

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court Of Common Pleas
Frank R. Addy, Circuit Court Judge

RECEIVED

APR 10 2019

S.C. SUPREME COURT

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, Harvey S. Peeler, Jr. 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.

INITIAL BRIEF OF RESPONDENTS STATE, PEELER AND WILSON

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STATEMENT OF ISSUES

1. Whether the circuit court judge abused his discretion in finding that this case is moot?
2. Whether this case falls within an exception to mootness?
3. Whether Appellants failed to raise and preserve some of the objections they have to the Order of Vacatur including allegations about the public interest and the possibility of enforcement actions.
4. Whether Appellants objections to the Order of Vacatur are not ripe for consideration.
4. Whether if, *arguendo*, this Court determines that this case is not moot, it should be remanded for the circuit court to rule on the Respondents Rule 59, SCRCF, motions to alter or amend.

STATEMENT OF THE CASE

This case was initiated by a complaint dated May 19, 2015. R. p. *. The Respondents¹ moved to dismiss it, but before that Motion was heard, Appellants filed an amended complaint (Complaint) date February 16, 2016 with the same parties. R. p. *. The Appellants alleged that they were citizens and residents of Greenwood County and that some of them were veterans of the United States armed services and members of the American Legion. They alleged that the War Memorial at issue in this case was donated by American Legion Post 20 and that the City of Greenwood permitted it to be placed on public property in 1929. R. p. *. (Complaint at page 3). Plaques on the monument list members of the service who died in wars dating back to World War I. *Id.* Their names were separated by race as to the two World Wars but not as to later wars. *Id.* The Complaint alleged that the Appellants wished to replace the plaques that contained segregated names and alleged that, on information and belief, that the American

¹ The Complaint included the Lieutenant Governor and President of the Senate who was then Henry McMaster. The current President of the Senate, Harvey Peeler, is now substituted for Mr. Mc Master's successor, Kevin Bryant.

Legion and Greenwood also did so. The Complaint alleged that the Heritage Act, S.C. Code Ann., §10-1-165, prevented replacement and violated S.C. Const. art. I §1 by “[t]ying the hands of the citizens of Greenwood from seeking a change in the War Memorial, by violating their freedom of speech under art. I §2, by depriving Post 20 and its members of freedom of speech and liberty and property without due process under art. I, §3, by requiring a 2/3’s vote to change the law, in violation of the General Assembly’s power to amend or repeal the law. The Complaint also alleged that the Act violates the Home Rule provisions of art. VIII by removing the ability of the City and its citizens to make decisions about memorials and monuments. The Complaint asked that the statute be declared unconstitutional and that a permanent injunction be issued.

Following a round of motions to dismiss, the Respondents State, Lt. Governor and President and Attorney General answered the Amended Complaint raising affirmative defenses that included, among others, lack of standing, the constitutionality of the Heritage Act and separation of powers. R. p. *. The Speaker also answered. R. p. * These Respondents moved for summary judgment on January 5, 2017, and the Plaintiffs and Speaker also did so.

The Court denied the Respondents’ Motions on May 18, 2018, and granted the Plaintiffs’ Motion in part. R. p. *. Although no party had argued that the Heritage Act did not apply to the monument, the circuit court found that the monument is private property belonging to the American Legion, and that the Heritage Act did not apply to it even though it is located on public land. These Respondents filed a Motion to Alter or Amend as did the Speaker.

While the Rule 59 Motions were pending, these Respondents moved under Rule 60, SCRCPP, in June 2018, for the Court to vacate the May 2018 Order because the plaques had been removed and replaced and the May Order was moot. R. pp. * (Motion and Exhibit A). The

Speaker also moved to vacate. R. p. *. The Court granted the Motions in its Order of November 14, 2018, which is the subject of this appeal. R. p. *. The Court found the “plaques on the Memorial were changed in the manner sought by Plaintiffs” and that its May Order was moot. R. p. * (Order at p. 2). He found the Rule 59 Motions moot also. Appellants appeal the Order of Vacatur.

STANDARD OF REVIEW

“Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. . . . [The] standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006).

ARGUMENT

Although these Respondents defended the constitutionality of the Heritage Act in this case, and stand by that defense, they do believe that this case is now moot because of the removal and replacement of the plaques. The circuit court did not abuse its discretion in granting the Rule 60 motions to vacate because this matter is moot.

I

THIS CASE IS MOOT

“A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.” *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). There are three exceptions to mootness. “First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction.” *Sloan v. Greenville Cnty.*, 380 S.C. at 535, 670 S.E.2d at 667. “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.” *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). “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.*

S.C. Pub. Interest Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017). This case is moot and does not meet any of the exceptions to mootness.

A judgment here “will have no practical legal effect upon the existing controversy.” *Sloan, supra*. As stated in the Order of Vacatur, “[t]he plaques at the heart of this litigation have in fact been changed; therefore, a “live controversy” between the parties no longer exists. The previous Order ‘no longer [has] 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 (2006).” Order of Vacatur, p. 2. As noted above, the plaques were moved 10 months ago, in June, 2018, by a non-party. R. p. * (Exhibit A to State’s Motion to Vacate).

Appellants contend that this case is not moot because a live controversy exists and that the plaques could be reinstalled. Judge Addy vacated his Order five months after their removal. Appellants have not reported that the plaques have been reinstalled in the ten months that they have been gone, nor do they object to the new plaques that replaced them. No basis in fact exists in the Record that the plaques may be restored. Accordingly, the possibility of their restoration remains merely abstract or theoretical, and the courts do not address such matters. *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 cite *S.C. Dep't of Revenue v. Club Rio*, 392 S.C. 636, 644, 709 S.E.2d 690, 695 (Ct. App. 2011), but the case does not support their position. The Court determined that the

licensee's surrender of his license pursuant to a temporary suspension order did not moot the revocation issue in the case because revocation would have "protect[ed] the public's future health, safety, or welfare in a way relinquishment did not." *Id.* Here, nothing further remained to be decided because the plaques were removed.

Appellants also cites *Friends of the Earth v. Laidlaw Services, Inc.*, 528 U.S. 167 (2000) for the proposition that a case is "not moot unless recurrence of problem [is] completely impossible." *Friends* does not require impossibility of recurrence. Instead, the Court's standard is that the conduct at issue "could not reasonably be expected to recur." 528 U.S. at 189. Here, the placement of the old plaques could not reasonably be expected to recur. The Respondents to this case all contended that the removal mooted the case, and in doing so, did not request restoration of the plaques. Appellants alleged in this suit that the City had approved the changing of the plaques. They contend that the former plaques no longer reflected the view of the American Legion Post that owned them. (Brief at Page 1). Appellant has pointed to no person or entity with any connection to the plaques or memorial that might restore the old plaques.

Hartmann v. Loudoun Co. Bd. of Ed. 118 F3d 996, 1000 n. 1 (4th Cir. 1997), cited by Appellants is also of no guidance. The Court said that, although the student was "currently in an educational placement which [the family] find[s] appropriate. . . [t]here is no question that the Hartmanns would re-enroll Mark in Loudoun County if their suit is successful." In the instant case, no one has been identified who would restore the old plaques.

Appellants also argue that the plaques that they wanted replaced have been removed illegally, and speculate that an enforcement action might be brought to put them back up. They failed to make this argument in response to the Rule 60 Motion or by motion to alter or amend

the vacatur order and cannot make it now on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.”); *See S.C. Dep’t of Transp. v. First Carolina Corp.* of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“[I]t is a litigant’s duty to bring to the court’s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error.”). None of the Respondents contested the removal of the plaques in their motions to vacate, and Appellants do not point to any threat of enforcement. Therefore, this issue is abstract and not subject to review (*Wallace, supra*) and is also not ripe for consideration. “[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.” *Colleton Cty. Taxpayers Ass’n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).” *Jowers v. S.C. Dep’t of Health & Envtl. Control*, 423 S.C. 343, 353–54, 815 S.E.2d 446, 451 (2018)

For all of the above reasons, Appellants have no factual basis for their claim that a live controversy exists as to enforcement and therefore, that a judgment would have a practical legal effect upon the controversy. Accordingly, this case is moot.

II

THE PUBLIC INTEREST EXCEPTION TO MOOTNESS IS NOT PROPERLY RAISED AND PRESERVED AND DOES NOT APPLY HERE

Appellants fails to raise, preserve or satisfy the public interest exception to mootness. Under that exception, “an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.” *S.C. Pub. Interest Found. v. S.C. Dep’t of Transportation, supra*. Appellants did not raise this exception to mootness in their Opposition to the Motions to Vacate or move to alter or amend the vacatur

order. Therefore they did not raise and preserve this exception. *Pye and SCDOT v. Carolina First, supra*

Appellants do not clearly explain why they believe that this case is in the public interest. They vaguely refer to public debate over historic monuments and appear to contend that this case does present an “imperative and urgent” need for future guidance as to other privately owned monuments around the state, but this case involves only the single monument in Greenwood and has been resolved by the removal and replacement of the plaques at issue. Therefore, no need for future guidance exists as to this issue and certainly no such need that is “imperative and urgent.” This exception for mootness is, therefore, abstract and unripe and not subject to consideration by this Court. *Wallace and Jowers, supra.*

III

IF, ARGUENDO, THE COURT FINDS THAT THIS CASE IS NOT MOOT, IT SHOULD REMAND THE CASE TO THE CIRCUIT COURT FOR A RULING ON THE RULE 59 MOTIONS

The circuit court judge, in his Order of Vacatur, found that the pending motions for reconsideration were moot. R. p. * (Order at p. 2). Therefore, should this Court find that this case is not moot, it should remand this case to him for consideration of the motions. *Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC*, 404 S.C. 385, 391, 745 S.E.2d 105, 108 (2013)(“Appellants raised . . . issues in their Rule 59(e) motion, but the trial court erroneously ruled it lacked jurisdiction to address them. On remand, the trial court will address the merits of the Rule 59(e) motion.”). Consideration of those Motions would be particularly important because the circuit court’s May, 2018 Order had decided this case on grounds never argued by the parties. These Respondents maintain that this case is moot, but should this Court rule

otherwise, they respectfully request that this Court remand the case for the circuit court to consider the pending Rule 59 motions for reconsideration.

CONCLUSION

The Respondents State of South Carolina, Alan Wilson and Harvey Peeler, respectfully request that this Court affirm the Order of the circuit court of November 14, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

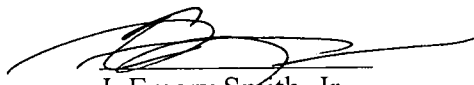
I hereby certify that on April 10, 2019, I served a copies of the Initial Brief of the State,
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