

RECEIVED

MAY 19 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2017-000134

Lower Court Case No. 2016-CP-40-07353

Richardson Construction Company, Inc. Appellant,

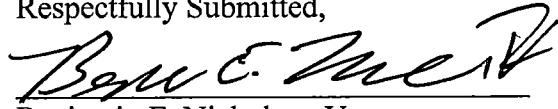
v.

Richland County, a political subdivision, and
McClam & Associates, Inc., Respondents.

MOTION OF RESPONDENT RICHLAND COUNTY TO DISMISS APPEAL

COMES NOW Respondent Richland County ("County"), by its undersigned attorneys, pursuant to Rule 240, SCACR, submit this Motion To Dismiss the Appeal of the Appellant, Richardson Construction Company, Inc., on the basis that there is no justiciable controversy for this Court to review as the subject matter of the appeal is moot. This Motion is made on the basis of South Carolina law, the Memorandum submitted herein in support thereof, and all affidavits and other documents filed in Respondent's Record in support of this Motion.

Respectfully Submitted,



Benjamin E. Nicholson V
MCNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
nnicholson@mcnair.net

Of Counsel:

Larry C. Smith, Esquire
Richland County Attorney
P.O. Box 192
Columbia, SC 29202

ATTORNEYS FOR RESPONDENT
RICHLAND COUNTY

May 19, 2017
Columbia, South Carolina

1454471v1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2017-000134

Lower Court Case No. 2016-CP-40-07353

Richardson Construction Company, Inc.Appellant,

v.

Richland County, a political subdivision, and
McClam & Associates, Inc., Respondents.

**MEMORANDUM IN SUPPORT OF MOTION OF RESPONDENT RICHLAND
COUNTY TO DISMISS APPEAL**

Respondent Richland County (“County”), by its undersigned attorneys, submit this Memorandum in Support of its Motion To Dismiss the Appeal of Richardson Construction Company, Inc. (“RCC”) on the basis that there is no justiciable controversy as the subject matter of the appeal is moot.

I. FACTS

This matter arises out of a procurement protest by the Appellant after it was declared non-responsive by Richland County for the award of a road extension contract for a project known as the Shop Road Extension I (“the Shop Road Project.”) The Appellant is a disappointed bidder that

had its nonresponsive bid disqualified by the County. The Appellant, attempting to by-pass the County's Procurement Ordinance, filed this lawsuit in part seeking a temporary injunction to prohibit the County from executing a contract ("the Shop Road Contract") with the sole responsive bidder, co-Respondent McClam & Associates, Inc. ("McClam"), on the Shop Road Project. The Appellant then filed a Motion for Temporary Injunction ("Motion") on December 19, 2016. (See "Respondent Richland County's Filings in Support of its Motion to Dismiss and in Opposition to Appellant's Motion for Temporary Injunction" – hereinafter "Respondent's Record," pp. 1-7.)¹

The Honorable DeAndrea G. Benjamin by Order filed December 22, 2016, denied the Motion. (Respondent's Record, pp. 91-100.) Judge Benjamin ruled in her Order against the Appellant on nearly every ground available, including:

1. That the Appellant did not show a likelihood of success on the merits since the Appellant admitted that its bid listed the wrong subcontractor that was not qualified by the County as an SLBE and the County did not have to waive this bid mistake. (Respondent's Record, pp. 94-96.)
2. That the decision by the County not to waive Appellant's bid error was reasonable. (Respondent's Record, p. 96.)
3. That Appellant had an adequate remedy at law because even if the Appellant was permanently denied the Shop Road Contract, it ultimately, if correct, could be awarded its bid preparation costs by the Richland County Procurement Review Panel. (Respondent's Record, pp. 96-99.)
4. That Appellant could not overcome the County's "compelling argument" that a delay in the Shop Road Project by the enjoining of the award of the Shop Road Project Contract had far greater potential for harm to the County than any possible harm to the Appellant. (Respondent's Record, pp. 99-100.)

The Appellant on January 23, 2017 filed its Notice of Intent to Appeal the Order. Prior to the appeal, the Appellant filed an Amended Complaint. After the Notice of Appeal was filed,

¹ For the Court's convenience, the County is filing one set of supporting documents in connection with both pending motions.

Judge Benjamin ruled on two Rule 59 motions filed by Appellant.² Matters with respect to the non-temporary injunction cause of action have proceeded in the Circuit Court, with most recently Judge Toal indicating at a hearing on the County's Motion to Dismiss the remaining causes of action in an Amended Complaint that she would deny that motion. (As of this filing, the County is unaware of an Order from Judge Toal on that motion being filed.)

However, the Appellant took no further action in this Court, except seeking and obtaining an extension on March 7, 2017 from this Court to file its Initial Brief and Designation of Matter to be Included in the Record on Appeal. Thus, the Appellant could have, but did not, choose to immediately seek relief in this Court from Judge Benjamin's Order in any further attempt to prevent the County and McClam from executing the Shop Road Contract. Appellant's seeking an extension and failing to seek a supersedes from Judge Benjamin's Order is significant given the sole relief sought by the Appellant's Motion.³

The sole remedy sought by the Motion⁴ as stated in the Motion is “[p]ursuant to Rule 65, SCRPC, RCC requests that this Court issue a temporary injunction staying execution of the Shop

² While not germane to the issues in this Motion to Dismiss, the County does not believe Judge Benjamin had jurisdiction to decide those motions after the Notice of Appeal of her Order was filed.

³ The request for extension and the failure to seek a supersedes in this Court should be fatal to Appellant's belatedly filed (May 9, 2017) Motion for Expedited Temporary Injunction Pending Appeal in this Court.

⁴ The Complaint itself sought slightly broader relief. As alleged in the Complaint at ¶¶97-105, Appellant sought either to enjoin the execution of the Shop Road Contract between the County and McClam (¶104) or if the contract was awarded, “to suspend the contract and direct McClam to conduct no work on the contract until such time as the Richland County Procurement Review Panel an hear and decide” the Appellant's protests. (¶105). (Appellant's Documents, pp. RCC-017-018). However, neither the Motion for Temporary Injunction nor the Order denying the Motion discussed the alternative form of relief of suspending the award of the Shop Road Contract if awarded. The alternative form of relief in ¶105 has first been mentioned by Appellant in its Motion for Expedited Temporary Injunction Pending Appeal filed on May 9, 2017.

Road Contract until the Richland County Procurement Review Panel can hear and decide RCC's pending appeal and award protest." The Appellant reinforced that singular request in its Initial Brief:

RCC filed this lawsuit on December 15, 2016, requesting a temporary restraining order and temporary injunction to postpone execution of a contract with McClam until the Procurement Review Panel could hear RCC's appeal and protest and a writ of mandamus directing Richland County to constitute a Procurement Review Panel.

(Appellant's Initial Brief, p. 6). The only issue before Judge Benjamin in Appellant's Motion related to a Temporary Injunction to enjoin the execution of the Shop Road Contract. Thus, the sole issue before *this Court* is whether Judge Benjamin's Order properly denied the Motion to enjoin the award of the Shop Road Contract. As noted above, Appellant did not seek a supersedes of the Order.

After Judge Benjamin denied Appellant's Motion on December 22, 2016, the County and McClam, as planned, executed the contract for McClam to commence work on the Shop Road Extension Project on January 11, 2017. (Respondent's Record, p. 102; Second Affidavit of Rob Perry, ¶5). McClam has been at work on this project since February 13, 2017. (Respondent's Record, pp. 102-03; Second Perry Affidavit, ¶6). Based on time expended in the CPM Schedule, McClam is approximately 16.5% complete with the Shop Road Project. Based on expenditures to date by the County to McClam (that should include any held retainage), McClam is approximately 15.5% complete with the Shop Road Project. Id. Richland County thus far has paid McClam \$3,428,604.95 through the end of April, 2017. Id.

II. ARGUMENT

There is not currently a justiciable controversy before the Court with respect to this appeal. The Shop Road Contract, the award of which Appellant seeks to enjoin, has been executed with McClam and is being performed. The lack of a justiciable controversy in this matter is created by

the unique relationship of these facts, the timing and nature of the claim for relief sought by the Appellant, and subsequent factual events after the appeal.

Before any action can be maintained, a justiciable controversy must be present. A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character. The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing.

Sloan v. Greenville County, 356 S.C. 531, 590 S.E. 2d 338, 346 (Ct. App. 2003).

The concept of lack of a justiciable controversy in the context of injunctive relief has been well explored by courts. An injunction cannot restrain an act which has already been completed. See e.g., *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 595 F. Supp. 1385 (D. Del. 1984) *aff'd* 769 F. 2d 152 (3rd Cir. 1985); *Brady v. City of Homedale*, 944 P. 2d 704 (Idaho 1997); *Fulton v. City of Morganton*, 260 N.C. 345, 132 S.E. 2d 687 (1963); *Kay v. David Douglas Sch. Dist. No. 40*, 303 Ore. 574, 738 P. 2d 1389 (1987); *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969); and *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E. 2d 143 (N.C. 1939).

In *Kalmanovitz, supra*, a shareholder of Pabst Brewing Company ("Pabst") brought suit under the federal securities law and Delaware state law seeking, in part, an injunction to restrain the merger and transfer of assets involved in a battle for control of Pabst. The plaintiffs asked that the defendant be enjoined from voting its Pabst shares; that the asset transfer be stopped; that the solicitation and purchase of Pabst shares and the implementation of the merger be stopped. 595 F.Supp. at 1391. In response, the Court held: "[t]he solicitation and purchase of shares, the vote, the merger and the asset transfers have, however, all occurred. This Court, therefore, cannot retroactively prohibit acts which are finished..." *Id.*

In *Brady, supra*, a homeowner who objected to construction of a school bus maintenance and storage facility filed suit seeking, in part, a Temporary Restraining Order ("TRO") and a preliminary injunction. After issuing a Rule to Show Cause the court quashed its Order and

dismissed Plaintiff's Motion for a TRO and denied Plaintiff's request for an injunction. On appeal, the Idaho Supreme Court held: "[t]he building was completed at the time the hearing was conducted before the District Court. Consequently, there was no act to enjoin by the District Court. An injunction cannot restrain an act already completed." 944 P. 2d at 707-08.

In *Fulton, supra*, a taxpayer sought to enjoin the city of Morganton, North Carolina from holding an election to determine whether beer and wine could be legally sold. In denying the Plaintiff's Request for an Injunction, the North Carolina Supreme Court held: "[t]he election has been held. The electorate has answered the questions propounded. It is quite obvious that a Court cannot restrain the doings of that which has been already consummated." 132 S.E. 2d at 688 (quotations and citations omitted.)

In *Kay, supra*, an action was brought for declaratory judgment and injunctive relief against inclusion of a formal prayer at a high school's commencement exercises. The Circuit Court entered a judgment granting the requested relief. On appeal, the Oregon Supreme Court held:

When the circuit court signed the challenged judgment, the commencement exercises were past. No plaintiff demanded, nor did any allege facts entitling that plaintiff to demand, more general relief against future practices of defendants. And a Court cannot either mandate or enjoin an act after it has been completed, at least not until the cosmological theory of reversible time is better established. The circuit court should have dismissed the proceedings after the commencement exercises were over.

738 P. 2d at 1390-91.

These cases from other jurisdictions are consistent with South Carolina law. "A moot case exists where a judgment rendered by a 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. If there is no actual controversy, this court will not decide moot or academic questions." *Seabrook v. Knox*, 369 S.C. 191, 196, 631 S.E. 2d 907, 910 (2006) (Citations omitted.) "Where only injunctive relief is sought and the need for that relief has ceased to be a justiciable

issue, an appellate court should not review the merits, or consider the granting of a new trial after it has become impossible to have a new trial in the case.” *Curtis v. State*, 345 S.C. 557, 567-68, 549 S.E. 2d 591, 597 (2001).

"In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Id.* "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.*

It is well settled that an appellate court may find an exception to mootness in South Carolina public procurement cases because “[t]here is a keen public interest in the stewardship of public funds and a strong need to provide guidance for future procurement decisions.” *Sloan v. Greenville County*, 590 S.E. 2d at 350.

However, the nature of Appellant’s claim in this case and the specific remedy it seeks do not provide an avenue for the *Sloan* exception to apply. In *Sloan*, as in other cases where an exception was applied, the appealing party also sought declaratory relief outside of injunctive relief. See *Sloan*, 590 S.E. 2d at 346 (“In his complaint, Sloan only requested a declaration that the contracts were illegal and should be set aside.”) Thus, there was an end game to the Sloan claims; a final adjudication pursuant to the Declaratory Judgment Act.

To the contrary here, the Appellant did not seek declaratory relief in its Complaint as to the award of the Shop Road Contract; rather, the only claims related to the Shop Road Contract award were for temporary restraining order, temporary injunction, and mandamus regarding the Appellant’s administrative protest to the County. There was not even a request for a permanent injunction in the

Complaint. In such a case, there is nothing further to adjudicate on this Motion once the Shop Road Contract was executed. See *Curtis v. State*, 549 S.E. 2d at 597.

Appellant argued in response to the County's Motion to Dismiss before Judge Toal that a court's evaluation of the merits of a case on a request for a temporary injunction is limited and has no binding effect beyond granting or denying the temporary injunction, citing *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E. 2d 824, 826 (1992). Respondent's position was that since the Appellant in its Motion asked only for a temporary injunction with respect to the execution of the Shop Road Contract by McClam, and not permanent injunctive relief, then the Order by Judge Benjamin was a final Order as to that cause of action. In either case, however, the relief sought by the Appellant in the Motion is moot. As noted *supra*, McClam and the County executed the Shop Road Contract on January 11, 2017.

The Appellant appealed Judge Benjamin's Order on January 23, 2017 and did not at any time thereafter seek further relief from the Circuit Court with regard to the sole remedy sought by its Motion—an injunction to prohibit the County and McClam from executing the Shop Road Contract, even though Appellant is permitted to do so. See SCRPC Rule 62(c) (allowing the Circuit Court, when it has issued an order denying an injunction, to “suspend, modify, restore or grant an injunction during the pendency of an appeal...”) As stated, in the months while the Appellant did nothing except seek an extension in its appeal in this Court, the Shop Road Contract was executed and the Project is now well underway.

Therefore, there is nothing left to adjudicate with respect to the Motion for Temporary Injunction. The Appellant sought an interim remedy of temporary injunction, lost at the Circuit Court level, and did not seek immediate relief from this Court for an injunction to enjoin the award of the Shop Road Contract. The pending action that was the subject of the interim injunctive relief requested, the execution of the Shop Road Contract, occurred. Therefore, there is nothing to be

decided going forward with respect to this claim since the Shop Road Contract has been executed and construction is well underway. There is no justiciable controversy since the execution of the Shop Road Contract means that no further relief can be granted under the temporary injunction cause of action and the matter is moot.

III. CONCLUSION

The Respondent, Richland County, respectfully requests that the Court dismiss the appeal of the Appellant, on the grounds stated herein, and grant Respondent its costs and fees.

Respectfully Submitted,



Benjamin E. Nicholson V
MCNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
nnicholson@mcnair.net

Of Counsel:
Larry C. Smith, Esquire
Richland County Attorney
P.O. Box 192
Columbia, SC 29202

ATTORNEYS FOR RESPONDENT
RICHLAND COUNTY

May 19, 2017
Columbia, South Carolina

1453699v3

May 19, 2017

Benjamin E. Nicholson, V

nnicholson@mcnair.net

T 803.799.9800

F 803.753.3278

Via Courier

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

Re: Richardson Construction Company, Inc. v. Richland County, a political
subdivision, and McClam & Associates, Inc.
Appellate Case No.: 2017-000134

Dear Madam Clerk:

Enclosed for filing, please find the original and seven copies of Respondent Richland County's Motion to Dismiss, and the original and seven copies of Respondent Richland County's Filing in Support of Its Motion to Dismiss and in Opposition to Appellant's Motion for Expedited Temporary Injunction Pending Appeal.

Please file the original of each in your office and return the file stamped extra copies to me via our courier. By copy of this letter we are serving counsel of record with copies of same.

Very truly yours,

McNAIR LAW FIRM, P.A.



Benjamin E. Nicholson, V

BEN,V:as
Enclosures

cc: Richard C. Detwiler, Esq.
Kathleen McDaniel Esquire
Alan Peace Esquire

RECEIVED

MAY 19 2017

SC Court of Appeals

McNAIR LAW FIRM, P.A.

1221 Main Street

Suite 1700

Columbia, SC 29201

Mailing Address

Post Office Box 11390

Columbia, SC 29211

mcnair.net