THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2016-CP-42-03288

Elizabeth Earley, John Earley, Lloyd Wilkins,
Henry Kerns, Margie Mills Kerns, Donna Pearson,
and Bruce Pearson, Appellants,

v.

The City of Woodruff, SC, and
The Terraces at Woodruff,
a South Carolina Limited Liability Company, Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

December 22, 2017

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In Sections I and II of their brief, Respondents ask this Court to adopt a novel application of the "two-issue rule." (Brief of Respondents, p. 5-8.) This doctrine provides that a general verdict in cases involving multiple issues should be affirmed unless all issues presented to the jury are subsequently raised on appeal, and unless none of the issues so raised would support the verdict. *See Dropkin v. Beachwalk Villas*, 373 S.C. 360, 644 S.E.2d 808 (S.C. App., 2007). The *Dropkin* court illustrated the doctrine as follows:

> These two applications of the "two issue" rule are illustrated in the following example: A case is submitted to the jury on the issues of defamation and invasion of privacy. The jury returns a general verdict for the plaintiff. The defendant appeals, arguing that the trial court erred by failing to direct a verdict on the defamation issue. Under one application of the "two issue" rule, an appellate court would affirm because defendant has failed to appeal the invasion of privacy issue as well. Assuming, however, that the defendant has appealed both issues, the appellate court would affirm on the basis of a second application of the "two issue" rule, if either of the two issues supported affirmance.

373 S.C. 360, 364, 644 S.E.2d 808, 810. In *Dropkin* and every other case of which the Appellants are aware, the "two-issue rule" is applied only in situations in which any one of the issues ruled upon could single-handedly produce the result reached by the trier of fact. In the present case, however, the Appellants' concession that the City complied with the notice requirements of S.C. Code Section 6-29-760(A) is not inconsistent with their arguments that the City nevertheless engaged in spot zoning and that the zoning ordinance currently in use has never received the imprimatur of the City Council as required by law.

Although the City went out of its way to obstruct citizen participation when it acted to rezone the Property, the Appellants concede that the City likely achieved substantial compliance with the notice requirements of S.C. Code Section 6-29-760(A) and have therefore opted to abandon this issue on appeal. However, the Appellants have independently alleged that the City engaged in spot zoning, have requested a declaratory judgment concerning the validity of the zoning ordinance, and have sought related injunctive relief. Appellants are not required to establish lack of notice under Section 6-29-760(A) in order to prevail on their other causes of action. The Respondents' invocation of the "two-issue rule" propounded in *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), is therefore inapposite and somewhat baffling. In *Jones*, the circuit court directed a verdict against the plaintiff as to all causes of action on four grounds, but because Jones appealed only three of the four grounds, the directed verdict was allowed to stand. It cannot be overemphasized, however, that the four grounds cited by the *Jones* trial court (no duty to secure Jones in the back of police cruiser so as to render escape impossible; comparative negligence; objectively reasonable use of force as a matter of law; and statutory immunity under S.C. Code Section 15-78-60(6)) each separately deprived the plaintiff of elements necessary for each of his causes of action.

Similarly, *Anderson v. Short,* 323 S.C. 522, 476 S.E.2d 475 (S.C., 1996), cited on page 7 of the Respondents' brief, stands for the straightforward proposition that when a derivative claim is dismissed together with a claim necessary for the success of that derivative claim, both grounds for dismissal must be appealed in order to preserve the derivative claim. The result in *Anderson* was compelled by the plaintiff's decision to appeal *only* the dismissal of his loss of consortium claim, leaving unchallenged the dismissal of his wife's underlying malpractice claim.

But the *Anderson* plaintiffs might well have obtained a reversal if they had instead abandoned the consortium claim on appeal and exclusively attacked the malpractice ruling, because the malpractice claim could survive even if the consortium claim was lost. *See Anderson v. Short* ("the [trial] judge ruled a claim for loss of consortium was ***derivative*** and ***thus*** [husband was] bound by the decision regarding [wife's] claim") (emphasis added). In sharp contrast with the unappealed rulings in *Jones* and *Anderson*, the circuit court's conclusion that the City substantially complied with the notice provisions of S.C. Code Section 6-29-760(A) in no way undermines the Appellants' other causes of action for spot zoning, declaratory judgment, and related injunctive relief and as such should not be treated as alternate sustaining ground for dismissal.

II. A CHALLENGE TO THE CIRCUIT COURT'S APPLICATION OF S.C. CODE ANN. § 6-29-760(D) IS CLEARLY PRESENTED IN THE APPELLANTS' INITIAL BRIEF.

In Section III of their brief, Respondents argue that Appellants have failed to challenge the trial court's conclusion that their challenge to the Woodruff Zoning Ordinance ("WZO") is time-barred by S.C. Code Ann. § 6-29-760(D). In its May 24, 2017 Order, the trial court found that "to the extent the Complaint may seek relief for zoning amendments enacted in 2005 (or prior to 2016), those claims are time-barred by the requirement of S.C. Code § 6-29-760(D) that any such challenge be brought within 60 days of the amendment." (May 24, 2017 Order, p. 10.) Respondents again misconstrue the nature of the Appellants' argument on this issue, although they are correct in concluding that Appellants do not believe their declaratory judgment action is time-barred by the statute in question—or by any statute, for that matter. They have simply asked the court to examine the City's records in order to determine whether or not the document being

passed off to the public as the "official" zoning ordinance is, in fact, the same document duly enacted by the City Council in 2005. To the extent that the Appellants' grievances relate to zoning changes enacted prior to 2016, the Appellants fully accept that Section 6-29-760(D) would deprive them of legal redress. Appellants are not, however, challenging past enactments, but the City's present reliance upon a document and zoning map which may or may not carry the force of law. While the Respondents may find this argument "convoluted," Appellants have presented it on Page 15 of their Initial Brief.

South Carolina appellate courts will ordinarily decline to consider any point which is not set forth in the statement of the issues on appeal." Moreover, "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct.App.1990). On the other hand, in 2004 this Court recognized that every issue need not necessarily receive its own heading: "Chief Justice Toal and her coauthors write in their work *Appellate Practice in South Carolina* that 'where an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments.'" *Henson v. International Paper Co.*, 358 S.C. 133, 141, 594 S.E.2d 499 (S.C. App., 2004). Whether or not the challenge to the trial court's interpretation of S.C. Code Section 6-29-760(D) is sufficiently clear from the Appellants' Initial Brief is for this Court to decide. However, despite their protestations to the contrary, Respondents were able both to provide this Court with a succinct summary of the Appellants' argument on this issue and to offer a rebuttal. (See Initial Brief of Respondent, p. 9).

III. THE CIRCUIT COURT'S DISMISSAL OF THE CLAIMS AGAINST THE TERRACES WAS EXPRESSLY PREDICATED ON ITS DISMISSAL OF THE ACTION AGAINST THE CITY. THEREFORE, IN CHALLENGING THE DISMISSAL OF THE CLAIMS AGAINST THE CITY, THE APPELLANTS HAVE ALSO CHALLENGED THE DISMISSAL OF THE TERRACES.

The Respondents suggest that the Appellants failed to raise a separate objection to the dismissal of the Terraces as a party-defendant. (Initial Brief of Respondents, p. 10). But as the Respondents' own brief accurately reports, the circuit court's dismissal of the Terraces was ***expressly predicated*** upon its dismissal of the Appellant's claims against the City: "[I]t is plain and apparent, from the face of the Complaint, that dismissal of the City removes the factual and legal basis for any asserted cause of action against the Terraces." (Order p. 12; Initial Brief of Respondents p.10). By implication, therefore, a decision by this Court reversing the dismissal of the action against the City would undermine the express basis for the circuit court's dismissal of the Terraces as a party, rendering a separate exception to this ruling merely duplicative. Moreover, the Respondents mischaracterize the nature of the relief sought in the Complaint. They suggest that Appellants sought "no relief specific to the Terraces or its property based on alleged wrongs of the Terraces," as if to suggest that the Terraces are mere innocent bystanders. The Appellants have alleged that the Terraces began development of the Property and have continued to make use of the Property in a manner inconsistent with is lawful zoning classification and have requested a court order enjoining the Terraces from making use of the Property in a manner inconsistent with existing zoning. In their prayer for relief, the Appellants specifically asked the court: (1) to "Declare the purported rezoning of the Property to an R-3 district to be null and void ***and enjoin development of the Property in any manner inconsistent with lawfully-enacted zoning***; and (2) to "***Enjoin the further development of the Property*** until such time as the issues raised in this Complaint have been fully and finally adjudicated."

(Complaint, p. 10). As in the preceding argument, Appellants would once again cite Chief Justice Toal and the *Henson* court for the proposition that "where an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments.'" *Henson v. International Paper Co.*, 358 S.C. 133, 141, 594 S.E.2d 499 (S.C. App., 2004).

IV. ALTHOUGH FIRST PRESENTED AS PART OF APPELLANTS' RULE 59(e) MOTION, EXCERPTS FROM THE WOODRUFF ZONING ORDINANCE SHOULD BE CONSIDERED ON APPEAL.

As part of their Rule 59(e) Motion to Reconsider, in the context of asking the court to reconsider its determination that the Appellants lacked standing to contest zoning changes affecting the Property, Appellants presented the trial court with excerpts from the Woodruff Zoning Ordinance. These excerpts recognize the heightened interest of landowners such as the Appellants when zoning changes are being made to nearby properties. Thus, Article XIII, Section III, Paragraph 3, provides that while the general public need be notified of proposed zoning changes only "in a newspaper of general circulation," owners of "surrounding property" are entitled to special notice, either by "posters [sic] the property" or by "mailing notices to the owners of the surrounding property. (WZO, p. 107-108.) As alleged in the affidavits of Donna Pearson (p. 2), Bruce Pearson (p. 2), Margie Mills Kerns (p. 2), and Henry Kerns (p. 2) (proffered in advance of the January 3, 2017 hearing, but not considered by the circuit judge), several of the Appellants actually received such notices. Article XIII, Section III, Paragraph 5, further recognizes the right of a small class of landowners to present a formal protest petition against a proposed zoning change. The petition must be signed by owners of lots included within the affected area, or by "those immediately adjacent to in the rear or on either side ***extending two hundred and fifty (250) feet***, or of those directly opposite ***extending two hundred and fifty (250)***

feet from the street frontage of such opposite lots . . . ." (WZO, p. 108) (emphasis added). Respondents object to the mention of this language for the first time as part of the Rule 59(e) Motion. (Initial Brief of Appellants, p. 13-14), however, as shown below, this information was presented in response to an analogy which appeared for the first time in the circuit court's May 24 Order and to which the Appellants had not previously had an opportunity to respond.

Courts have long acknowledged that new issues cannot be raised in a Rule 59(e) motion which could have been raised earlier. *See, e.g., Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481 (S.C. App., 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.") Appellants nevertheless submit that this Court can properly consider the relevant portions of the Woodruff Zoning Ordinance for purposes of determining whether or not to grant standing to the Appellants for two reasons. First, the language from the WZO does not introduce a new issue, but merely additional evidence in support of Appellants' contention that they have a heightened interest in what happens across the street from them. Second, and perhaps more importantly, the language in the Woodruff Zoning Ordinance was presented in contrast to the following language found on Page 7 of the circuit court's order, which is quoted at length here:

> The significance of the "owner of adjoining land" restriction placed on standing by Section 6-29-760(C) is ***illustrated by a comparison to other standing statutes*** in the Comprehensive Planning Act. For example, S.C. Code Section 6-29-820 (relating to appeals to circuit court from decisions of the board of zoning appeals) provides, in its subsection (A), that "[a] person who may have a substantial interest in any decision of the board of appeals" may appeal. Section 6-29-900 (relating to appeals to the circuit court from boards of architectural review) uses identical language granting statutory standing to "a person who may have a substantial interest in any decision of the board of architectural review." These are broad statutory grants of standing for particular appeals; Section 6-29-760(C) is not a broad statutory grant of standing.

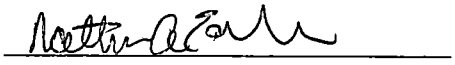
(May 24, 2017 Order, p. 7) (emphasis added). Significantly, none of the foregoing statutes were raised by Respondents during the January 3, 2017 hearing or in their Memorandum in Support of

the City of Woodruff's Motion to Dismiss. Thus, the first time this analogy was presented to the Appellants was in the circuit court's order, and its inclusion in the order is one of the factors which prompted the Appellants to file a Rule 59(e) motion in the first place. Appellants submit that the act of asking the circuit court to consider counterexamples in opposition to examples used ***for the first time*** in the court's order dismissing the case falls squarely within the range of purposes for which Rule 59(e) was created. *See, e.g., Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772 (S.C., 2004) ("our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it . . . ."). Accordingly, Appellants respectfully request this Court to consider the relevant portions of the Woodruff Zoning Ordinance in reaching its determination as to whether or not to grant them standing to pursue the issues raised in the Complaint.

CONCLUSION

The remaining issues raised in the Initial Brief of Respondents have previously been addressed in the Appellants' Initial Brief. For the reasons expressed herein, this Court should reverse the circuit court's dismissal of the complaint as to all defendants and remand the matter for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The Initial Brief of Appellants in the above-referenced matter was served upon the following parties on December 23, 2017, via first class U.S. mail.

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Sworn to before me this 23rd day of December, 2017,

Notary Public for South Carolina
My Commission Expires: ~~My Commission Expires~~
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