post Office Box 6138
Columbia, SC 29260,

(803) 708-4200
Attorneys for Fairways Development LLC, Intervenor, Respondent



Samuel T. Brick, Pro Se, Petitioner
124 Runneymede Drive
Columbia, South Carolina 29016
803 546 4895
sbrick2011@gmail.com

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