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. 2018-001910

SKYDIVE MYRTLE BEACH, INC. .....Petitioner

v.

HORRY COUNTY.....Respondent

REPLY BRIEF OF PETITIONER

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Skydive Myrtle Beach, Inc. ("SDMB") respectfully submits the following *Reply Brief* to the *Brief of Respondent*, dated April 9, 2019.

ARGUMENT

1. Horry County's Application for Ejectment is not moot.

In this argument, Horry County contends that there are substantial differences "between a court order allowing a commercial tenant to remain in possession of property, and a court order restoring a commercial tenant to possession after the tenant has vacated and stopped making payment for 3 ½ years." (Resp. Br., p. 7-8).

But this misses the point for three reasons. First, SDMB was not in control of how it was ejected. It had a bond in place. [R. p. 2]. By operation of law: (a) nothing in the text of S.C. Code Ann. § 27-37-130 limits the bond's application solely to the "first level"—circuit court – of appellate proceedings in a commercial ejectment; (b) Rule 241(b)(10), SCACR specifically references § 27-37-130, leading to an absurd result if the appeal did in fact end at the circuit court level; and (c) in *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20 (Ct. App. 1987), the Court of Appeals specifically analyzed "the situation of an *appeal* from magistrate's court to the court of common pleas *to an appellate court* (emphasis added)." [R. pp. 401-402][1]. Despite this, on September 17, 2015, Horry County employed its police power to kick SDMB off of the GRE. [R. p. 324] ("[a]nyone affiliated with [SDMB] found therein without express

[1] Also, the plain, ordinary and common sense meaning of "appeal" means the entire process of appeal – including review by the Court of Appeals and Supreme Court of the decisions of the circuit court. *See* S.C. Code Ann. § 14-8-200. The usual and customary meaning of the word "appeal" covers **all** levels of appellate review. Thus, it would be an impermissible "subtle or forced construction" to limit the operation of § 27-37-130 to only to the Circuit court level, when that limitation is absent from the statutory text and flies in the face of the plain and ordinary meaning of the word appeal. *Ranucci v. Crain,* 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014).

authorization from Horry County will be considered trespassers, and handled accordingly.").

Second, SDMB was not in control of the 3 ½ years it has taken to get this matter before the South Carolina Court of Appeals, or the Supreme Court. All that SDMB could do is perfect the appeal on time – which it did – and to which Horry County has conceded this point. (Return to Cert., p. 7).

Third, even if Horry County is correct that S.C. Code § 27-37-140 only allows an action for damages against a commercial landlord – rather than for recovery of possession (which SDMB is not willing to concede) – *it has nothing to do with whether the appeal is moot.*

Not only is this argument a red herring, but so is the point that only the FAA can restore SDMB's aeronautical business. (Resp. Br. p. 8). All SDMB wants from the Supreme Court is a ruling that the case is not moot, and to either proceed with the appeal on substantive – not procedural – grounds on the lease, or remand to the Court of Appeals. The Supreme Court should not be persuaded by the light in which Horry County casts the arguments on *certiorari*..

2. The Court of Appeals did not 'correctly' apply *Barry v. Zahler*.

Here, Horry County first argues that *Barry v. Zahler*, 220 S.C. 86, 66 S.E. 2d 459 (1951) is not "old and outdated," because it is cited by *City of Charleston v. Masi*, 362 S.C. 505, 509, 609 S.E.2d 301, 304 (2005) and *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014). Once again, though, these cases cite *Barry* primarily 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. Likewise, it ignores that *Barry* predates the Appellate Court Rules by nearly forty years; thus, to the extent the holding of *Barry* conflicts with the effect of Rule 241, SCACR, that rule would govern. *See* Rule 102(a), SCACR ("Effective Date and Repealer").

Next, Horry County argues that the only question is whether "the case justiciable." (Resp. Br. p. 9). If SDMB was still in possession of Hangar 7, argues Horry County, then the case would not be moot; but since SDMB is not in possession, the argument goes, the case *is* moot. (Resp. Br. p. 10). In other words, mootness does not require *any* analysis of the intervening act that caused the case to become moot; even if the case became moot because of unfair or deceptive means, the Court is required to treat it a moot anyway. (*Id.*).

This argument, however, flies in the face of modern mootness cases. *Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015); *see also Abbeville School Dist. v. State*, 410 S.C. 619, 629-60, 767 S.E.2d 157, 162 (2014). Neither case says what Horry County argues.

Likewise, neither *Mathis v. South Carolina State Highway Department* nor *Curtis v. State* anywhere state that mootness doctrine does not require *any* analysis of the intervening act that caused a case to become moot. *Mathis v. South Carolina State Highway Department*, 260 S.C. 344, 195 S.E.2d 713 (1973); *Curtis v. State*, 345 S.C.557, 549 S.E.2d

591 (2001). These decisions are miscited. The circumstances by which a case becomes moot should be subject to review, especially when – as here – there was unfairness.

SDMB does not claim that "Skydive's rights to Hangar 7 were protected even though Skydive had surrendered the premises and stopped payments." (Resp. Br. p. 10). Rather, SDMB claims that it would have remained in possession and would have maintained the payments but for Horry County's wrongful eviction. Once again, SDMB only seeks to have this Court declare the case is not moot, and either take up the appeal or remand to the Court of Appeals to decide the matter on substantive grounds.

Horry County next argues that there was not an "improper use of police powers" but merely the "absence of a stay" that caused it to evict SDMB. (Resp. Br. p. 11). This is ridiculous. Pages 326-327 of the Appendix clearly establish that Horry County was not interested in a stay, and specifically does not discuss a stay as a predicate for removal of SDMB from Hangar 7; rather, Horry County's attorney informed SDMB that "[a]nyone affiliated with Skydive Myrtle Beach, Inc. found therein without express authorization from Horry County will be considered trespassers, and handled accordingly." More to the point, ten Sherriff's deputies, some in tactical gear and all armed, were present before the 5:00 p.m. deadline on October 16. Thus, the eviction was in fact all about using the County's police powers. It has nothing to do with SDMB having "little incentive to remain" (Resp. Br. p. 11) as Horry County suggests; such a rationale can be found nowhere on p. 327 of the Appendix. [R. p. 327].

Finally, Respondent ends with the same argument the Court of Appeals suggests – that SDMB should have filed a second petition for a stay with the Court of Appeals. Once again, however, a petition under Rule 241 is not required under the Appellate Court Rules;

it forces that Petitioner to make another meaningless petition, which could never have been heard in time. It probably would have been denied anyhow (the first one was out of time as well), since by the Court of Appeal's logic, the appeal was moot the second that SDMB left the hangar. This is simply unfair to SDMB.

3. SDMB's other reasons not to apply *Barry v. Zahler* are before the Court.

SDMB suggests that all its reasons not to apply *Barry v. Zahler* are in the record and before the Court. The lack of citation to authority by Respondent is telling.

4. Section 27-37-130 was met by the original Magistrate's bond.

In this section, Horry County argues that under S.C. Code Ann. § 27-37-130, the original bond somehow ceased to exist – though it never really says *when* it ceased to have existence.

We know that SDMB paid the bond within five days of the Magistrate's order (on August 1, 2014) and continued to pay it up through the time it was disposed. [R. p. 29]. We also know that Section 27-37-130 does not differentiate between an appeal to the circuit court and subsequent appeal to the Court of Appeals/Supreme Court. (*See* Argument 1, *infra*). When the ejection is stayed by a bond, it is stayed throughout the entire process of appellate review so long as the tenant-appellant adheres to the bond established by the Magistrate. Rule 241, SCACR. Thus, although the Bond states that it would remain in effect until the action is "heard on appeal and decided by the Circuit Court" [R. p. 2], this language is confusing and ambiguous; in reality, the terms of the bond itself are irrelevant, erroneous and/or non-binding against the weight of authority.

Accordingly, Horry County's argument that the Bond ceased to exist is really that it ceased to exist following Horry County's eviction of SDMB using its police powers (literally) to retake Hangar 7. Horry County says that the "bond ceased to be funded as required by § 27-37-130, but this was only after SDMB was dispossessed. It strains credulity to think that Horry County would have accepted the $1,200 per month from SDMB after Horry County's naked use and abuse of its municipal authority, or that SDMB should be faulted for not paying now 3 ½ years later.

5. The modern exceptions to mootness do apply.

Horry County argues that SDMB could have prevented the case from becoming moot by "refusing to leave Hangar 7, paying rent, and obtaining a stay of the Magistrate's Order of Ejection from the appellate courts." (Resp. Br. p. 14). This also is ridiculous.

Horry County definitely used its police powers, which it had not done previously. It marshalled ten deputies on October 16, 2015. Some were in tactical gear; all were armed. SDMB employees (many veterans) were afraid that they would be arrested or worse if they did not depart by 5:00 p.m.; in fact, the overwhelming force displayed by Horry County was because SDMB employed so many veterans. SDMB had no choice but to vacate, as the County Attorney's email states [R. p. 327]. SDMB was not allowed to stay; there was nothing voluntary about it. It worked on October 16, 2015 precisely because Horry County made use of the of the armed deputies. For Horry County now to deny that it used its own police powers is risible.

As for actual modern exceptions to mootness set forth in *Wachesaw Plantation*, 402 S.C. at 384, 741 S.E.2d at 758 (2015), SDMB posits that it has met its burden of establishing the first and third exceptions in its *Brief of Petitioners*. Horry County misses the point of both (1) evading review and (3) preclusive effect. The Supreme Court should not be equally misled.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals and take the Petitioner's appeal up for its own review, or remand to the Court of Appeals for further disposition.

Respectfully submitted,

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May 2, 2019
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PROOF OF SERVICE – REPLY BRIEF OF PETITIONER

The undersigned attorney for Petitioner hereby certifies that a true copy of the ***Reply 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 2nd day of May 2019, to the following:

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