THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Circuit Court Judge

Case No. 2015-CP-24-00514

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,
..........Respondents,

v.

Thomas Waller, Larry Jackson, P. Dale Kittles, Charles L. Maus, and Terry C. Weeks,
..........Defendants.

INITIAL BRIEF OF RESPONDENT JAY LUCAS, SPEAKER OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES

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Counter-Statement of Issues on Appeal

Did the circuit court properly exercise its discretion in vacating its May 2018 Order after a person not a party to the litigation physically replaced the existing World War I and World War II plaques on the Greenwood War Memorial with new plaques that Appellants sought to have installed on the War Memorial, thus yielding the result that Appellants sought, removing the active case or controversy, and leaving nothing more for the trial court to do?

1. Once Appellants obtained the relief they sought when the Original World War Plaques were removed from the War Memorial by a non-party to the case and the May 2018 Order had no further effect, did the trial court properly vacate its May 2018 Order as moot?

2. Is invocation of the public importance exception appropriate where Appellants' contentions are unpreserved for review and, furthermore, are based on allegations not contained in their Amended Complaint?

Introduction

Contrary to Appellants' assertions, this appeal does not involve the Heritage Act, S.C. Code Ann. § 10-1-165, even though the Amended Complaint challenged that Act as an impediment to replacing the then-existing World War I and World War II Plaques on the Greenwood County War Memorial with new plaques. Rather, the issue before the Court in this appeal is limited to the decision by the trial court to grant separate motions by Respondents to vacate its May 2018 Order as moot pursuant to Rule 60(b), SCRCP. In that May 2018 Order, which is not before the Court, the trial court found that the Heritage Act did not apply to the Greenwood County War Memorial. Appellants did not file a motion to reconsider the May 2018 Order and, thus, are bound by the trial court's ruling with respect to the non-applicability of the Heritage Act. While Respondents' motions to reconsider the May 2018 Order were pending, a non-party replaced the existing World War I and World War II Plaques with new Plaques, which was the objective of the Amended Complaint. Because of that action, the trial court issued its November 2018 Order of Vacatur ruling that its May 2018 Order was moot, and also denied as moot Respondents' motions for reconsideration. Because Appellants have appealed only from the November 2018 Order of Vacatur, a reversal of that Order, if the Court is so inclined, would require remand to the trial court for consideration of Respondents' motions for reconsideration that were pending when the trial court issued the Order Granting Vacatur. *See* Br. of Appellants, p.7. But for the reasons explained below, including that no Respondent or other person has sought to restore the original Plaques, the trial court properly exercised its discretion to vacate its May 2018 Order as moot.

Statement of the Case and Statement of Facts

Appellants[1] instituted this action by filing a Complaint in the Court of Common Pleas for Greenwood County on May 19, 2015. [Compl.; R.___.] They thereafter amended the Complaint on February 16, 2016. [Am. Compl.; R.___]. As alleged by Appellants, the underlying case involved a War Memorial created and owned by American Legion Post 20[2] and placed with authorization on the City of Greenwood's public property in 1929. [*See* Am. Compl. ¶6; R.___.] The purpose of the War Memorial is as follows:

> ERECTED NOVEMBER 11, 1929, BY THE GREENWOOD POST No. 20 OF THE AMERICAN LEGION THE LEGION AUXILLARY AND THE CITIZENS OF GREENWOOD COUNTY IN HONOR OF THE BRAVE MEN WHO SACRIFICED THEIR LIVES SO THAT LIBERTY AND JUSTICE MIGHT REIGN THROUGHOUT THE WORLD.

[Am. Compl. ¶7; R.___.] On the War Memorial are plaques listing the names of Greenwood County servicemen who sacrificed their lives in World War I, World War II, the Korean War, and the Vietnam War. [*See* Am. Compl. ¶¶8-9; R.___.] At the time this action was instituted, the World War I and World War II plaques, based on the regrettable segregation of the United States Armed Forces at the time, identified the servicemen under the headings "White" and "Colored" (the "Original World War

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[1] Because the underlying merits or allegations of the case are not before this Court for review, Defendant believes that combining the Statement of the Case with the Statement of Facts is appropriate in this instance.

[2] American Legion Post 20 is not a party to this litigation. Instead, Appellants, some of whom are individual members of American Legion Post 20, brought this action in their individual capacities, the propriety of which was the subject of tension before the trial court, including in the still-pending motion for reconsideration of Respondents of the underlying—and vacated—order.

Plaques"). [Am. Compl. ¶9; R.___.] The plaques for the Korean War and the Vietnam War, reflecting the desegregation of the Armed Forces occurring as a result of President Harry S. Truman's signature of Executive Order 9981 on July 26, 1948, identify the servicemen who died in those conflicts without regard to race. [*See* Am. Compl. ¶10; R.___.] Appellants instituted this action seeking to replace the Original World War Plaques with plaques that simply identify the same servicemen without regard to race (the "New World War Plaques"), just like the Korean War and Vietnam War plaques, but contended that the Heritage Act did not allow it. [Am. Compl. ¶¶11-13; R.___]. Appellants sought a declaration that the Heritage Act is unconstitutional or alternatively injunctive relief barring application of the Heritage Act to the War Memorial.

Motions to dismiss were timely filed by all Respondents, and were denied by the Honorable Frank R. Addy, Jr. in an order dated April 15, 2016. Answers to the amended complaint were timely filed by all Respondents. Following discovery, Appellants and Respondents filed cross motions for summary judgment.

By Order dated May 18, 2018 (the "May 2018 Order") [R.___], Judge Addy granted Appellants' motion for summary judgment in part and denied Respondents' motions for summary judgment, ruling that the Heritage Act does not apply to the War Memorial, thereby obviating the need to provide injunctive relief while ensuring the accomplishment of the true object of Appellants' lawsuit, *i.e.*, the replacement of the Original World War Plaques.

Although the trial court ruled for them only in part, and expressly declined to invalidate the Heritage Act in any respect, Appellants did not move for reconsideration of the May 2018 Order. Respondents separately moved for reconsideration of the May 2018 Order but, before any action was taken on those motions, the Original World War Plaques were replaced with the New World War Plaques.[3] The change of the plaques appears to have been made by a person not a party to the action. *See* Adam Benson, *Greenwood resident: I violated Heritage Act*, INDEX-JOURNAL (June 11, 2018) [Exhibit A to Speaker Lucas's Motion to Vacate Judgment as Moot; R.___.]

Respondents thereafter separately filed motions to vacate the judgment as moot. By Order dated November 14, 2018 (the "Order Granting Vacatur") [R.___], Judge Addy granted the motion to vacate the May 2018 Order as moot and denied the pending motions for reconsideration as moot. This appeal—which is only from the decision vacating the May 2018 Order as moot—followed.

[3] Appellants do not dispute that the plaques have been changed. Br. of Appellants, at 2.

Argument

The circuit court correctly vacated its May 2018 Order after a person not a party to the litigation physically replaced the Original World War Plaques with the New World War Plaques that Appellants sought to have installed on the War Memorial.

Standard of Review

The decision to grant relief under Rule 60(b) is reviewed for an abuse of discretion. *See, e.g., S.E. Hous. Found. v. Smith,* 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008). "An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support." *Id.*

Analysis

1. **After Appellants obtained the relief they sought when the Original World War Plaques were removed from the War Memorial by a non-party to the case, the May 2018 Order had no further effect or application and the trial court properly vacated that Order as moot.**

The trial court correctly exercised its discretion in vacating the May 2018 Order as moot pursuant to Rule 60(b), SCRCP. Rule 60(b) allows a Court to "relieve a party ... from a final judgment, order, or proceeding" if there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," "the judgment is void," or "the judgment has been satisfied, released, or discharged, ... or it is no longer equitable that the judgment should have prospective application." Rule 60(b)(2), (4), & (5).

The trial court correctly ruled that the May 2018 Order is moot because the true relief sought by Appellants—the change of the War Memorial plaques—was accomplished after the Order was issued,[4] while Respondents' motions to reconsider were pending, and before any appeal was taken from the May 2018 Order. A matter is moot if "some event occurs making it impossible for [a] reviewing Court to grant effectual relief." *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Appellants in fact agree that "a case is moot if there is no live controversy." Br. of Appellants, p.3.

Replacement of the Original World War Plaques with the New World War Plaques by a person not a party to this action ended any live controversy. *Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (holding that acts subsequent to initiation of the case rendered a request for injunctive relief moot). That is, removal of the plaques by a non-party "rendered the issues made by this appeal moot and academic" and there remains "no actual controversy between the parties." *Mathis*, 260 S.C. at 346, 195 S.E.2d at 714. In short, as a result of an

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[4] Appellants' attempt to dispute that the true object of the litigation was not the replacement of the Original World War Plaques, but instead "an order preventing defendants from relying on the Heritage Act to block a change in the plaques," Br. of Appellants, p.6 n.2, is twisted logic that ignores the factual allegations of the amended complaint, which alleged that "[Appellants] approached the City of Greenwood with funding and a request to change the plaques, and have been informed that the City is barred from doing so, and that urging the City to do so is futile." [Am. Compl. ¶15; R.___.] It was that alleged affirmative action by Appellants to change the plaques which served as the basis for the case or controversy of the underlying litigation and the invalidation of the Heritage Act, or the alternative request for injunctive relief, were merely the means to accomplish Appellants' true object: changing the plaques.

intervening event, the May 2018 Order became an advisory order and properly was vacated as moot by the trial judge. *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957) ("The Uniform Declaratory Judgment Act ... does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise, or license litigants to fish in judicial ponds for legal advice.") (internal quotation marks and citations omitted).

The termination of any live controversy here is especially significant due to the fact that the Original World War Plaques were replaced by a person not a party to this case. Thus, the case was mooted by a non-party without regard to the respective rights of the parties themselves or the actual legal issues pending in this case. *Jones v. Dillon-Marion Human Res. Dev. Comm'n*, 277 S.C. 533, 535–36, 291 S.E.2d 195, 196 (1982) (dismissing case as moot when appellant ceased to exist through action taken by governmental actors not a party to the action). Therefore, once the plaques were replaced, the May 2018 Order could no longer have any "practical legal effect upon an existing controversy because an intervening event render[ed] any grant of effectual relief impossible." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477-78 (2006) (dismissing FOIA case as moot because all requested documents were provided) (citing *Mathis*, 260 S.C. at 346, 195 S.E.2d at 715); *see also Sloan v. Greenville County*, 380 S.C. 528, 670 S.E.2d 663 (2009) (as Appellants' note, the Court of Appeals in this case "affirmed the trial court's finding of mootness where

complained-of contracts had all been performed or cancelled") (quotation is from Br. of Appellants, p.4).[5]

Simply put, because there was nothing left to do and nothing left to enforce once the New World War Plaques were installed on the War Memorial, the trial court properly exercised its discretion to grant Respondents' Rule 60(b) motions due to an intervening event and vacate the May 2018 Order as moot. Appellants attempt to avoid this exercise of discretion by the trial court by arguing (1) that the "'intervening event' is easily reversible," and (2) that "the 'practical legal question' ... is live." Br. of Appellants, p.4. However, neither of Appellants' arguments establishes that the trial court abused its discretion in vacating the May 2018 Order.

Contrary to Appellants' first contention against mootness, the hypothetical possibility that the plaques could be replaced does not mean that the Order is not moot. Initially, but significantly, no Respondent or anyone else has undertaken to reinstall the Original World War Plaques since they were replaced with the New World War Plaques in June 2018. And as the trial court observed when granting the motion to vacate the Order as moot, Respondents have not at any time requested

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[5] Vacating the May 2018 Order as moot in these circumstances was particularly appropriate. Aside from the fact that the plaques were changed, the May 2018 Order approved a change in the plaques based on a theory never briefed or argued by any of the parties to this case and did so based on the rights of an entity—American Legion Post 20—that never was a named party. *E.g., Stone v. Salley*, 244 S.C. 531, 537, 137 S.E.2d 788, 790 (1964) ("[Appellants] cannot obtain a decision as to the invalidity of the Act on the ground that it impairs rights of others."), *overruled on other grounds by R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000); *Dillon County v. Md. Cas. Co.*, 217 S.C. 66, 76, 59 S.E.2d 640, 644 (1950) ("[O]ne attacking the constitutionality of a statute is not the champion of any rights except his own.").

restoration of those original plaques. [Order Granting Vacatur, p.2, n.1; R.___.] Moreover, the underlying action is moot because if someone hypothetically—an indicator of mootness to be sure—now sought to restore the original plaques, the action to obtain that restoration would have to be brought by some person or entity against entities not presently before the Court, namely American Legion Post 20 and the City of Greenwood, because those are the entities with ownership of the War Memorial and of the property on which it rests.

The cases cited by Appellants do not support their argument that replacement of the plaques as they sought did not moot this case. *S.C. Dep't of Revenue v. Club Rio*, 392 S.C. 636, 709 S.E.2d 690, (Ct. App. 2011), is an enforcement action where the Court of Appeals held that the surrender of a license did not moot an enforcement action because the licensing statute at issue required the surrender of the license once a motion for temporary suspension was granted until there was a determination as to whether the license should be revoked. *Id.*, 392 S.C. at 643-45, 709 S.E.2d at 694-95. The Court noted that there were differences in the legal consequences between suspension and revocation that could only be determined through a hearing. *Id.*, 392 S.C. at 645-47, 709 S.E.2d at 695-96. In other words, the surrender of the license did not end the statutory controversy. In contrast, replacement of the plaques did end the controversy because the injury alleged by the Appellants—the inability to replace the plaques—was resolved through actions by persons not parties to the action and because no Respondent has sought to replace the plaques. In short, *Club Rio* was an enforcement action that sought to stop the defendant from engaging in

certain affirmative conduct, whereas this case sought to effect the ability of Appellants to accomplish their goal of changing the Original World War Plaques through the invalidation of the Heritage Act or the imposition of injunctive relief preventing the Respondents from enforcing the Heritage Act. Because Appellants have achieved that goal—the Original World War Plaques were changed and the Heritage Act has not been invoked by Defendants—the case is moot.

Appellants' other cases also do not advance their argument. *Friends of the Earth v. Laidlaw Services, Inc.*, 528 U.S. 167 (2000), also is a statutory enforcement lawsuit that was instituted pursuant to the federal Clean Water Act. The Fourth Circuit Court of Appeals held that the case was moot because the conduct had ceased. The Supreme Court reversed, noting in pertinent part that voluntary compliance in an enforcement case does not moot a case unless "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*, 528 U.S. at 190. The Supreme Court then remanded the case to the Fourth Circuit (which itself further remanded the case to the District Court, *see, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 208 F.3d 209 (4th Cir. 2000)), for such a factual inquiry. Thus, contrary to the inference created by Appellants, no determination was finally made that mootness under the circumstances was inappropriate.

But—again—*Laidlaw* was an enforcement case, which sought to stop the defendant from acting in violation of the Clean Water Act, whereas these Appellants sought to change the Original World War Plaques through the invalidation of the Heritage Act or the entry of injunctive relief. Because the plaques were replaced as

Appellants sought, because Respondents have not expressed any desire or intention to restore the original plaques, and because restoration of the original plaques now would involve a lawsuit against entities not a party to this lawsuit, this case is moot because the restoration of the plaques cannot "reasonably be expected to recur." *Id.* And although Appellants cite *Hartman v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997), which involved alleged non-compliance with the federal Individuals with Disabilities Act, that case involved "unusual circumstances" in which the defendant's conduct had a continuing impact on the plaintiff's actions through a denial of his school of choice. *Id*, 118 F.3d at 1000. In contrast, there is no reasonable indication that anyone seeks to change the result that Appellants now have achieved through placement of the New World War Plaques on the War Memorial and, thus, there is no continuing impact on Appellants.

Appellants' second anti-mootness argument also does not demonstrate that the trial court abused its discretion. Appellants' argument is not entirely clear, but appears to be a plea for the Courts of this State to rule on the applicability of the Heritage Act due to uncertainty about its status. This argument should be rejected as unpreserved because Appellants did not present it to the trial court in their Opposition to Motions to Dismiss for Mootness. [Pls.' Opp'n to Mots. to Dismiss for Mootness, pp.1-2; R.___;] *see S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–302, 641 S.E.2d 903, 907 (2007) (To preserve an issue for appeal, it must be: "'(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient

specificity.'") (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed.2002)).

Moreover, this argument is not ripe for judicial review and, thus, does not present a justiciable controversy because no Defendant, or anyone else for that matter, has sought to invoke the Heritage Act to force restoration of the original plaques on the War Memorial. *E.g., Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) ("'[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.'"). Appellants point to nothing other than hypothetical abstractions to support their argument regarding the Heritage Act, which is insufficient to ripen their sought-after controversy. *See, e.g., Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 228, n..7, 467 S.E.2d 913, 918, n.7 (1996) (holding that Mining Act case was not ripe where the facts did "not indicate an imminent violation of rights"). Simply put, these hypothetical abstractions do not entitle Appellants to go "fish[ing] in judicial ponds for legal advice." *Sanders*, 231 S.C. at 68, 97 S.E.2d at 213. The trial court properly vacated the May 2018 Order as moot because there is nothing left to do with respect to the relief that Appellants actually sought in their Amended Complaint.

2. Appellants' arguments for invocation of the public importance exception are unpreserved for review and, furthermore, are based on allegations not contained in their Amended Complaint.

Appellants further argue that this Court should consider this case anyway, notwithstanding mootness, because it "presents issues of important public interest." Br. of Appellants, pp.6-7. They contend that the issue is one of public importance, Br. of Appellants, p.6; that there is a need for future guidance for other "monuments

throughout the state," Br. of Appellants, p.7; and the issue is one of imperative and manifest urgency because "[o]ur people cannot be kept in suspense," Br. of Appellants, p.7. But none of these arguments were presented to the trial judge in Appellants' opposition memorandum to Respondents' motions to vacate and, thus, are unpreserved.[6] [Pls.' Opp'n to Mots. to Dismiss for Mootness, pp.1-2; R.___;] *see First Carolina Corp. of S.C.*, 372 S.C. at 301–302, 641 S.E.2d at 907. Moreover, these contentions are all unripe pleas for an advisory opinion on abstract and theoretical points due to the fact that this case involves only the War Memorial in Greenwood County, not other memorials around the State. *Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review.")

Appellants' arguments in this regard not only are unpreserved, but also are unripe. Consequently, Appellants' arguments are invalidated because the public importance exception may not be invoked to either revive an unpreserved argument or to reach an unripe claim. *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 367, 815 S.E.2d 446, 458–59 (2018) (holding that public importance exception

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[6] Nor were the other exceptions to mootness invoked by Appellants below, *e.g.*, issues raised that are capable of repetition but evading review, or decisions which may affect future events or have collateral consequences for the parties. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

applied only to standing and not ripeness determinations because the doctrine applies only if there is an existing injury and not to the possibility of a future injury). Finally, with respect to this case, there is no "imperative and manifest urgency" to support invocation of the unpreserved public importance exception because the Original World War Plaques have been replaced on the War Memorial and there has been no showing of any action by Respondents or others to cause a restoration of those plaques. In short, for a host of reasons, incantation of the Public Importance talisman is not warranted in this case.

Conclusion

Because the replacement of the Original World War Plaques with the New World War Plaques on the War Memorial caused this case to become moot, the trial court properly exercised its discretion to vacate its May 2018 Order.

Respectfully submitted,

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v.

Thomas Waller, Larry Jackson, P. Dale Kittles, Charles L. Maus, and Terry C. Weeks,
....Defendants.

PROOF OF SERVICE

This is to certify that I, Elizabeth Kurtz, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy **Speaker Jay Lucas's Initial Brief of Respondent** by depositing the same in the U.S. Mail to the following:

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April 10, 2019
Columbia, South Carolina