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**Jul 23 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No. 2018-001766

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Charleston Development Company, LLC, Charleston Housing Company, LLC and NotSo Hostel, LLC, Appellants,

v.

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Daniel Baker, Marie Baker, Matthew and Christina Bare, Andre Bauer, Peter Bierce, Brandon Blount, Barbara Brass, Richard T. Brewer, Sigrid Anne Eilertson, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Christina Cross, Darryl J. Damico, Labar Daniel, Stephen Darwak, Lindsay Davenport, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Timnah Giller, Virginia Geller, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, Shaun Halsor, Josephine Rex, Arthur Halvorson, Andrew Halvorson, Linda Hancock, Laura Hyatt, Mike Hartel, Nathan Herring, James Hicks, Jr., Laurie Hicks, Preston G. Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Mandi Walters, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Benjamin Levitt, Richard Levitt, Jesse Lutz, Nikou Manouchehri, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Amanda Lee Raymer, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Inderjit Singh, Avtar Singh, Alecia Stevens, Lee Stevens, Justin Swan, Merrick Teichman, John Van Vlack, Jr., William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, AJB Trust, Anthony & Jacqueline Bradley, Trustees, Hartshorn Family Trust, Helene Kenny / Bridget Denny

Revocable Trust, Wilhelmina M. Wieters Life Estate Childrens Trust, 33 Bogard Street LLC, 249 Cumming, LLC, 253 Coming Street LLC, 259 East Bay LLC, 259 East Bay 10 B LLC, 272 D Coming St. LLC, Café International, Inc., Corner At Old Canton, LLC, Geer Interests LLC, Kit Properties LLC, Lambert-Weiss LLC, The Naws LLC, New Lease Capital LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC,

Of whom,

Younesse Alami, Simon M. Adell, Matthew Anderson, Matthew Asher, Andre Bauer, Peter Bierce, Brandon Blount, Reginald P. Brown IV, Mary Cahill, Ryan Cockrell, Kevin and Virginia Conlon, Anne Marie Crevar, Darryl J. Damico, Stephen Darwak, Lindsay Davenport, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Ryan Gilreath, Sonya. Gilreath, Shaun Halsor, Josephine Rex, Laura Hyatt, Nathan Herring, James Hicks, Jr., Laurie Hicks, Preston G. Hipp, Colin Jones, Matthew F. Jones, Robert C. Jones, Robin Joseph, Molly Keeler, John Kenny, Abigail King, Aaron Kless, Laurie Kramer, Robert Kramer, Allison Kreutzer, Jesse Lutz, Thomas Naselaris, Zoe Naselaris, Beau O'Steen, Cori O'Steen, Lance Parr, Brandon Perdue, Hadassah Rothenberg, Daniel Ryan, Kimberly Bowlin, Kevin Schnittker, Ginger Scofield, Alecia Stevens, Justin Swan, Merrick Teichman, John Van Vlacic, Jr., William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, Helene Kenny / Bridget Denny Revocable Trust, 259 East Bay LLC, 259 East Bay 10 B LLC, Corner At Old Canton, LLC, Kit Properties LLC, The Naws LLC, One Henrietta LLC, Periwinkle Partners, LLC, Porch Properties LLC, Westbury Properties, LLC, and Westendorff Hardware LLC, are

Respondents.

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**RETURN TO APPELLANTS' PETITION FOR REHEARING**

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**CITATION OF AUTHORITIES**

**CASES**

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933) ....2  
Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001). ....1  
McMaster v. Dewitt, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014).....2

**RULES**

Rule 221(a), SCACR.....1  
South Carolina Rules of Evidence, Rule 701.....2  
South Carolina Rules of Evidence, Rule 702.....2

**OTHER AUTHORITIES**

Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999).....1

## LEGAL ARGUMENT

Appellants submit this Return to Appellants' Petition for a Rehearing. Respondents seek a rehearing allegedly on the basis that the Court overlooked or misapprehended several points. Per Rule 221(a), SCACR, in order to prevail on a petition for rehearing, Appellants must demonstrate the Court overlooked or misapprehended their argument. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). However, although Appellants have used the appropriate words ("overlooked" and "misapprehended") to comply with Rule 221 (a), SCACR, in fact what Appellants really seek is for this case to be tried a second time and a different conclusion reached.

Specifically, Appellants contend: 1) the Court applied the wrong standard of review; 2) failed to consider a witness' testimony about damages and failed to overrule the trial judge's rejection of that witness' Affidavit which contradicted his sworn deposition testimony; 3) failed to consider the fact that a discovery motion was pending in State Court; and 4) misinterpreted a City of Charleston ordinance. All of these arguments were already made in Appellants' final brief,<sup>1</sup> argued at the hearing, and fully addressed by this Court in its Order.<sup>2</sup> "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999):

Petitions for rehearing are filed in at least three-fourths of the cases decided by this court. Many of them, we fear, some time, are filed just for delay. It is a rare thing when the court grants such a petition. Usually, they are dismissed with a simple order to that effect, for the

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<sup>1</sup> Appellants' Final Brief, pp. 5- 6, 10-11; Argument II. A, B, C, D; and Argument V.

<sup>2</sup> Order, pp. 3-9, 11.

reason that they contain nothing but a “rehash” of what the losing party has said before, matters which the court has already considered well and disposed of. Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933)

As stated above, several of Appellants’ issues have already been fully briefed and argued by Appellants, so Appellants are merely rehashing their old arguments. Further, to the extent there are misapprehensions and oversights in this case, these misapprehensions are made by counsel for Appellants, not the Court.

For instance, regarding the standard of review, Appellants misapprehend the “scintilla of evidence” rule. When an essential element of a cause of action cannot be established, facts and factual disputes are irrelevant, no matter how many facts there are.

Regarding the Court’s alleged failure to consider witness Holt’s testimony about damages, Appellants contend certain previous case law permits a property owner to give his estimate of the value of land and damages. However, here, Holt is not the owner of any property, he merely holds a membership interest in an LLC that is the owner of the property. In the context of income producing commercial property, an individual member of an LLC does not qualify as a lay witness under the South Carolina Rules of Evidence, Rule 701 and, even if they did, only a Rule 702 expert can testify as to an opinion based on information that is not in itself admissible (or admitted) in evidence. Appellants misapprehend the significance of the South Carolina Rules of Evidence.

Regarding the lower court’s refusal to consider an Affidavit that contradicts previous sworn, testimony, Appellants misapprehend the law regarding sham affidavits.<sup>3</sup>

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<sup>3</sup> McMaster v. Dewitt, 411 S.C. 138, 144, 767 S.E.2d 451, 454 (Ct. App. 2014) (adopting rule that a circuit court has discretion to refuse to consider a sham affidavit).

Regarding the Court's alleged failure to adequately consider a pending discovery motion, Appellants misapprehend the litigation process. Summary judgment cannot be avoided merely by filing a Motion to Compel and alleging there may be evidence unknown to Appellants that supports their allegations. Again, if the elements of a cause of action cannot be established, discovery issues are of no import. Further, Appellants' case was three years old when summary judgment was granted and Appellants had had ample time to pursue and resolve discovery issues. Appellants misapprehend their responsibilities as plaintiffs in litigation.

Regarding the misinterpretation of a City of Charleston ordinance, again it is Appellants who misapprehend the concept of zoning. Local governments are authorized by State law to enact and enforce zoning ordinances, not individuals. The only time individuals can directly seek judicial intervention is when they seek injunctive relief to prevent irreparable harm, and as the Court notes, Appellants admitted they did not know if they suffered irreparable harm and were seeking money damages.

### CONCLUSION

For these reasons, Respondents respectfully request this Court dismiss Appellants' Petition for Rehearing as all of Appellants' arguments have already been well considered and disposed of by this Court.

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Respectfully submitted,

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Date: July 23, 2021