THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Case No. 2015-CP-26-8179
Appellate Case No. 2016-002175

Robert DeCiero,..Appellant,

v.

Horry County, State of South Carolina,..Respondent.

RESPONDENT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

FACTUAL AND PROCEDURAL HISTORY

Upon motion of the Respondent Horry County, the circuit court dismissed Appellant's Complaint under Rule 12(b)(6), SCRCP, by order dated June 22, 2016, filed July 11, 2016. (R. p.3)

The pleadings and evidence before the court at its hearing on the motion were the Complaint (R. p.8), the Answer (R. p. 15), Respondent's Motion to Dismiss and Memorandum in Support thereof (R. p. 48-55), Affidavit of Janet Carter, Horry County Planning Director, with Exhibits A-F (R. p. 69-87), and Appellant's Memorandum and Reply Brief to Respondent's Motion to Dismiss (R.56-61), without affidavit or other testimony.

Certain provisions of state and local statutory law were before the circuit court at the hearing. Appellant alleged he resides in Horry County Zoning District SF-6. (R.pp.11, 12, 16, 70.) Sections of the Zoning Ordinance having to do with SF-6 were cited to court at the hearing in the Affidavit and in the memoranda submitted by both parties (R. p. 50-61, 70, 76.) The Complaint cited two zoning ordinance sections verbatim: §431 Horry County Zoning Ordinance, the definition of "family," and §1300, the provision for funding enforcement of the zoning ordinance. (R. p. 12).

Based on the pleadings, evidence, and testimony and law before the court, the circuit court found the Complaint deficient under Rule 8(a), SCRCP (R. p. 4).

The circuit court further found the Zoning Ordinance "restricts construction in Long Bay Estates to single-family homes or duplex dwellings...neither of which restrict short-term rental or the number of occupants" (R.p. 4).

Lastly, the circuit court found Appellant lacked standing under the law because he failed to allege a particularized injury. (R. p.5).

Appellant appealed the dismissal. He was granted several extensions of time by this Court (Order of February 7, 2017.) On March 21, 2018, Respondent submitted a Motion to Dismiss the Appeal (denied by order filed May 24, 2017), and Appellant served an Amended Notice of Appeal March 3, 2017. The court denied Respondent's Motion to Quash the Amended Notice by order filed June 1, 2017, and the parties timely briefed the matters on appeal.

The matters were heard without oral argument by a three-judge panel. The parties were notified by Order dated December 5, 2018 1, of the Court Panel's two-to-one decision, in which two

1 Postal service was suspended December 5 in honor of the late President George H.W. Bush

judges voted to reverse the circuit court and one voted to affirm the circuit court.

STANDARD OF REVIEW

The appellate court was to apply "the same standard of review as the [circuit] court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). Petitions for Rehearing are to be based upon points overlooked or misapprehended by the court. Rule 221(a), SCACR. Rehearing may be granted at the court's discretion. Rehearing *en banc* may be granted if the appeal was heard and decided by the three-judge panel without oral argument when consideration by the full court is needed to secure uniformity of decisions or when the case involves a question of exceptional importance. Rule 219 (a), SCACR.

ARGUMENT

I. The divided three judge panel misapprehended the insufficiency of the Appellant's Complaint.

The three-judge panel of the Court ("the Panel") overlooked the insufficiency of Appellant's Complaint under Rule 8(a) and misapprehended the insufficiency of his failure to plead facts to establish a cause of action or make any prayer for relief, where the circuit court found no short plain statement of the grounds or facts showing Plaintiff is entitled to relief, no causes of action, and no prayer for relief. The Panel made a specific similar finding: "Appellant did not label or otherwise identify a cause of action" (Order of December 5, 2018.) However, two of the three judges on the Panel excused the defect by finding he alleged elements necessary for a mandamus case.

The Panel ascribed no plain error to the circuit court's finding on any of the three Rule 8(a) requirements, and only addressed one --that a cause of action be pled. On that one, the two judges

found appellant *did not* identify a cause of action, which was consistent with the circuit court. The circuit court's finding Appellant failed to plead a short plain statement of grounds including facts and statutes showing the pleader was entitled to relief is supported by a review of the Complaint, as briefed by Respondent (Brief of Respondent pp. 5-7.) This was not addressed by the Panel. The decision by two of the three judges seems to be based on some extrapolated finding about the elements of mandamus. Mandamus was not pled or otherwise *even mentioned* in Appellant's Complaint. The Panel overlooked that Appellant's Complaint literally cites only two ordinances, neither of which supports any relief.

II. The divided three judge panel misapprehended the facts pled when it concluded Appellant pled facts to establish he suffered a concrete and particularized injury to support standing.

The circuit court found Appellant failed to allege any injuries particular to him (R. p.5) and therefore lacked standing to seek relief from a public zoning authority. There was no zoning violation pled (see Complaint, R. pp. 8-14) and no zoning violation existed because Horry County decided *not to zone* for short term rentals (R. p. 69-85.) Two of the judges found Appellant possessed standing under §6-29-950, S.C. Code. This misapprehends the Horry County Zoning Ordinance and that Appellant cited no zoning ordinance section alleged to have been violated in his pleadings (because there is not one.)

Further, the two judges overlooked the South Carolina Supreme Court's holdings in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E. 2d 846, 407 S.C. S.C. 67 (2014), and Respondent's arguments related thereto (Brief of Respondent pp. 10-13.) Rather than applying the standing test prescribed by the Court, the divided Panel looked only to §6-29-950, S.C. Code. AS the court pointed out in *Carnival*, the statute only applies to an adjacent or neighboring property owner

who would be specially damaged. The Carnival plaintiffs established they were tenants and held a neighboring conservation easement. The Court found those facts did not support standing. Appellant filed no affidavit. His only allegations are in his Complaint. He never alleges he owns property. He never establishes that his residence is neighboring or even nearby—much less adjacent to--any alleged zoning violation, nor that there is particularized injury or harm to him. No supporting fact in this regard was before the circuit court. Just like in *Carnival*, Appellant "has made no allegation [he] owns adjacent or neighboring property." Id. at 852. This may be ascribable to a simple overlooking of the evidence that was before the circuit court.

Finally, the underpinning of statutory standing to challenge zoning violations, as set out by the Supreme Court in *Carnival*, is that there is actually a zoning ordinance identified and alleged to have been violated. That is not the case here. Appellant has not alleged he is particularly or specially injured by an alleged zoning violation, much less that a favorable decision would be likely to redress an injury. He alleged no violation of the zoning ordinance. He has not alleged the County has permitted multi-family construction in violation of SF-6, or not enforced traffic or other ordinances.(Brief of Respondent p.13)

III. The divided three judge panel misapprehended that the circuit court erred in finding the Horry County Zoning ordinance does not prohibit short term rental.

The only testimony presented to the circuit court was from the Horry County Planning Director, Janet Carter, J.D. , which was uncontroverted by Appellant. Ms. Carter testified Horry County has considered and never adopted a short-term rental ordinance. That the Panel would hold the court erred in finding "the zoning ordinances do not prohibit short-term rentals" is to completely overlook the only testimony and evidence before the circuit court. (R. pp. 69-72, paragraphs 10, 14,

20, 21, 24.) Moreover, the Panel found "the circuit court cited no authority in support of its conclusion, and the relevant ordinances do not appear in the record." (Order of December 5, 2018.) This conclusion overlooks that the circuit court had the benefit of the affidavit testimony, three memoranda of law, and argument (*see* R. pp.23:11-24: 25:15). The Panel overlooked two important things: (1) in reaching its conclusion, the court did in fact cite both zoning ordinances to which Appellant referred in his Complaint (R. p.4); and (2) other ordinances (or the lack thereof) were in included in the record by citation or reference. For example, SF-6 was referenced by Appellant and Respondent in the Complaint and pleadings, the Affidavit, and the memoranda submitted to the circuit court. Ordinances are in the nature of statutory law. An appellate court may consider law cited to it on appeal to support a fact-finding court's conclusions. The Panel's statement that "relevant ordinances do not appear in the record" is analogous to suggesting no appellant litigant could cite any law—caselaw or statutory—that did not appear in a trial court's record. Even so, the Panel overlooked Appellant's Complaint, which includes the text of the two statutes he cites and his own citation of SF-6, and overlooked the Affidavit in the Record of Janet Carter stating there is *no* ordinance in Horry County that addresses permanent homes, short term rentals, or transient occupancy, and describing SF-6. While this may be different from other jurisdictions, this is the Horry County Council's decision. (Id. and R. 69-73.) The Panel missed that the "relevant ordinances" are either a) in the record as cited by Appellant or b) not in the record because they do not exist. To the extent either party cited other ordinances on appeal, statutory law may be cited to as supporting legal authority, not necessarily printed verbatim in a record.

CONCLUSION

Respondent Horry County respectfully requests consideration by the full Court of Appeals as

(1) necessary to secure uniformity of the Court's decisions with regard to the Panel's conclusions about matters and authority not included in the record; and (2) to address a question of exceptional importance.

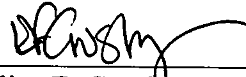
The South Carolina Supreme Court held "an appellate court may not reverse a lower court based on a legal or factual premise not advanced by the party who lost at the trial level." *Repko v. Georgetown County*, ___ S.C. ___ (Op. 27837 August 29, 2018). The divided panel in this case reversed a circuit judge's decision based on based on premises not advanced by Appellant in circuit court- namely, mandamus. The losing party at circuit court (Appellant) "must present his issues and arguments to the lower court and obtain a ruling before the appellate court will review [them.]" *Id.*, citing *I'on v. Town of Mt. Pleasant*, 338 S.C. 406, 442, 526 S.E. 2d 716, 724 (2000). As one example, the Panel in this case cited §6-29-950, S.C. Code, as well as a fabricated cause of action for mandamus, neither of which were argued, cited, or raised at the trial level by the losing party. §6-29-950, S.C. Code was raised for the first time in Appellant's Brief (p.13). At no time did he make a cause of action for mandamus or argue same, either at trail or in his Brief (pp. 8-10.) "while an appellate court may affirm a lower court judgment for any reason appearing in the record, an appellate court may not, of course, reverse for any reason not appearing in the record." *Repko* at 7-8.

Secondly, Appellant's challenge, even in the light most favorable to him in reading the Complaint dismissed under Rule 8, appears to be a challenge to a South Carolina County Government's zoning authority *not* to address something. The record contains ample evidence and testimony the elected body of this political subdivision has not zoned for short-term rental or occupancy requirements in Appellant's zoning district, for whatever reason. The Court of Appeals, in reversing the circuit court's decision here, calls into question any County's right to consider the

zoning issues facing it[2] and on balance reach a conclusion. These are exceptionally important issues.

In the alternative, in the event the Court declines to rehear the appeal *en banc*, Respondent respectfully requests the divided Panel rehear and reconsider the matters identified herein as overlooked or misapprehended and affirm the circuit court.

Respectfully submitted,



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December 19, 2018

2 *E.g.* impact of short-term rental of beach houses on property tax classification rates, owner's rental incomes, the residential real estate and rental industries, owner, rental agency, or county ability to demand evidence of filial relations from renters, retail and hospitality industries, etc.