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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

MAR 23 2017

SC Court of Appeals

Case No. 2015-CP-26-8179
Appellate Case No. 2016-002175

Robert DeCiero,.....Appellant,

v.

Horry County, State of South Carolina,.....Respondent.

NOTICE OF MOTION AND MOTION TO DISMISS

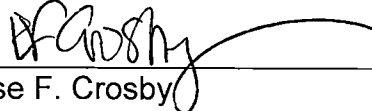
TO: Thomas C. Brittain, Attorney for Appellant

YOU WILL PLEASE TAKE NOTICE that the Respondent, by and through undersigned counsel, hereby moves before the Court of Appeals on the tenth day after service hereof, or at such other time and place as is set by the Court, for an Order dismissing the above-captioned appeal.

The grounds for this motion are Appellant failed to file a Notice of Intent to Appeal or Notice of Appeal of the circuit court's June 22, 2016 Order, filed July 19, 2016, Order, cited in his Initial Brief. Rather, he served Respondent with Notice of Appeal of the circuit court's September 22, 2016, Order, and his statement of the issues on appeal and argument are

not salient to that order. He did not appeal the court's June 22, 2016 Order. Rule 203(a) and (d)(ii), SCACR.

Respectfully submitted,



Elise F. Crosby
CROSBY LAW FIRM, LLC
405 Dozier Street
Georgetown, South Carolina 29440
(843) 546-3103
Attorney for Respondent

Date: March 20 2017
Georgetown, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-CP-26-8179
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Robert DeCiero,.....Appellant,

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RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

FACTUAL AND PROCEDURAL HISTORY

After a hearing on the defendant Horry County's motion June 1, 2016, the circuit court dismissed Appellant's Complaint by order dated June 22, 2016, filed July 11, 2016. (EX. A, "the June 22 Order.")

Appellant timely filed a Motion to Reconsider Order of Dismissal, tolling the time for appeal under Rule 203(b), SCACR. The court issued a Form 4 Order denying Appellant's Motion to Reconsider, dated September 16, 2016, filed September 22, 2016. (EX. B, "the September 16 Order"). In October, Appellant timely served his Notice of Appeal of "the Order Denying Motion to Reconsider Order granting Defendant's Motion to Dismiss...dated

September 16, 2016.” (EX. C.) The Order Appellant named and attached was the September 16 Form 4 Order. The June 22 Order was not appealed.

ARGUMENT

In his Initial Brief, Appellant argues the circuit court erred in (I) dismissing his Complaint under Rule 12(b)(6), SCRCP as deficient under Rule 8(A), SCRCP; (II) determining the zoning ordinances he cited do not restrict occupancy; and (III) determining Appellant lacked standing. The order he complains of and cites to in his brief and includes in his proposed Designation of Matter for the Record on Appeal was the unappealed June 22 Order.

The appeal he filed is from the Order denying his Motion to Reconsider. In that motion, (EX. D), he briefly addressed Rule 8, citing that he is not seeking monetary damages, and included a sentence on standing. The motion does not address the court’s holding from June 22 regarding occupancy. At a minimum, that portion of Appellant’s brief that argues Issue II should summarily be dismissed because it was not raised in the motion denied by the Order being appealed.

Appellant appealed the “Order Denying Motion to Reconsider...dated September 16.” He did not cite, identify, or attach the June 22 Order in or to his Notice of Appeal, as required by Rule 203(d)(iii), and an appeal of that order is now time barred.1 Rule 203(b), SCACR.

The Appellate Court Rules "are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.”

Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992.) "The right to an appeal may be lost through a variety of actions by an appellant..." *State v. Serrette*, 375 S.C. 650, 654 S.E.2d 554, (Ct.App. 2007.) "The requirement of service of the notice of appeal is jurisdictional," *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

Appellant's statement of the issues on appeal and argument in his Initial Brief are not salient to the Order he appealed. Therefore, his appeal should be dismissed. Rule 203(a) and (d)(ii), SCACR.

Respectfully submitted,



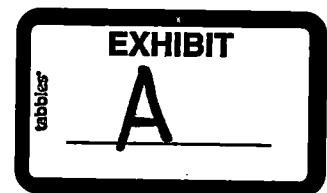
Elise F. Crosby
CROSBY LAW FIRM, LLC
405 Dozier Street
Georgetown, South Carolina 29440
(843) 546-3103
Attorney for Respondent

Date: March 20, 2017
Georgetown, South Carolina

Rule 11 certification

Counsel does not believe consultation with Appellant presents reasonable chance for successful resolution.

¹ An appeal would have been timely if filed at the time he filed the instant appeal



STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Robert Deciero, a resident of Long Bay)
 Estates Subdivision, Myrtle Beach,)
 South Carolina,)
)
 Plaintiff,)
 vs.)
)
 Horry County, State of South Carolina,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2015-CP-26-8179

Order of Dismissal
 (Rule 12(b)(6). S.C.R.C.P.)

HORRY COUNTY
 2016 JUL 19 AM 8:41
 MELANIE H. HARRIS
 CLERK OF COURT

HEARING DATE: June 1, 2016
 PRESIDING JUDGE: Benjamin H. Culbertson
 PLAINTIFF'S ATTORNEY: Thomas C. Brittain
 DEFENDANT'S ATTORNEY: Elise F. Crosby
 COURT REPORTER: Grace Hurley

This matter comes before the court upon motion of the defendant for dismissal of Plaintiff's Complaint under Rule 12(b)(6), South Carolina Rules of Civil Procedure.

In support of its motion, Defendant argues Plaintiff fails to allege facts sufficient to constitute a cause of action and lacks standing.

Findings of Fact and Conclusions of law

Plaintiff's Complaint fails to allege facts sufficient to constitute a cause of action. Under Rule 12(b)(6), SCRPC, a Complaint will be dismissed if it fails "to state facts sufficient to constitute a cause of action." *Carnival Corp. v. Historic Ansonborough Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (S.C. 2014.) In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Id.*, citing *Doe v. Marion*, 373 S.C. 390 (2007).

Under Rule 8(a), SCRPC, a civil pleading stating a claim for relief "shall contain (1) a short

1
 [Handwritten signature]

COPY

and plain statement of the grounds including facts and statutes, upon which the court's jurisdiction depends, ... (2) a short and plain statement of the facts showing the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." The plaintiff alleges "every home in Long Bay Subdivision is currently zoned as a SF6 residential district and, as such, is to be comprised of single family and duplex family dwellings." He further cites Section 431 of the Horry County Zoning Ordinance: "Family: An individual, or two or more persons related by blood, marriage, or adoption, living together as a single household unit, or a group of not more than five persons not related by blood, marriage, or adoption, living together as a single household unit," and Section 1300, an enforcement provision. There is no short and plain statement of the grounds or the facts showing Plaintiff is entitled to relief. There are no causes of action. Finally, there is no prayer for relief. The Complaint's deficiencies under Rule 8(a) entitle the defendant to relief under Rule 12(b)(6).

Furthermore, I conclude as a matter of law the zoning ordinance upon which the plaintiff relies restricts construction in Long Bay Estates to single-family homes or duplex dwellings, neither of which restricts short-term rental or the number of occupants.

Lastly, if his Complaint were interpreted to seek relief from a public zoning authority for harm as alleged in his Complaint, Plaintiff lacks standing. For a plaintiff to possess standing he must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Carnival Corporation*, citing *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594 (2001). In order for an injury to be particularized, it must affect the plaintiff in a personal way. *Carnival* at 851, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "§6-29-950's requirement that a private party seeking to enjoin a zoning violation must be

especially damaged incorporates the particularized injury requirement of general standing doctrine as a requirement.” *Carnival* at 852. The Complaint alleges no injuries particular to the plaintiff. I find as a matter of law the plaintiff fails to allege a particularized injury and therefore fails to establish standing.

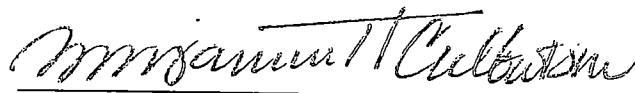
In light of the Court’s findings and conclusions, no matters outside the pleadings presented to the court were considered. Therefore, as a result of this ruling, the Defendant’s Motion for Summary Judgment is moot.

NOW, THEREFORE, it is hereby

ORDERED, that the plaintiff’s Complaint is DISMISSED under Rule 12(b)(6), SCRPC; it is further

ORDERED, that the defendant’s Motion for Summary Judgment is MOOT.

AND IT SO ORDERED.



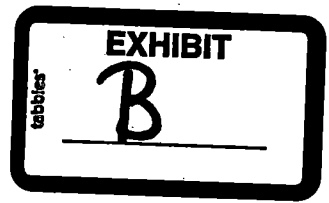
Benjamin H. Culbertson
Presiding Judge

Conway, South Carolina
June 22, 2016

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-26-8179



Robert Deciero
PLAINTIFF(S)

Horry County, State of South Carolina
DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(A), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

16 SEP 22 PM 1:11
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider Order of Dismissal is DENIED.
(This motion is decided without oral arguments.)

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|--|--|--|
| N/A | N/A | \$ N/A |

If applicable, describe the property, including tax map information and address, referenced in the order:

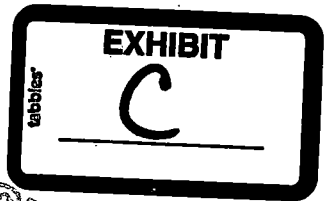
The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant in the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Benjamin H. Culbertson
Benjamin H. Culbertson, Circuit Court Judge

2148
Judge Code

Sept. 16, 2016
Date

10-14-16



IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-CP-26-8179

Robert DeCiero, a resident of Long Bay Estates Subdivision,
Myrtle Beach, South CarolinaAppellant,

v.

Horry County, State of South Carolina.....Respondent.

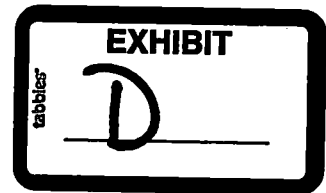
NOTICE OF APPEAL

Robert DeCiero appeals the Order Denying Motion to Reconsider Order granting Defendant's Motion to Dismiss of the Honorable Benjamin H. Culbertson dated September 16, 2016. Appellant received written notice of entry of this Order on October 14, 2016.

October 18, 2015

Thomas C. Brittain, Esq.
The Brittain Law Firm, P.A.
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562
Attorney for Appellant

Other Counsel of Record:
Elise F. Crosby, Esquire
Crosby Law Firm, LLC
405 Dozier Street
Georgetown, SC 29440
843-546-3103
Attorney for Respondent



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
)
 Robert DeCiero, a resident of Long Bay) C/A No.: 2015-CP-26-8179
 Estates Subdivision, Myrtle Beach, South)
 Carolina,)
)
 Plaintiff,)
)
 v.) **MOTION TO RECONSIDER**
) **ORDER OF DISMISSAL**
 Horry County, State of South Carolina,)
)
 Defendant.)

TO: THIS HONORABLE COURT AND ELISE F. CROSBY, ESQUIRE, ATTORNEY FOR DEFENDANT:

Now comes attorney for Plaintiff Robert DeCiero, a resident of Long Bay Estates Subdivision, Myrtle Beach, South Carolina (“Plaintiff”) and moves this Court to reconsider its previous Order of Dismissal pursuant to Rule 12(b)(6) S.C.R.C.P.

Defendant Horry County, State of South Carolina’s (“Defendant”) Motion to Dismiss/Motion for Summary Judgment was heard before the Honorable Benjamin H. Culbertson on June 1, 2016 at which time oral arguments were made by attorneys for Plaintiff and Defendant.

Attorney for Defendant argued, in part, that Plaintiff’s Complaint was deficient in that it failed to set forth a short and plain statement of the facts of the case, contained no causes of action and made no prayer for relief under Rule 8(a) and, therefore, Defendant was entitled to relief under Rule 12(b)(6) S.C.R.C.P. with all due respect the Court refused a citizen’s request to require the County to enforce its own zoning ordinance. None other than a citizen could have standing. Furthermore, there are no proof requirements at the dismissal stage.

Attorney for Plaintiff argued that Defendant’s arguments were inaccurate and that there were no Rule 8(a) violations in Plaintiff’s Complaint. The Complaint makes it clear that Plaintiff

believes the applicable zoning ordinance is being violated by the commercial explosion of six to eight families on a regular basis in a residential zone. The relief sought in the Complaint is for Defendant to enforce the appropriate zoning ordinance, as required to by law, and there is no monetary amount associated with this prayer for relief. Therefore, Rule 8(a) is not a basis for dismissal of this action.

Further, attorney for Plaintiff argued that Defendant's Motion is premature in that this case has not been fully litigated. Discovery is required, including the taking of depositions, in order to collect enough information to present before the Court so as to render a decision in this matter with respect to whether or not the zoning ordinance upon which the Plaintiff relies restricts short term rentals or the number of occupants. The Court would have to go outside the pleadings to make such a judgment in this case.

Following this hearing Judge Culbertson notified attorney for Plaintiff that he was granting her Motion to Dismiss thereby making her Motion for Summary Judgment moot and requested that a formal order be drafted for his review.

On July 18, 2016, attorney for Plaintiff received by U.S. mail an unfiled copy of the Order of Dismissal which was signed by The Honorable Benjamin H. Culbertson on June 22, 2016. In response, Plaintiff hereby submits this Motion to Reconsider the Order granting Defendant's Motion to Dismiss for the above-listed reasons. Further, Plaintiff reiterates any and all statements, evidence, case law, etc. contained in his previous memorandums of law and/or affidavits filed in relation to this action.

THE BRITAIN LAW FIRM



Thomas C. Brittain
4614 Oleander Drive
Myrtle Beach, South Carolina 29577
843-449-8562 (Telephone)
843-497-6124 (Facsimile)
Attorney for Plaintiff

July 26, 2016
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-CP-26-8179
Appellate Case No. 2016-002175

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SC Court of Appeals

Roberts DeCiero,.....Appellant,

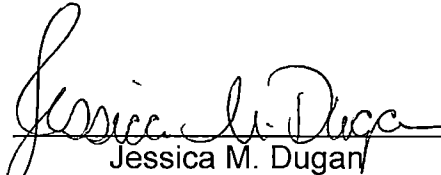
v.

Horry County, State of South Carolina,.....Respondent.

PROOF OF SERVICE

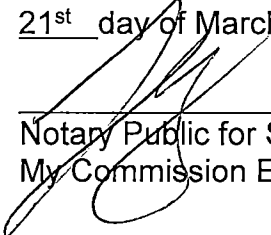
I, Jessica M. Dugan do hereby certify that I am an employee of THE CROSBY LAW FIRM, LLC, attorney for the Respondent in the above-referenced action, do hereby certify that I did this 21st day of March, 2017, by first class mail, postage prepaid, serve a copy of the **Notice of Motion and Motion to Dismiss and Respondent's Memorandum in Support of Motion to Dismiss** on the following Attorney, addressed as follows:

Thomas C. Brittain, Esquire
The Brittain Law Firm, P.A.
4614 Oleander Drive
Myrtle Beach, SC 29577



Jessica M. Dugan

Sworn to before me this
21st day of March, 2017.



Notary Public for South Carolina
My Commission Expires: 3/24/2016



JOE M. CROSBY
jcroby@crosbyfirm.com

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405 DOZIER STREET
GEORGETOWN, S. C. 29440
TEL: (843) 546-3103 FAX: (843) 546-0747
www.crosbyfirm.com

ELISE F. CROSBY*
ecrosby@crosbyfirm.com
*Certified Family Court Mediator

March 21, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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MAR 23 2017

SC Court of Appeals

RE: *Robert DeCiero vs. Horry County, State of South Carolina*
Appellate Case No.: 2016-002175

Dear Ms. Kitchings:

Enclosed please find for filing in regards to the above-referenced case the original and six (6) copies of Respondent's Notice of Motion and Motion to Dismiss and Respondent's Memorandum in Support of Motion to Dismiss, along with the Proof of Service and the \$25 filing fee.

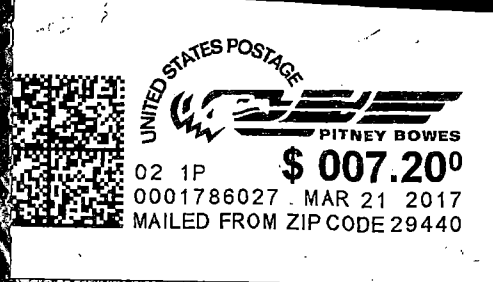
With kindest regards,

Respectfully yours,

Elise F. Crosby
Elise F. Crosby

EFC/jmd
Enc

cc: Thomas C. Brittain, Esquire ✓



Crosby Law Firm, LLC
405 Dozier Street
Georgetown, SC 29440

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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MAR 23 2017

SC Court of Appeals