

RECEIVED

FEB 11 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Circuit Court Judge

Civil Action Case No.: 2015-CP-24-00514
Appellate Case No.: 2018-002214

Thomas Waller, Larry Jackson, P. Dale Kittles, Claude L. Maus,
and Terry C. Weeks,Appellants,

v.

The State of South Carolina, Kevin L. Bryant, Lt. Governor of
the State of South Carolina, Jay Lucas, Speaker of the South Carolina
House of Representatives, and Alan Wilson, Attorney General of
South Carolina,Respondents.

INITIAL BRIEF OF APPELLANTS

Armand G. Derfner, Esq.
Jonathan S. Altman, Esq.
Samuel H. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

C. Rauch Wise, Esq.
305 Main Street
Greenwood, SC 29646

Sally C. Newman, Esq.
1630 Meeting Street, #2
Charleston, SC 29405

Attorneys for Appellants

TABLE OF CONTENTS

Table of Authoritiesi
Statement of Issues on Appeal1
Statement of the Case2
Standard of Review3
Argument
1. THIS CASE IS NOT MOOT.....3
2. THIS CASE PRESENTS ISSUES OF IMPORTANT PUBLIC INTERESTS.6
Conclusion7

TABLE OF AUTHORITIES

CASES

Friends of the Earth v. Laidlaw Services, Inc., 528 U.S. 167 (2000).....5
Hartmann v. Loudoun Co. Bd. of Ed., 118 F3d 996, 1000 n. 1 (4th Cir. 1997)5
Seabrook v. City of Folly Beach, 357 S.C. 304, 523 S.E.2d 462 (1999)4
Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2005)3 & 6
Sloan v. Greenville County, 380 S.C. 528, 670 S.E.2d 663 (2009)4
S.C. Dept. of Revenue v. Club Rio, 392 S.C. 636, 709 S.E.2d 690 (2011)3 & 4

OTHER AUTHORITY

S.C. Code Ann. § 10-1-1652

STATEMENT OF ISSUES ON APPEAL

1. DOES AN EASILY REVERSEABLE INTERVENING EVENT OCCURRING AFTER JUDGMENT MOOT A CASE?
2. ARE THE HERITAGE ACT'S CONSTITUTIONALITY AND ITS APPLICABILITY TO PRIVATELY OWNED MONUMENTS A MATTER OF IMPORTANT PUBLIC INTEREST?

STATEMENT OF THE CASE

This suit was filed on May 19, 2015 by the President and several members of American Legion Post 20 (hereinafter "Post 20") in Greenwood, South Carolina, all military veterans including one who was a veteran of World War II. The defendants were the State, the Lt. Governor, Speaker of the House, and the Attorney General. The suit involves a war memorial ("memorial") owned by Post 20 located at Main Street Square in Greenwood, South Carolina. The memorial honors veterans from Greenwood who died in America's two World Wars and the Korean War. The fallen soldiers in the World Wars are identified in segregated lists; first a list of "white" deceased veterans and then followed by a list of "colored" veterans. The segregated arrangement no longer reflects Plaintiffs' viewpoint or the viewpoint of Post 20 which desires to replace the pro-segregation plaques with plaques that honor the deceased veterans in single alphabetical lists without regard to priority of race or color.

Plaintiffs alleged that they approached the City of Greenwood and obtained the City's approval to change the plaques. The segregated plaques would be placed in the Greenwood museum for education and historical study.

Through an Attorney General's opinion, Plaintiffs were informed that changing the plaques would violate the South Carolina Heritage Act, which provides that:

"No Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish-American War, World War I, World

War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African American History monuments or memorials erected on a public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered...”
See S.C. Code Ann. § 10-1-165.

Plaintiffs then filed this suit, alleging that if the Heritage Act prevented a change in the plaques, the Act violated the South Carolina Constitution in various ways, including that it deprived them and Post 20 of property without due process of law and freedom of speech and petition rights.

On cross-motions for summary judgment, the lower court ruled on May 18, 2018 that the South Carolina Heritage Act does not apply to privately owned monuments – like the monument at issue in this case -- even if they are on public property. The court observed that if the Act were interpreted to block changes in privately owned monuments, it would invade private speech and property rights in violation of the South Carolina Constitution.

After the decision, defendants filed several motions asking the lower court to reconsider its ruling, emphasizing that the ruling had an effect far beyond one monument in Greenwood. One motion emphasized the legislative effort and great compromise that led to the Heritage Act and said “it is vitally important to protect the Heritage Act.” Another motion emphasized the vast reach of the lower court’s ruling, saying “over 170 Confederate monuments and markers were erected throughout South Carolina,” virtually all of them presented to towns and villages by “private groups such as the Daughters of the Confederacy, SC” etc., which typically kept legal title to the monument or marker.

While these motions were pending, on information and belief, the segregated plaques in question were removed by a third party (not connected with plaintiffs or defendants) and replaced by integrated plaques. Further on information and belief, the segregated plaques were

taken to the Veterans Center of Greenwood County (which houses a Veterans Museum) where they remain in storage and intact.¹

Thereafter, defendants moved to dismiss the case as moot because “the plaques at issue in this case have been removed and replaced.” Plaintiffs opposed this motion, saying “the original plaques are still in existence and could be restored.”

The lower court did not conduct a hearing or take any evidence but on November 14, 2018, granted defendants’ motion dismissing the case as moot. The lower court ruled that a “live controversy between the parties no longer exists” and that this Court’s case of Sloan v. Friends of Hunley, Inc., applied here because “an intervening event render[ed] any grant of effectual relief impossible.”

This appeal followed. The notice of appeal was served on December 12, 2018.

STANDARD OF REVIEW

Mootness, like standing and other jurisdictional issues, is a question of law for the Court, and review is therefore de novo. S.C. Dept. of Revenue v. Club Rio, 392 S.C. 636, 709 S.E.2d 690 (Ct. App. 2001).

ARGUMENTS

A. THIS CASE IS NOT MOOT.

This Court’s black letter law is that a case is moot if there is no live controversy. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2005). In that case, Sloan’s suit to require

¹ It may seem unorthodox to include statements of fact “on information and belief” rather than from a record in the lower court but there was no evidentiary hearing on the mootness issue. The fact that the plaques were replaced by a non-party, comes from a newspaper article which the Defendants attached to their motion to dismiss for mootness. The fact that the plaques are intact in the Veterans center is based on the personal visual observation of one of appellants’ counsel. It is believed these facts are all undisputed.

a non-profit organization to comply with the Freedom of Information Act was held moot when the organization provided the requested documents. That case involved a “one-way” dispute: once the documents were produced, there was no going backward. The same was true in Seabrook v. City of Folly Beach, 357 S.C. 304, 523 S.E.2d 462 (1999), where a suit challenging a city’s refusal to issue a permit was held moot when the city issued the permit. Once the permit was issued, there was no going back.

Those are examples of the “intervening event” category, and in cases of that type, the question is whether the intervening event in fact ends the controversy. Another example is Sloan v. Greenville County, 380 S.C. 528, 670 S.E.2d 663 (2009), where the South Carolina Court of Appeals affirmed the trial court’s finding of mootness where complained-of contracts had all been performed or cancelled.

Here, by contrast, the fact that the original plaques have been replaced still leaves a live controversy. Effectual relief is possible – another way of testing for a moot case -- for two reasons.

First, the “intervening event” is easily reversible. The original plaques could be reinstalled just as easily as they were removed.

Second, even without a reinstallation of the old plaques, the removal of the old plaques was and remains illegal, and the “practical legal question” – another phrase this Court uses to test mootness -- is live.

As to the first “reversible intervening event,” cases everywhere deny mootness where an intervening event can be reversed. See S.C. Dept. of Revenue v. Club Rio, 392 S.C. 636, 709 S.E.2d 690 (2011)(voluntary surrender of license did not moot a revocation case).

There are many cases in other courts, see, *e.g.*, *Friends of the Earth v. Laidlaw Services, Inc.*, 528 U.S. 167 (2000)(not moot unless recurrence of problem completely impossible); *Hartmann v. Loudoun Co. Bd. of Ed.*, 118 F3d 996, 1000 n. 1 (4th Cir. 1997)(enrollment in another school district did not moot case against school district where student could re-enroll in original school if he prevailed).

As to the “practical legal question,” the Heritage Act says the removal of the plaques was illegal, a blatant violation of South Carolina law. Under the lower court’s original Order, removal of the plaques was not illegal because the Heritage Act (under that ruling) does not apply to privately owned monuments on public property like the Post 20’s monument in Greenwood. When the lower court vacated its first order, the removal became illegal again, and so did the placement of the current plaques. That enormous cloud is the essence of a practical legal question: is the Post 20 monument a standing piece of lawlessness? What about enforcement? When it was first proposed to mount the integrated plaques to replace the segregated plaques, the Attorney General issued a formal opinion that doing so would be illegal. Now that it has happened, will the Attorney General move to enforce the Heritage Act? Will the Solicitor? Can the Attorney General fail to take some enforcement action? Can he countenance a blatant violation of the Heritage Act? Can the other defendants – the State and the chief officers of the Senate and House of Representatives? Can they tell the people of South Carolina that anyone can ignore the Heritage Act and nothing will happen?

In short, the decision of the lower court, and any reviewing court, can resolve a very practical legal question. The lower court did, and a reviewing court still can, grant effectual relief – to plaintiffs in telling them that the original plaques can be replaced in compliance with the

law, or, if that relief is denied, the courts' ruling tells the defendants that they can enforce the retention of the original plaques (and remove the new plaques if they are still there).²

B. THIS CASE PRESENTS ISSUES OF IMPORTANT PUBLIC INTEREST.

The “public importance” exception to dismissing cases for mootness applies only for “a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in matters of important public interest.” *Sloan v. Friends of Hunley, Inc., supra; Curtis v. State*, 345 S.C. 557, 439 S.E.2d 591 (12001).

This doctrine is applied rarely, and rightly so. Appellants believe this is one of those rare cases. The test can be broken down into three parts: (a) public importance, (2) need for future guidance, and (3) imperative and manifest urgency.

1. Public importance. Few issues today have become more important and emotion-laden than historical monuments. The Heritage Act has, if anything, stirred more emotion and public debate than before the law was passed. In South Carolina, the issue has erupted in Columbia, Charleston, Florence, Rock Hill, even Walhalla, and at Clemson, Winthrop and The Citadel. Many other states have been riven by debate over historical monument and, sadly, controversies have been marked by violence.

As important as the general issue of monuments is the role of the Constitution. In emotional times, some people forget that the Constitution tells us where the line falls between our rights and the other person's rights. Telling where that line is in this case is an important function of this Court.

² The relief requested in this suit was not an order changing the plaques but an order preventing the defendants from relying on the Heritage Act to block a change in the plaques. The lower court's original order granted that relief. With the order vacated, the defendants are free to take the precise action that this suit was brought to prevent.

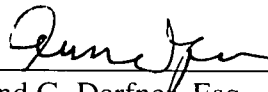
2. Need for guidance. The peculiar nature of the question means it has a direct effect on cities and towns and their monuments throughout the state – 170 monuments just for the Confederacy. Before the question of mootness arose, the defendants filed motions for reconsideration, emphasizing the widespread incidence of privately owned monuments around the state, and urging the lower court to at least narrow its decision to avoid a huge impact on all these other cities and towns and monuments.

3. Imperative and manifest urgency. Ironically, it is the two orders of the lower court that create the urgency. Before this case there were frequent discussions about the Heritage Act, its application and its constitutionality. Now, however, there is an order removing privately owned monuments from the Act – and another order saying, “not yet.” What are cities, towns legislators and others to do? When the next case comes, it will either agree with the lower court’s first order or with the defendants. Our people cannot be kept in suspense.

CONCLUSION

The Order of Vacatur of November 14, 2018, should be reversed, the Order of May 18, 2018, should be reinstated, and case remanded to proceed as appropriate as of the day before the Vacatur Order.

February 7, 2019



Armand G. Derfner, Esq.
Jonathan S. Altman, Esq.
Samuel H. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

C. Rauch Wise, Esq.
305 Main Street
Greenwood, SC 29646

Sally C. Newman, Esq.
1630 Meeting Street, #2
Charleston, SC 29405

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

FEB 11 2019

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Frank R. Addy, Circuit Court Judge

Civil Action Case No.: 2015-CP-24-00514
Appellate Case No.: 2018-002214

Thomas Waller, Larry Jackson, P. Dale Kittles, Claude L. Maus,
and Terry C. Weeks, Appellants,

v.

The State of South Carolina, Kevin L. Bryant, Lt. Governor of
the State of South Carolina, Jay Lucas, Speaker of the South Carolina
House of Representatives, and Alan Wilson, Attorney General of
South Carolina, Respondents.

PROOF OF SERVICE

I certify that I have served Appellants' Initial Brief and Designation of Matter on Respondents State of South Carolina, Henry McMaster, Lt. Governor and President of the South Carolina Senate, Jay Lucas, Speaker of the South Carolina House of Representatives, and Alan Wilson, Attorney General of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on February 7, 2019, properly addressed to their attorney(s) of record as follows:

J. Emory Smith, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Tracey C. Green, Esq.
WILLOUGHBY & HOEFER, P.A.
930 Richland Street
Post Office Box 8416
Columbia, SC 29202

Date: February 7, 2019



Armand G. Derfner, Esq.
Jonathan S. Altman, Esq.
Samuel H. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

C. Rauch Wise, Esq.
305 Main Street
Greenwood, SC 29646

Sally C. Newman, Esq.
1630 Meeting Street, #2
Charleston, SC 29405

Attorneys for Appellants