THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

APPELLATE CASE NO. 2015-001868

SKYDIVE MYRTLE BEACH, INC. .....Appellant

v.

HORRY COUNTY..... Respondent

PETITION FOR REHEARING

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Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, the Appellant Skydive Myrtle Beach ("Appellant" or "Skydive") petitions the Court of Appeals for rehearing on its opinion, filed July 11, 2018, dismissing the appeal on the basis of mootness.

INTRODUCTION

The Court bases its entire opinion on an almost 70-year old case – *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) – which was cited by neither party in their briefs. The main distinction between *Berry* and the case at bar, however, is that Skydive did not *voluntarily* give up the tenancy to Hangar 7; SDMB was forced out by operation of the County's police powers.

Not only is *Berry* inapposite and distinguishable, but the Court further errs by ignoring the three general exceptions to the mootness doctrine set forth in modern cases, such as *Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015). These three exceptions were argued by Appellant in its reply brief but play no part in this Court's opinion.

Accordingly, the appeal should not have been dismissed. The case was either not moot and/or one of three exceptions applied, and the appeal should have proceeded on the Appellant's appeal issues.

ARGUMENT

In *Berry*, the plaintiff-tenants prevailed in their appeal from the magistrate's court; the circuit court, however, remanded the case for a new magistrate's trial. *Berry*, 220 S.C. at 87, 66 S.E.2d at 459. Rather than be satisfied with the result, however, the plaintiff-tenants appealed to the Supreme Court saying that the circuit court erred in not dismissing the proceedings outright in their favor. *Id.*, 220 S.C. at 87, 66 S.E.2d at 459-460. Then, inexplicably, the plaintiff-tenants

voluntarily "vacated the premises and delivered possession to the landlord." *Id.*, 220 S.C. at 87, 66 S.E.2d at 460.

In this case, however, Skydive did not voluntarily give up possession of Hangar 7 but instead was forced out after receiving an email dated September 16, 2015. (R. p. 358). The County attorney, in following up on this email, specifically relied upon the police power of Horry County to back up his request. Thus, there was nothing *voluntary* about the Appellant's dispossession from Hangar 7.

Consequently, the holding of *Berry* as used by this Court simply is not valid.

The Court notes that Skydive never filed for a stay of Judge Hyman's ejectment ("Skydive never requested this court stay its ejection pending appeal"). (Opinion, p. 4). Such a motion would be made pursuant to Rule 241, SCACR. *See* Toal, et al., APPELLATE PRACTICE IN SOUTH CAROLINA 3D (SC Bar 2016), at pp. 372, 340-345. However, under Rule 241(b)(4), SCACR, suits for dispossession of real property are automatically excepted from the "automatic stay" in Rule 241(a). Thus, while Skydive could have sought a stay, it was not required to do so in order to perfect this appeal. *See generally*, Rule 241, SCACR.

Finally, it should be noted that *Berry* predates the adoption of the current South Carolina Appellate Court Rules [first effective September 1, 1990]. To the extent the holding of Berry conflicts with the effect of Rule 241, SCACR, then the rule would govern. Rule 102(a), SCACR ("Effective Date and Repealer").

There can be no doubt that the whole purpose of the appeal at bar was for Skydive to be able to resume its rightful occupancy of Hangar 7 and resume its lawful business. If the Court had accepted one or more of Skydive's appeal grounds, and reversed the Circuit Court, that is the natural result. The fact the County succeeded in forcibly dispossessing SDMB from Hangar 7

does not render this appeal "of no practical legal effect" nor is the Court of Appeals "precluded from granting effectual relief." *S.C. Ret. Syst. Inv. Comm'n v. Loftis,* 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). It should be noted that the passage of three (3) years is immaterial in the appeal, in that it otherwise was filed and perfected on time.

Second, in *Wachesaw Plantation* Justice Beatty confirmed the three exceptions to mootness:

> "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. 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., 402 S.C. at 384, 741 S.E.2d at 758 (internal citations and quotations omitted); *see also Abbeville School Dist. v. State*, 410 S.C. 619, 629-60, 767 S.E.2d 157, 162 (2014).

To the extent the Court believes Appellant's appeal arguments are moot (which Skydive denies), then Appellant would respectfully argue that the first and third exceptions to mootness apply.

As to the first exception, there is an absence of any reported decisions on point; if landlords can successfully make the County's argument, then many commercial tenant-litigants with valid appeal bonds may be improperly dispossessed from tenancies at the conclusion of circuit court review in contravention of clear law. The need for clarity and direction from the Court of Appeals on Rule 241(b)(10), SCACR mandates review in the instant case for the benefit of commercial landlords and tenants, and courts, across the State. Thus, this Court should apply the first exception to mootness. *Cf. In Re McCracken*, 346 S.C. 87, 90, 551 S.E.2d 235, 237 (2001).

As to the third exception, there is ongoing litigation between the parties [2014-CP-26-1193]; thus, the circuit court's refusal to stay execution, along with determination of mootness by the Court of Appeals, both will result in collateral consequences in the ongoing case in terms of the County arguing at some future period that such litigation is moot as well, or that there is some preclusive effect on Skydive's damages claim.

In addition, there is a high probability that one or both of the parties might seek certiorari to the Supreme Court, which means that the Circuit Court's error will affect future events, as well. Accordingly, the third exception to mootness is triggered also. *Cf. Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 597 (2001).

CONCLUSION

For these reasons, Skydive respectfully asks for rehearing, and for this Court to rule on the merits of Skydive's appellate arguments contained in its Final Initial Brief.

Respectfully submitted,

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July 24, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

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SC Court of Appeals

APPELLATE CASE NO. 2015-001868

SKYDIVE MYRTLE BEACH, INC.....Appellant

v.

HORRY COUNTY,..... Respondent

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Petition for Rehearing*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following:

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July 24, 2018

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

RE: ***Skydive Myrtle Beach, Inc. v. Horry County***
Appellate Case No.: 2015-001868
Our File No.: 6247 - 1

Dear Ms. Abbott Kitchings:

The Appellant Skydive Myrtle Beach respectfully submits the original and six (6) copies of its ***Petition for Rehearing*** in the above-captioned matter. My firm's check in the amount of $25.00 for the petition fee is attached herewith.

Of course, should there be any questions or concerns, please do not hesitate to contact my office.

With kindest regards, I remain,

Very truly yours,

BROWN & VARNADO, LLC

Robert B. Varnado

RBV/kfg
Enclosure(s): as stated

cc: Arrigo P. Carotti, Esquire *(via US Mail)*
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