

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**

APPELLATE CASE NO. 2018-001910

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S.C. SUPREME COURT

SKYDIVE MYRTLE BEACH, INC.Petitioner

v.

HORRY COUNTY.....Respondent

**HORRY COUNTY'S RETURN OPPOSING
SKYDIVE MYRTLE BEACH, INC.'S
PETITION FOR WRIT OF CERTIORARI**

November 6, 2018

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Rules

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QUESTION PRESENTED

Is the appeal moot because there is no specific relief available to petitioner and nothing more for the court to consider?

COUNTER STATEMENT OF CASE

On July 23, 2014, Magistrate Chris Arakas ordered that Petitioner Skydive Myrtle Beach, Inc. (Skydive) be ejected from an airplane hangar owned by Horry County. [R 1] Skydive appealed Judge Arakas’ order to the Court of Common Pleas on Horry County. Skydive moved in Magistrate’s Court for a Bond to Stay Execution on Appeal. [R 2] The specific language used

in Skydive's motion was for the Circuit Court to stay execution on the Judgment of Ejectment until the matter is heard and decided by the Circuit Court. [R 2] In so moving Skydive undertook to pay periodic rent thereafter due according to the findings of the Court. [R 2] Judge Arakas granted Skydive's motion and stayed execution of the writ of ejectment until the matter was heard and decided by the Circuit Court. [R 2]

In his Return on Appeal, Judge Arakas stated that Skydive's agreement/lease for the airplane hangar expired January 1, 2014. Horry County was the rightful Landlord and it did present Skydive with a new agreement/lease which Skydive refused to sign. Therefore, Skydive had no legal right to be on the premises. Eviction was granted. [R 3] Skydive requested in its notice of appeal that the Magistrate's order be vacated and the writ of ejectment be set aside.

Circuit Court Judge Larry Hyman heard the appeal and on May 29, 2016, decided the matter in favor of Horry County. He issued an order dismissing Skydive's appeal. [R 10] Skydive moved for reconsideration of Judge Hyman's order which was denied. [R 20] Horry County then demanded that Skydive vacate the premises pursuant to Judge Arakas' order of eviction. In response, Skydive through its attorneys Brown and Varnado, LLC, made a Motion for Emergency Injunction and Stay of Ejectment dated September 17, 2015. [R 24] In its motion Skydive alternatively requested a stay of proceedings under S.C. R. Civ. P. 62 and a writ of supersedeas under S.C. App. Ct. R. 241. [R 24] Judge Hyman denied Skydive's emergency motions on October 13, 2015. He found Horry County had demonstrated that it would suffer substantial risk by virtue of Skydive's continuing operations from Horry County property and Judge Hyman found that it would be inappropriate to grant a stay or writ of supersedeas where the burden to Horry County significantly outweighed any potential damage to Skydive. [R 31 - 32] Skydive then filed a Motion to Reconsider the Judge Hyman's order of October 13, 2015.

Skydive's motion for reconsideration was denied also. [R 32b] Skydive noticed appeals to the S.C. Court of Appeals from Judge Hyman's order dismissing the appeal from Magistrate's Court and from Judge Hyman's order denying Skydive's Motion for Emergency Injunction and Stay of Ejection.

Under the SC Rules of Appellate Procedure orders of ejection are not subject to the general stay for appeals. S.C. App. Ct. R. 241. However the appellate rules permit any party to move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision. S.C. App. Ct. R. 241. Although Skydive appealed Judge Hyman's orders, it failed to move for a supersedeas of the matters decided in Judge Hyman's orders as permitted in S.C. App. Ct. R. 241. The procedure and requirements for obtaining a supersedeas of Judge Hyman's order is contained in S.C. App. Ct. R. 241. A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service. S.C. App. Ct. R. 241. Skydive did not file the required verified petition. Instead, Skydive vacated the premises upon the demand of Horry County.

The Court of Appeals found that Skydive's sole issue on appeal was Skydive's right to possess Horry County's airplane hangar. Skydive has not been in possession of the hangar for

almost three years and therefore the appeal is moot because there is nothing the court can do lawfully to restore Skydive's right to possess the airplane hangar at the conclusion of the present appeal. See *Berry v Zahler* 220 S.C. 86, 66 SE 2d 459 (1951).

Skydive filed the Petition for Writ of Certiorari claiming that the decision of the SC Court of Appeals is flawed because it is based (1) on old, inapposite case law which has been surpassed and (2) on an untested procedural requirement. [Pg. 8, Petition for Certiorari] Horry County respectfully disputes Skydives claims on both points.

ARGUMENT

1) The SC Court of Appeals applied the correct law.

In *Berry v Zahler* 220 S.C. 86, 66 SE 2d 459 (1951) during the course of litigating an ejectment action in Magistrate's court, the tenants in that proceeding vacated the premises and delivered possession to the landlord. The SC Supreme Court held that under those circumstances, the issue, which was the right to possession of the premises, had become moot, and the appeal would not be considered. *Id.* The Court stated: "It has also been long settled law in this State that this court cannot consider merely speculative questions and give judgment upon disputed points of law. Our duty is to pronounce practical judgments, to settle and determine the rights of parties." *Id.* That legal principle is still good law in South Carolina. See SCACR 241(d), 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)(An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists) also See *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). (A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy).

Skydive has failed to show that an actual controversy capable of specific relief exists over

their right to possession of Horry County's airport hangar. Further Skydive has not shown that a favorable decision on its appeal will have practical legal effect upon the existing controversy. For whatever reason, Skydive has vacated the premises. The question of whether it should be forced to leave is now moot. If Skydive had the right to remain in Horry County's airplane hangar by successfully resisting an ejectment proceeding, the right to remain ended when Skydive vacated the premises. If Skydive had any remedies when it vacated the premises, those remedies may have been for ouster. See *Laughon v. O'Braitis*, 360 S.C. 520, 525, 602 S.E.2d 108, 110 (Ct. App. 2004); *Freeman v. Freeman*, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996) (Ouster' is the actual turning out or keeping excluded a party entitled to possession of any real property.) Of course, Horry County contends that Skydive did not have a claim for ouster under the facts of the present case.

2) *SCACR 241 is not an untested procedural requirement.*

A comprehensive procedure for obtaining a supersedeas staying a court order is contained in S.C. App. Ct. R. 241. Skydive followed the requirement contained in paragraph 1 of the procedure. Skydive made an application for a supersedeas in the Circuit Court. [R 164] Although the Circuit Court denied Skydive's application, Skydive failed to proceed to step 2 of the procedure which was: "After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order." S.C. App. Ct. R. 241.

Skydive claims it was not required to follow S.C. App. Ct. R. 241 to perfect its appeal. [Petition, pg. 10] While it may be true that Skydive was not required to seek a stay from the appellate court to perfect its appeal, Skydive was required to seek a stay from the appellate court to obtain a supersedeas of the order of ejectment and Judge Hyman's order denying Skydive's

application for a supersedeas order. S.C. App. Ct. R. 241. Skydive's attempt to conflate an appeal bond in magistrate's court with a supersedeas of a subsequent order issued by a Circuit Court Judge was rejected by implication in the adoption of S.C. App. Ct. R. 241.

Judge Hyman's decision to deny Skydive's application for a supersedeas of the ejectment order did not make Skydive's appeal moot. Skydive's vacating the premises was an intervening act that made the appeal moot. *Berry v Zahler* 220 S.C. 86, 66 SE 2d 459 (1951). Skydive claims that it did not have any choice because of Horry County's acts. Although Skydive admits it could have made an application for a stay in the appellate court, it claims that it was not required to do so obtain a supersedeas of Judge Hyman's order. [Petition, pg. 10] Horry County disagrees. S.C. App. Ct. R. 241 contains the following requirement: "A person seeking an order granting a writ of supersedeas must file a written petition verified by the client." The language in S.C. App. Ct. R. 241, is mandatory. Skydive's claim that it did not have any choice but to vacate Horry County's airport hangar due to Horry County's acts is not consistent with the procedural remedies made available to it under S.C. App. Ct. R. 241.

3) *Analysis of mootness.*

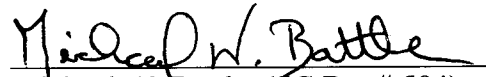
S.C. App. Ct. R. 241, is a clear and comprehensive procedure for stay and supersedeas in civil actions. Compliance with S.C. App. Ct. R. 241 does not require further guidance from the Court. Skydive simply did not follow the procedure laid out in S.C. App. Ct. R. 241 and as a result the lower courts' orders were properly enforced by Horry County. Since Skydive was not in possession of the airport hangar, the question of whether it should be ejected was moot. *Id.*

Skydive makes a general claim that the mootness doctrine should not be applied because the Court's decision will have some improper collateral consequences on other pending litigation previously filed between the parties [*Skydive Myrtle Beach, Inc v. Horry County, et. al.* 2014-

CP-26-1193]. Skydive claims the present decision will allow Horry County to argue that such litigation is now moot or that there is some preclusive effect on Skydive's existing damages claims. The relation of the issues in the present case and Skydive's damages claims in 2014-CP-26-1193 was raised before the magistrate in Skydive's motion to dismiss on the grounds that the present case should be dismissed because 2014-CP-26-1193 was pending in circuit court at the time the present ejectment action was filed. The magistrate denied Skydive's motion to dismiss and found the ejectment action was independent of 2014-CP-26-1193. Skydive's claim of collateral consequences is not supported by the record.

CONCLUSION

For the forgoing reasons, Respondent Horry County respectfully requests that Skydive Myrtle Beach, Inc.'s Petition for Certiorari be denied and its appeal be dismissed.


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November 7, 2018

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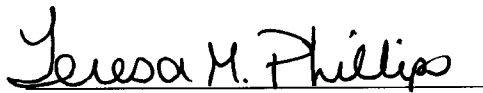
v.

Horry County.....Respondent.

PROOF OF SERVICE

I certify that I have this 7th day of November, 2018 served Horry County's Return Opposing Skydive Myrtle Beach, Inc.'s Petition for Writ of Certiorari on Attorney of Record listed below by depositing a copy of same in the US Mail.

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