THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Opinion No. 5537
Heard March 5, 2018 – Filed July 11, 2018
Petition for Rehearing Denied September 20, 2018
Appellate Case No. 2018-001910

SKYDIVE MYRTLE BEACH, INC. .....Petitioner

v.

HORRY COUNTY.....Respondent

PETITION FOR *CERTIOARI*

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing was made and ruled upon by the South Carolina Court of Appeals on September 20, 2018.

QUESTION PRESENTED

Did the Court of Appeals err in dismissing the appeal on the basis of mootness?

INTRODUCTION

The Court of Appeals 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, nor was it argued at the oral hearing. The main distinction between *Berry* and the case at bar is that Skydive did not *voluntarily* give up the tenancy to Hangar 7; SDMB was forced out of its tenancy to Hangar 7 by operation of the County's police powers.

Thus, not only is *Berry* inapposite and distinguishable, but the Court of Appeals 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), which were argued by Appellant in its reply brief but play no part in this Court's opinion.

Finally, the Court of Appeals apparently now requires a party to take the extra, and almost certainly moot step, of seeking to have the Court of Appeals issue a stay of ejectment pursuant to Rule 241, SCACR, in order to perfect an appeal from an action for ejectment. Not only is this an extra burden for both the Court and the parties to a tenancy dispute, it also ignores the fact that: (1) the circuit court had already denied a stay; and (2) such a motion is not required under the South Carolina Appellate Court Rules.

Accordingly, the appeal should not have been dismissed. The appeal was either not moot and/or one of three exceptions applied, and the case should have been decided on the Appellant's appeal issues, rather than on faulty procedural grounds. This Court should therefor take *certiorari*.

STATEMENT OF THE CASE

Skydive Myrtle Beach, Inc., ("SDMB") is a skydiving business that operated out of the Grand Strand Airport ("GSA") located in North Myrtle Beach, South Carolina. The GSA is owned by Horry County (the "County"). For many years, the County employed Grand Strand Aviation d/b/a/ Ramp 66 ("Ramp 66") as its agent to administer GSA. On May 10, 2012, Ramp 66 entered into an eight (8) year lease with SDMB for the rental of "Bird Hangar" which is now known as "Hangar 7". [R. pp. 359-361]. At some point thereafter, SDMB lost its copy of the Lease.

In 2013, the County terminated its agency relationship with Ramp 66 and assumed direct oversight of GSA through the Horry County Department of Airports ("HCDA"), a County agency. Thereafter, HCDA presented a "Space Use Permit" to SDMB, which SDMB executed on September 13, 2013. [R. pp. 335-341].

SDMB filed a complaint against the County, the HDCA and individual defendants (county personnel) on February 28, 2014, ("Primary Action" or "14-CP-26-1193")[1] alleging fifteen causes of action arising from County's conduct against SDMB which included, *inter alia,* allegations of breach of a lease contract, breach of a lease contract accompanied by a fraudulent act, civil conspiracy, fraud, interference with a contractual relationship, and attempted retaliatory eviction. [R. pp. 33-68].

[1] *Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC) v. Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal,* C.A. 2014-CP-26-1193.

Every allegation in SDMB's Primary Action is related to SDMB's leasehold interest in Hangar 7. The County answered on March 15, 2014 but did not counterclaim for ejectment or declaratory judgment of its rights, nor did it move to amend its Answer. [R. pp. 69-75].

However, on June 5, 2014, the County filed an Application for Ejectment against SDMB in the Myrtle Beach Magistrate's Court, styled as *Horry County v. Skydive Myrtle Beach, Inc.*, CA No. 2014CV261092444 ("Magistrate's Action"). [R. pp. 1, 3, 78].

On June 13, 2014, SDMB moved for the Magistrate's Action to be dismissed or consolidated with the Primary Action based on the following grounds: S.C. Code Ann. § 23-3-30 (magistrate jurisdiction limited to $7,500.00); Rules 12(b)(1) and (2), SCRCP (subject matter and personal jurisdiction); Rule 12(b)(8), SCRCP (another action pending between same parties and same subject matter); and Rule 42, SCRCP (judicial economy, common questions of law and fact require consolidation). [R. p. 86]. It should be noted that formal service on SDMB was not affected on SDMB until four days later, on June 17, 2014. [R. p. 77].

The Magistrate orally denied SDMB's Motion to Dismiss on July 2, 2014 – holding that the Magistrate's Court had concurrent jurisdiction to determine an action that was "strictly a Land Lord [sic] Tenant dispute, and that the action already filed by the defendant in Common Pleas does not address." [R. p. 3]. On July 11, 2014, the Magistrate's Court mailed SDMB a Summons dated July 8, 2014, setting a bench trial at 11:00 a.m. for July 23, 2014. [R. p. 7].

On July 18, 2014, SDMB filed a timely Motion to Reconsider the denial of its 12(b) Motion to Dismiss the Magistrate's Action pursuant to: (1) Rule 12(b)(8), SCRCP (Primary Action filed); (2) Rule 12(b)(1) and (2) (no subject matter and personal jurisdiction since limit of Magistrate's Court is $7,500.00 as set forth in S.C. Ann. § 23-3-3). [R. pp. 88-89]. In the event SDMB's 12(b) motions were denied, SDMB also requested alternate relief: (1) to consolidate all matters under

Rule 42, SCRCP in the interests of judicial economy to avoid undue expense for common issues of fact and law in the Primary Action; (2) time to file its answer and counter-claim pursuant to Rule 12(a)(1), SCRCP ("if the Court denies the [12(b)(1), (2), or (8)] motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action"); (3) thirty days continuance pursuant to Rule 14, SCRMC (the "court shall be lenient in the allowance of changes or amendments to complaints, answers, and counterclaims, and in granting continuances of trials for good cause shown. . . . Raising a claim, defense, or counterclaim for the first time at trial shall constitute grounds for continuance when necessary to serve the ends of justice."); and (4) a Jury Trial pursuant to Rule 13(c), SCRMC. [Id.].

On July 21, 2014, over County's objection, the Magistrate allowed a hearing on SDMB's motion to reconsider when "both parties [would be] present in the courtroom." [R. p. 3]. The hearing on the motion to reconsider was set for July 23, 2014 at 11:00 a.m. [Id.].

At the July 23, 2014, hearing, the Magistrate's Court denied SDMB's Motion to Reconsider along with its requests for continuance, time to file an answer and counterclaim, and a jury trial. Significantly, thirty minutes later the Magistrate Court then conducted a full bench trial less than an hour after denying the motion to reconsider, over SDMB's objection and requests for continuance. [R. p. 3]. The Magistrate then issued a Writ of Ejectment against SDMB. [R. p. 1].

Specifically, the Magistrate's Return states:

> Attorney Eastman requested The Court to reconsider its ruling/decision on the Motion he put forth. The Court advised both parties that it would hear his Motion of Reconsideration on July 23rd with both parties present in the courtroom.
>
> On July 23rd, again both parties appeared. The Court heard from attorney Eastman who requested the Court to reconsider its ruling/decision on the Motion he put forth. The Court again respectfully denied his Motion. At that point [sic] The Court moved directly into the action filed by Horry County, Rule to Vacate.

> Attorney Eastman Requested a Jury Trial and 30 days to file a Counter Claim [sic]. The Court denied both of his request [sic]. Neither one were [sic] filed/requested timely. The Counter Claim [sic] should have been filed within the 30 day time period to file The answer and jury Trial [sic] should have been requested five days prior to the court date of July 23rd, 2014. The Court heard testimony from both sides and there witness [sic]. The Court found that based on the testimony and evidence issued [sic] that the agreement/lease between Skydive Myrtle Beach and Horry County did in fact expire January 1st, 2014. That Horry County is the rightful land lord [sic] and did present Skydive Myrtle Beach with a new agreement/lease. That Skydive Myrtle Beach did not agree with it, and refused to sign the new agreement/lease. Therefore Skydive Myrtle Beach has no legal right to be on the property or in the building. Eviction was granted.

[R. p. 3].

SDMB filed its timely appeal to the circuit court on July 25, 2014. [R. p. 82]. Importantly, on August 1, 2014, a Bond Hearing was held in the Magistrate's Court with SDMB appearing *pro se.*[2] The Court issued a bond requiring SDMB to pay back-rent and remain current on its Hangar 7 occupancy at the $1,200.00 per month rate as previously agreed between the parties. [R. p. 2].

On March 2, 2015, counsel for SDMB presented argument that the Appeal should be consolidated with the Primary Action and filed written memorandum of law under the Primary Action caption. [R. pp. 111-136]. The court continued the appeal and ordered SDMB to request a joint status conference. [R. pp. 6-7].

On March 13, 2015, SDMB filed a Request for a Joint Status Conference in both the Primary Action and Appeal. [R. p. 321].

The appeal came to a hearing before the Horry County Court of Common Pleas, the Honorable Larry B. Hyman, Jr. presiding, on May 6, 2015, along with SDMB's motion for Joint Status Conference, as well as Respondent's motions for a rule to show cause, increase bond

[2] On July 30, 2015, the Magistrate denied SDMB's request for continuance due to schedule conflict and unavailability. Counsel for SDMB was in Florida and could not attend due to schedule conflict on less than two days' notice. [R. pp. 137; 80].

amount, and injunctive relief. After hearing oral argument, Judge Hyman then directed the parties to submit proposed orders for his consideration no later than May 11, 2015, which counsel for both parties timely accomplished. [R. pp. 396-418, 388-395]. In the meantime, Judge Hyman executed a Form 4 Order dated May 6, 2015, filed with the Clerk of Court on May 13, 2015, mailed to counsel of record on May 20, 2015 (received by counsel for SDMB on Tuesday, May 26, 2015), in which he indicated "Motion to Appeal Denied" (hereinafter "Form 4 Order"). [R. pp. 8-9].

Appeal # 1 – Dismissal of Appeal.

The Form 4 Order did not state that a formal order was forthcoming; however, within ten (10) days of its service, on May 27, 2015, Judge Hyman executed a formal *Order Dismissing Magistrate's Appeal*, filed May 29, 2015, served via U.S. Mail that same date, and received by counsel for SDMB via email also on May 29, 2015 ("Formal Order"). [R. pp. 10-19].

Out of an abundance of caution, SDMB moved the Court to reconsider both orders (i.e., the Form 4 Order and the Final Order) simultaneously by a timely Rule 59(e) Motion to Reconsider served June 3, 2015. [R. pp. 139-163]. Judge Hyman signed an Order Denying Appellant's Motion to Reconsider Dismissal of Appeal on July 16, 2015, which was filed July 21, 2015 and received by Appellant on July 27, 2015. [R. pp. 20-23]. Appellant's Notice of Appeal thereto was timely served on August 19, 2015.

Appeal # 2 – Supersedeas/Stay.

On September 16, 2015, the County issued a seventy-two (72) hour notice of intent to eject SDMB from GSA on the grounds that a supersedeas bond was required since the appeal was denied. [R. p. 358]. On September 17, 2015, SDMB filed a Notice of Motion for Emergency Injunction and Stay of Ejectment. [R. pp. 164-178]. Judge Hyman conducted a hearing on

September 22, 2015 and directed the parties to file any additional, supporting memoranda and materials by September 25, 2015. [R. p. 302].

On September 25, 2015, the Appellant filed a Supplemental Memorandum of Law which raised and analyzed the matters contained in Section III of this brief; Respondent filed a supplemental memorandum of law as well. [R. pp. 419-431, 432-438]. On October 13, 2015, Judge Hyman signed an Order Denying Appellant's Motion for Injunction and Stay of Ejectment, which was filed October 15, 2015 and received by Appellant the same date. [R. pp. 28-31]. On October 23, 2015, Appellant served a timely Rule 59(e) motion to reconsider the October 13, 2015 Order. [R. pp. 179-191].

Judge Hyman, on November 19, 2015, denied SDMB's Motion to Reconsider the October 13, 2015 Order which was received by Appellant's counsel that same day electronically, but not filed with the clerk of court until November 24, 2015. [R. p. 32B].

Out of an abundance of caution, Appellant had additionally filed a September 25, 2015, *Verified Petition for Supersedeas Bond to the Horry County Court of Common Pleas.* [R. p. 192]. On November 4, 2015, Judge Hyman issued an Order Denying Petition for Supersedeas Bond which was filed November 9, 2015, of which written notice was received November 16. [R. p. 32]. Accordingly, Appellant served its Notice of Appeal # 2 on November 20, 2015. Following a motion to consolidate, the Court of Appeals consolidated these two appeals by an Order dated December 30, 2015.

Procedural History.

The matter came to hearing on March 5, 2018. The Court of Appeals issued its opinion on July 11, 2018 and the Appellant filed a timely motion to reconsider, which was denied September 20, 2018.

ARGUMENT

This case appears to turn on whether the Supreme Court will uphold a dismissal from the Court of Appeals, when the dismissal: (1) is based on old, inapposite caselaw which has been surpassed, and (2) on an untested procedural requirement. Petitioner believes that it has raised good and valid appeal points that are worthy of being heard; if the Supreme Court agrees, then it should grant *certiorari* and either remand the case for further proceedings by the Court of Appeals or hear SDMB's appeal directly.

1. Berry *is Inapposite.*

The Court of Appeals bases its entire decision on *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951). In *Berry*, the plaintiff-tenants prevailed in circuit court on their appeal from the magistrate's court; the circuit court, however, remanded the case for a new magistrate's trial. 220 S.C. at 87, 66 S.E.2d at 459. Rather than be satisfied with this favorable outcome, however, the plaintiff-tenants appealed to the Supreme Court – arguing 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. Understandably, the Supreme Court found fault with the plaintiff-tenant's appellate practice. *Id.*

In this case, however, Skydive did not voluntarily give up possession of Hangar 7 – instead, it was forced out of its leasehold 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 demand. Thus, there was nothing *voluntary* about the Appellant's dispossession from Hangar 7 – SDMB was run out of its tenancy by Horry County, effective September 17, 2015. If a future plaintiff-tenant loses an appeal to the circuit court and the landlord is a governmental agency, then according to the Court of Appeals, the tenant has no further appeal

rights *ipso facto* if the governmental agency forces it out; the Court of Appeals will treat it the same as if the tenant vacated of its own accord.

The holding of *Berry* as used by the Court of Appeals is simply invalid. First, *Berry* predates the South Carolina Appellate Court Rules [first effective September 1, 1990]; thus, to the extent the holding of Berry conflicts with the effect of Rule 241, SCACR, then the rule would govern. *See* Rule 102(a), SCACR ("Effective Date and Repealer").

Second, there can be no doubt that while the purpose of the appeal at bar was for Skydive to be able to resume its rightful occupancy of Hangar 7, even more importantly, SDMB wished to resume its lawful business at the Grand Strand Airport. 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). Irrespective of where Horry County allowed SDMB to continue skydiving operations, it was being allowed to resume operations without interference that was the true gravamen of the appeal.

Third, it should be further noted that the passage of three (3) years ("Skydive has not possessed the property in almost three years") is completely immaterial in the appeal. It was not SDMB's fault that that there is a lag in cases being determined by the Court of Appeals. All that it can do is perfect on time – which it did.

Fourth, the Court of Appeals puts emphasis on the fact 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 (S.C. 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. Thus, the Court of Appeals has added another costly layer to tenancy appeals which is not required under the Appellate Court Rules.

Moreover, by the Court of Appeals' own logic, the minute that SDMB was evicted under threat of the County's police power, then it ceased possession of the property. Thus, the Court of Appeals would have denied the motion for a stay for precisely the same reason as it did three years later – because it was "moot". This cannot be the result of a timely appeal of South Carolina court decision, yet the Court of Appeals has made it so.

Berry has been primarily cited for its fifth headnote – "[q]uestions of public interest originally encompassed in an action should be decided for future guidance, though they may have become abstract or moot in the immediate contest." The Court of Appeals, however, relies upon *Berry's* first headnote which analyzes mootness – an analysis which has long-since been surpassed.

Mootness, Generally.

In *Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015), Justice Beatty confirmed the three modern 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, this Court should take *certiorari* of this manifestly unjust situation and modify the Court of Appeals ruling to allow the amended complaint against the Individual Defendants to proceed.

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October 22, 2018
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Appellate Case No. 2015-001868

PROOF OF SERVICE

The undersigned attorney for Petitioner hereby certifies that a true copy of the ***Petition for Writ of Certiorari*** in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 22nd day of October, 2018, to the following:

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