THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
FEB 22 2019
S.C. 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

INITIAL BRIEF OF PETITIONER

Robert B. Varnado (S.C. Bar # 0007850)
BROWN & VARNADO, LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Petitioner

Other Counsel of Record:

Michael W. Battle, Esquire
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528
-and-
Arrigo P. Carrotti, Esquire
Horry County Attorney
1301 2nd Avenue
Conway, SC 29526
Attorneys for Respondent

TABLE OF CONTENTS

Table of Contents i

Table of Authorities i

Statement of the Case 1

Standard of Review 6

Arguments 7

1. *Barry v. Zahler* is Inapposite 7

2. Other Reasons Not to Apply *Barry v. Zahler* in this Case 9

3. The Court of Appeals and Respondent seek to impose an unrequired and untested provision of Rule 241 SCACR 10

4. The Court of Appeals Ignores Modern Exceptions to Mootness 12

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

CASES

Abbeville School Dist. v. State, 410 S.C. 619, 767 S.E.2d 157 (2014) 13

Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) .... passim

Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996) 6, 14

Charleston County Parents for Public Schools v. Moseley, 343 S.C. 509, 541 S.E.2d 533 (2001) 12

Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) 16

Freeman v. Freeman, 323 S.C. 95, 473 S.E.2d 467 (Ct. App. 1996) 10

In Re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) 14

Jones v. Dillon–Marion Human Res. Dev. Comm'n., 277 S.C. 533, 291 S.E.2d 195 (1982) 7

Laughton v. O'Braitis, 360 S.C. 520, 602 S.E.2d 110 (Ct. App. 2004) 10

Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 195 S.E.2d 713 (1973) 7

Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006) 6, 7, 13

Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App 2003) 14

S.C. Ret. Syst. Inv. Comm'n v. Loftis, 402 S.C. 382, 741 S.E.2d 757 (2013) 9

Turner v. S.C. Dep't of Health & Environ. Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008) 12, 15

Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander, 414 S.C. 355, 778 S.E.2d 898 (2015) 13

Woods v. Bivens, 292 S.C. 76, 354 S.E.2d 909 (1987) 10

STATUTES, REGULATIONS and RULES

Rule 102(a), SCACR 9

Rule 241, SCACR .... passim

OTHER AUTHORITIES

Toal, et al., APPELLATE PRACTICE IN SOUTH CAROLINA 3D (S.C. Bar 2016) 10

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. 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].

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].

Every allegation in SDMB's Primary Action is related to SDMB's leasehold interest in Hangar 7. Horry 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].

---

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,* civil action number 2014-CP-26-1193.

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 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

---

[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 on less than two days' notice. [R. pp. 137; 80].

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].

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]. Petitioner's *Notice of Appeal* thereto was timely served on August 19, 2015.

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 Petitioner 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 Petitioner the same date. [R. pp. 28-31]. On October 23, 2015, Petitioner 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 Petitioner'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, Petitioner 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, Petitioner 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.

The matter came to oral argument on March 5, 2018. The Court of Appeals issued its opinion on July 11, 2018 [R., pp. 460-464] and the Petitioner filed a timely Petition for Rehearing [R., pp. 465-470], which was denied September 20, 2018. [R. p. 475]. Petitioner filed the *Petition for Certiorari* on October 22, 2018 and the Supreme Court granted review on January 10, 2019.

STANDARD OF REVIEW

Generally, this Court only considers cases presenting a justiciable controversy. *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) (citing *Byrd v. Irmo High School,* 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996)). A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. *Id* at 369 S.C. 25-26, 630

S.E.2d at 477. A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. *Id.* (citing *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). If there is no actual controversy, this Court will not decide moot or academic questions. *Id.* (citing *Jones v. Dillon–Marion Human Res. Dev. Comm'n.,* 277 S.C. 533, 535, 291 S.E.2d 195, 196 (1982)).

ARGUMENT

The Supreme Court should not affirm a dismissal from the Court of Appeals on the basis of mootness when the dismissal is based: (1) on old, inapposite caselaw [*Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951)] which neither side raised in briefs or oral argument, and which has been surpassed by both modern caselaw and the adoption of the South Carolina Appellate Court Rules (SCACR); and (2) on an untested procedural requirement which the Court of Appeals erroneously read into Rule 241, SCACR. Petitioner has raised good and valid appeal points that are worthy of being heard [R. pp. 362-409, 443-459] but which the Court of Appeals ignored when it dismissed the appeal for mootness. Thus, the Supreme Court should reverse and remand the case for further proceedings by the Court of Appeals or hear the entire Appeal directly.

1. **Berry v. Zahler** ***is Inapposite.***

The Court of Appeals bases its entire decision on *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951). [R. pp. 463-464]. 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 – by Horry County ran SDMB out of its tenancy effective September 17, 2015. [*Id.*]

The Court of Appeals, though, ignores this. Instead, it has ruled that when plaintiff-tenant loses a tenancy appeal, then *where the landlord is a governmental agency* and it forces the plaintiff out of the leasehold, the tenant has no further appeal rights *ipso facto*. [R. pp. 460-464]. The Court of Appeals, thus, treats a forced-out tenant in the same manner as if the tenant vacated of its own accord. [*Id.*]. If the underlying opinion is allowed to stand, then this becomes the law of South Carolina. This cannot be the intent of *Berry,* but the Court of Appeals misapplies it to fit the instant facts. The Supreme Court should therefore reverse the Court of Appeals and/or rule upon the Petitioner's appeal points.

In its *Return to Petition for Writ of Certiorari* (Return to Cert., p. 7), Horry County effectively admits that it used its police powers to force out SDMB by not contesting it, but nevertheless says that the *method* of eviction does not matter, only the result. ("For whatever reason, Skydive has vacated the premises. The question of whether it should be forced to leave is now moot. If Skydive had a right to remain … the right ended when Skydive vacated the premises."). Respondent claims that SDMB has no it has no right to possession of Hangar 7 and that a favorable decision to it will have a practical legal effect upon the existing controversy (*Id.*).

SDMB, by contrast, argues that the method of eviction *does* matter; since it was forced out by Horry County. But for Horry County's self-serving and self-dealing actions, SDMB would still be in Hangar 7 paying $1,200 a month in rent under the appeal bond. Thus, there would have been nothing moot about the appeal. Accordingly, *Barry v. Zahler* is simply the wrong case for the Court of Appeals to base its decision on.

2. *Other Reasons Not to Apply* **Berry v. Zahler** *in this Case.*

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

Second, while a big part of 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 was also litigating to maintain its lawful business at the Grand Strand Airport generally. [*See e.g.* R, pp 36-51, 222-232, 275-280]. Thus, irrespective of <u>where</u> Horry County allowed SDMB to continue skydiving operations – i.e., Hangar 7 or some other space – part of gravamen of the instant appeal was that SDMB should be allowed to operate at the GSA without being harassed by the County generally. If the Court of Appeals had accepted one or more of SDMB's appeal grounds, and reversed the Circuit Court, then Skydive could have used another hangar or had the County build one. The fact the County succeeded in forcing SDMB out of Hangar 7, therefore, 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).

Third, it should be further noted that the passage of three (3) years is completely immaterial in the appeal. ("Skydive has not possessed the property in almost three years"). [R. p. 464]. All

that SDMB could do is perfect the appeal on time – which it did – and which Horry County concedes this point in its *Return to Petition for Writ of Certiorari.* (Return to Cert., p. 7). It was not SDMB's fault that that there is a lag in cases being determined by the Court of Appeals. In any event, if the Court of Appeals' and Respondent's logic is taken to its natural conclusion, then the appeal was moot before it was even filed, since Horry County was able to force the Petitioner out before the appeal even commenced.[3] Petitioner submits this cannot be the intent of *Berry.*

3. The Court of Appeals and Respondent seek to impose an unrequired and untested provision of Rule 241 SCACR.

The Court of Appeals also puts emphasis on the fact that SDMB never sought from it a stay of Judge Hyman's ejectment ("Skydive never requested this court stay its ejection pending appeal"). [R. p. 463]. Such a request 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 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.

What the Court of Appeals does here, however, is add another costly layer to tenancy appeals by making appellants seek a request of stay with it, even though: (1) it is not required under the SCACR; and (2) by Court of Appeals' own logic the minute that SDMB was evicted under threat of the County's police power its appeal was moot anyway. Thus, it would have denied the motion for a stay for precisely the same reason as it did three years later – because of mootness.

---

[3] Horry County contends that Skydive may have a remedy for ouster, citing *Laughton 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). However, "actual ouster is not meant *a physical eviction*, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits." *Woods v. Bivens,* 292 S.C. 76, 80, 354 S.E.2d 909, 912 (1987) (emphasis added).

SDMB submits that such a result cannot possibly be the outcome for a timely and meritorious appeal, yet the Court of Appeals makes it so.

For its part, Horry County admits in its *Return to Petition for Writ of Certiorari* that Skydive followed Rule 241, SCACR in seeking an application for supersedeas from the circuit court, but states that SDMB then "failed to proceed to step 2" by seeking superseadeas from the Court of Appeals." (Return to Cert., p. 7). Of course, Horry County can show nothing in Rule 241(b) that makes filing again with the Court of Appeals a required step ("[a]fter a lower court ... has ruled, any party *may* petition the appellate court where the appeal is pending) (Rule 214(b), SCACR, emphasis added), nor can the County articulate any reason why this Court should require a second stay be filed at the Court of Appeals in the face of the plain and ordinary meaning of the rule.

Horry County next argues that while SDMB may not have been required to seek a stay from the Court of Appeals to perfect its appeal, it was still required to seek one if Skydive wanted supersedeas of the trial court's denial. (*Id.*) This is tautology. By conceding that SDMB perfected its appeal, Horry County has admitted SDMB's contention that obtaining supersedeas at the Court of Appeals was not required for the appeal to proceed.

The same holds true for Horry County's assertion that "Skydive's attempt to conflate an appeal bond in magistrate's court with a supersedeas of a subsequent order issued by a Circuit Judge was rejected by implication in the adoption of [Rule 241]." (*Id.* p. 8). Skydive has in no way attempted to 'conflate the appeal bond with supersedeas'; rather, SDMB has repeatedly said that the bond should continue on as the case goes through the various levels of appeal. This is yet another pointless attack by Horry County.

Finally, we come to the County's final argument which is so incoherent as to be effectively meaningless. It cites Rule 241's requirement that "a person seeking an order granting a writ of supersedeas must file a written petition verified by the client" and says that this is mandatory (*Id.*). SDMB complied with this mandatory provision at the lower court [R. p. 192]. What this requirement has to do with (i) the requirement of filing a second petition for stay with the Court of Appeals; or (ii) Horry County using its police power to force SDMB out of Hangar 7 remains a mystery to SDMB.

To cut through the circular reasoning adopted by Horry County in its *Return to Petition for Writ of Certiorari*, SDMB admits that Rule 241 is "a clear and comprehensive procedure for stay and superseadeas" and that compliance with Rule 241 does not require further guidance from the Court." These tenets are self-evident, <u>but they do not impact</u>: (i) whether SDMB was required to file a second petition for supersedeas with the Court of Appeals; or (ii) whether this failure supports the Court of Appeals ruling. Horry County must know this, yet completely fails to address either point. This Court, however, can take notice. *Turner v. S.C. Dep't of Health & Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) ("[if a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.").

4. The Court of Appeals Ignores Modern Exceptions to Mootness.

In modern authority, *Berry v. Zahler* is 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." *See e.g., Charleston County Parents for Public Schools v. Moseley*, 343 S.C. 509, 514, 541 S.E.2d 533, 535 (2001). The Court of Appeals, however, relies upon *Berry's* first mootness headnote [R. p. 463] – a holding

which has long-since been surpassed – but then ignores Petitioner's arguments that two modern exceptions to mootness apply. This is another error which further militates in favor of reversal.

In *Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015), Chief Justice Beatty – at that time an Associate Justice – 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)[4].

Thus, to the extent the Supreme Court believes that Petitioner's appeal arguments are rendered moot [because Horry County forced out SDMB], then Petitioner argues that *Wachesaw Plantation's* first and third exceptions to mootness apply. It raised this argument to the Court of Appeals – both pre-opinion in Appellant's Reply [R. p. 455-457] and once again in the Petition for Rehearing [R. 466-469] – but was ignored by the Court of Appeals.

As to the first exception ("the issue raised is capable of repetition but evading review"), SDMB submits that this case precisely fits this exception. "In evaluating whether a moot issue is capable of repetition, yet evading review the Court does not require that the complaining party be subject to the action again .... [h]owever, the action must be one which will truly evade review."

---

4 This expanded the prior "two exceptions" set forth in *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006) ("[t]wo exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest.").

Sloan, 369 S.C. at 27, 630 S.E.2d at 478. Still, "[t]he party bringing the action need only show the issue raised is *capable* of repetition and is not required to prove there is a "reasonable expectation" the issue will arise again. *Sloan v. Greenville County*, 356 S.C. 531, 554-555, 590 S.E.2d 338, 350-351 (Ct. App 2003). Moreover, South Carolina has adopted a "'lenient' approach to evading review analysis." *Byrd,* 321 S.C. at 431–32, 468 S.E.2d at 864.

Here, Horry County can evade review of its leasehold practices by simply forcing out tenants after the first level of appeal (or, frankly, even *before* circuit court review) and then say "sorry, but the appeal is moot because we forced them out." Horry County, thus, will never be subject to review despite the capability of repetition. Consequently, Horry County's conduct is in a similar vein as school suspensions (*Byrd v. Irmo High School*) and procurement contracts (*Sloan v. Greenville Co.*) in which this Court has found a justiciable controversy exists despite any mootness of the questions presented. The need for clarity and direction from the Court of Appeals on Rule 241(b)(10), SCACR, also mandates review in the instant case for the benefit of both governmental and commercial landlords and tenants across the State; in an absence of any reported decisions on point, a strong possibility exists that *commercial* landlords can also successfully use the County's argument (improperly dispossessing tenants with valid appeal bonds at the conclusion of magistrate court proceedings, or circuit court review, in contravention of clear law) by simply using the police to evict them. 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 [the companion litigation in 2014-CP-26-1193, which this Court is considering on certiorari as well (appellate case # 2017-001382)]. Thus, the circuit court's refusal to stay execution, along with dismissal because of mootness by the Court of Appeals, will result in collateral consequences in 2014-CP-26-1193,

in terms of the County arguing at some future period that: (1) such litigation is moot as well, or (2) that there is some preclusive effect on Skydive's damages claim. This is a very real danger to Petitioner and cannot be lightly dismissed. 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).

It should be noted that SDMB argued to the Court of Appeals – in both its *Reply Brief* and the *Petition for Rehearing* – that the first and third exceptions to mootness apply; SDMB argued them once again here in its *Petition for Certiorari*. [R. pp. 455-457; 466-469; Petition for Cert.]. Despite SDMB repeatedly making arguments, Horry County tellingly does not discuss any of the modern exceptions to mootness in its *Return*, which this Court can take into consideration. *See*, *Turner*, 377 S.C. at 547, 661 S.E.2d at 121. ("[if a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.").

CONCLUSION

Barry v. Zahler is old, outdated and limited to its facts; the Court of Appeals cited it for the wrong reasons. Likewise, nothing in Rule 241, SCACR, requires an appellant to seek a stay at the Court of Appeals level unless it wants to.

The case is not moot; but even if it is, then two of the three modern exceptions to mootness apply – which neither the Court of Appeals nor Horry County analyzed or mentioned. For these reasons, this Court should reverse the Court of Appeals and take the Petitioner's appeal up for its own review.

(signature on following page)

Respectfully submitted,

BROWN & VARNADO LLC

Robert B. Varnado, (S.C. Bar # 0007850)
P.O. Box 1127
Mt. Pleasant, SC 29465
(843) 737-7300

January 21, 2019
Mount Pleasant, South Carolina

RECEIVED
FEB 22 2019
S.C. SUPREME COURT

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. 2019-001910

SKYDIVE MYRTLE BEACH, INC. ....Petitioner

v.

HORRY COUNTY..Respondent

PROOF OF SERVICE – INITIAL BRIEF

The undersigned attorney for Petitioner hereby certifies that a true copy of the ***Initial Brief of the Petitioner*** in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 21st day of January, 2019, to the following:

Michael W. Battle, Esquire
Arrigo P. Carotti, Esquire
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528
Attorneys for Respondent

(signature on following page)

Robert B. Varnado (S.C. Bar # 0007850)
BROWN & VARNADO, LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Petitioner

January 21, 2019
Mt. Pleasant, South Carolina