

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2021-00934

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

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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CITATION OF AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

Procedural Background

On October 7, 2015 (2015-CP-10-5415); November 2, 2015 (2015-CP-10-5900); and March 4, 2016 (2016-CP-10-1117 and 2016-CP-10-1118) Petitioners filed four (4) lawsuits in each of which a trust alleged various Respondents violated the City of Charleston's zoning ordinance regarding short-term rentals.

On April 22, 2016, Petitioners moved to transfer the cases to the Business Court Pilot Program. Judge Roger M. Young assigned these cases to the Business Court Pilot Program in Charleston County on June 14, 2016 and assigned Judge R. Markley Dennis, Jr. exclusive jurisdiction to hear all matters pertaining to these cases. (App., p. 23.)

Judge R. Markley Dennis, Jr. granted summary judgment on November 3, 2016 to Respondents in all four (4) cases based on the Appellant Trust having no standing, and allowed Petitioners to amend and consolidate their Complaints. (App., pp. 24-40.) The Complaints were consolidated into case number 2015-CP-10-5415.

Petitioners' Amended Complaint has four (4) causes of action: Nuisance, Violation of City Zoning Ordinance; Unfair Trade Practices Act, and Unjust Enrichment. (App., pp. 45-63.) After a hearing on June 7, 2018, the Lower Court granted summary judgment to all Respondents as to all of Petitioners' causes of action. (App., pp. 1-21.) Petitioners' subsequent Motion for Reconsideration was denied without a hearing on September 5, 2018. (App., p. 44.)

Petitioners filed an appeal to the Court of Appeals on September 16, 2018 challenging the grant of summary judgment on all issues except unjust enrichment. The case was briefed by the parties and a hearing held before the Court of Appeals on April 15,

2021. On June 23, 2021, the Court of Appeals issued an order upholding the Lower Court's grant of summary judgment to Respondents. (App., pp. 280-293.) Petitioners filed a Motion for a Rehearing on July 7, 2021 to which Respondents filed a Return. (App., pp. 294-317.) Petitioners' Motion for a Rehearing was denied on August 4, 2021. (App., pp. 318-320.) Petitioners then filed this Petition for Certiorari on August 27, 2021 and served the same on Respondents on August 30, 2021.

Factual Background

In 2012, the City created a special overlay zone district to allow short-term rentals. (App., pp. 225, 227-230.) The City of Charleston Zoning Ordinance defines short-term rentals as a lease in duration between 1 and 29 days. (App., p. 223.) Petitioner Charleston Development Company, LLC owns 106 A and B Cannon Street; Petitioner Charleston Housing Company, LLC owns 5 and 6 Tulley Alley and 179 D and E St. Philip Street; and Petitioner NotSoHostel, LLC owns 156 Spring Street and 33 Cannon Street. (App., pp. 46-47.) Each LLC is owned by an irrevocable trust called Global Real Property Trust. (App., pp. 88, 250-251.) Bob Holt is the Trustee of Global Real Property Trust and the Chairman of each of the three (3) LLC's. (App., pp. 250-252.) Petitioners rent all of the above listed properties as short-term rentals. (App., p. 46-47.)

Respondents are private property owners who rented their homes or portions of their homes as short-term rentals. Petitioners filed this suit in order to enforce the City's Short-Term Rental Ordinance against Respondents. The trial court granted Respondents' motion for summary judgment and dismissed all of Petitioners' causes of action.

The Court of Appeals affirmed the trial court's grant of summary judgment on Petitioners' claims of violation of a City ordinance, SCUTPA and nuisance because

Petitioners failed to present evidence of their damages. The Court of Appeals also declined to address the issue of whether Petitioners are entitled to videotaped depositions.

COUNTERSTATEMENT OF ISSUES PRESENTED

- 1. Petitioners fail to present any special and important reason justifying discretionary review of the Court of Appeals' decision by this Court.**
- 2. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding the standard for summary judgment.**
- 3. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding the sufficiency of Affidavits or an owner's right to testify about damages to property.**
- 4. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding granting summary judgment prematurely.**
- 5. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding statutory standing or usurping the authority of a South Carolina municipality.**

LEGAL ARGUMENT

- 1. Petitioners fail to present any special and important reason justifying discretionary review of the Court of Appeals' Decision by this Court.**

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242 (b), SCACR. Rule 242 (b) lists five (5) circumstances to illustrate when certiorari is appropriate: 1) cases in which there are novel questions of law; 2) cases in which there is a dissent in a Court of Appeals decision; 3) cases where a Court of Appeals decision conflicts with a prior Supreme Court decision; 4) cases where substantial constitutional issue are directly

involved; and 5) cases involving a federal question when there is a conflict between a Court of Appeals' decision and a United States Supreme Court opinion.

Petitioners rely on the third reason in their request for certiorari. Petitioners contend the Court of Appeals decision in this case "is in direct conflict with Supreme Court precedent regarding what a litigant must present in response to a motion for summary judgment, usurps the provinces of the jury and the City of Charleston, and has the effect of sanctioning admittedly illegal business activity." (App., pp. 298-299.)

All of Petitioners' arguments regarding summary judgment, as well as their contention that a City zoning ordinance grants standing to enforce a zoning ordinance despite to this Court's holding in Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014), were previously made in Petitioners' brief to the Court of Appeals and fully addressed by that Court in its Order. Petitioners are merely rehashing old arguments and this Court should decline to issue a writ in this case. However, in the event this Court issues a writ, it should summarily affirm and dispense with Petitioners' appeal for the reasons stated herein.

2. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding the standard for summary judgment.

Petitioners contend that the Court of Appeals failed to follow precedent by failing to apply the summary judgment standards of "a mere scintilla of evidence" and "viewed in a light most favorable." Citing to the same case Petitioners contend the Court of Appeals did not follow, Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991), the Court of Appeals stated, "...Rule 56 (c) mandates entry of summary judgment ...against a party who

fails to make a showing sufficient to establish the existence of an essential element of the party's case... ." (App., p. 284.)

Here, nexus and proximate cause are essential elements of damages. Petitioners fail to show any nexus between any damages they allege and any particular Respondent. In order to show any Respondent's rental of property was the proximate cause of Petitioners' damages, Petitioners would have had to have offered evidence that someone who rented a particular Respondent's property would have rented one of Petitioners' properties (and not gone to a hotel) if that particular Respondent's property not been available for rental. There is no evidence in the record of what any particular renter would have done regarding each named Respondent. Therefore, whatever damages Petitioners contend they suffered (which the Court assumed *arguendo* they could prove), were not associated with any particular Respondent and so Petitioners failed to establish an essential element of their claim.

Petitioners confuse the trial judge's statement regarding the amount of damages being a factual issue, with the trial court's subsequent holding that even if the amount of damages could be determined factually, there was no proof of any nexus or proximate cause between the alleged damages and any particular Respondent. Both of the trial judge's statements are true. Petitioner's argument fails because as stated in Baughman, "[T]here can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 306 S.C. 116, 410 S.E.2d 546. (internal citations omitted).

- 3. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding the sufficiency of Affidavits or an owner's right to testify about damages to property.**

Contrary to Petitioners' assertion, the Court of Appeals did not hold a property owner cannot testify about the value of his property. The Court of Appeals held that the lower court was justified in refusing to rely on the Affidavit of someone who was not identified as an expert witness when his statements failed to show any nexus between Respondents' actions and Petitioners' damages, failed to offer evidence of the proximate cause of any of Petitioners' damages, and failed address how any specific Respondent damaged Petitioners. (App., pp. 288-290.) The Court of Appeals' decision was supported by the reference to three (3) cases¹, none of which Petitioners allege violate Supreme Court precedent. (App., pp. 289-290.)

Further, the cases cited by Petitioners as proof that precedent was not followed are not on point. State v. Brown, 402 S.C. 119, 740 S.E.2d 493 (2013) was a criminal case where the issue was whether a property owner could testify as to the value of property to support a grand larceny conviction. Barfield v. Dillon Motor Sales, Inc., 233 S.C. 26, 103 S.E.2d 416 (1958) was a workers' compensation case where the testimony of the book-keeper was evidence of the number of employees for jurisdictional purposes. Seaboard Coast Line Railroad v. Harrelson, 262 S.C. 43 202 S.E.2d 4 (1974) was a condemnation case where a property owner testified about the value of property he was familiar with. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010) was a tort case involving the competency of an expert witness who testified about the value of a pick-up truck. S.C. Highway Dep't v. Grant, 265 S.C. 28, 216 S.E.2d 758 (1975) was a

¹ S.C. State Highway Dep't v. Hines, 234 S.C. 254, 107 S.E.2d 643 (1959); Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel Island Riverside Devs., LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017); and Rodgers v. Rodgers, 280 S.C. 205, 311 S.E.2d 743 (Ct. App. 1984).

condemnation case involving a property owner's testimony about the value of his property. Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 10 (1981) was a case where the Court allowed a property owner to testify as to the value of a building. None of these cases address special damages or standing and, therefore, none of them support Petitioners' arguments. Notably, the Court of Appeals held that Holt could testify about the value of his property, but he failed to offer any evidence of what the value would be without illegal competition or any evidence that Respondents' actions were the nexus or proximate cause of damages. (App., pp. 290-292.)

Petitioners also allege in error that the Court of Appeals' holding is in irreconcilable conflict with Preservation Society of Charleston v. S.C. Dept. of Health and Environmental Control, 430 S.C. 200, 845 S.E.2d 481 (2020). In Preservation Society of Charleston, this Court considered affidavits on the issue of damages when determining associational standing for an ALJ appeal. Petitioners are LLC's, not an association and they have never alleged associational standing. Further, the issue before the Court of Appeals was not whether to accept an affidavit to prove damages but, rather, whether Bob Holt's Affidavit could prove any nexus between Respondents' actions and Petitioners' damages, or proximate cause, or prove that any damage Petitioners suffered was caused by any specific Respondent. The Court of Appeals' inquiry was entirely different than this Court's inquiry in Preservation Society of Charleston.

In fact, this Court distinguished Preservation Society of Charleston from the Carnival case:

Our approach in *Carnival Corp.* is not applicable here because *Carnival Corp.* involved nuisance and zoning claims initiated in the circuit court, not the statutory grant of

administrative review in the ALC that is at issue here. Further, the plaintiffs in *Carnival Corp.* did not submit affidavits regarding individualized harm. 430 S.C. at 214–15, 845 S.E.2d at 488–89 (2020), reh'g denied (Aug. 7, 2020).

The two cases are not irreconcilable; they are merely distinguishable.

4. The Court of Appeals' decision does not conflict with any prior Supreme Court decision regarding granting summary judgment prematurely.

Petitioners contend that because there was a motion to compel pending in the Lower Court, it was premature to grant summary judgment. Petitioners cite only Baughman v. American Tel. and Tel. Co., 306 SC 101, 410 S.E.2d 357 (1990) for the proposition that summary judgment cannot be granted if a motion to compel is pending. The Baughman case does not stand for the proposition that any pending discovery motion precludes the court from deciding a summary judgment motion. In Baughman, the Court found that two (2) years into litigation, the petitioners who had sought discovery on the issue of what substances were emitted from a plant did not have that information and that they could not identify an expert without that information. In Baughman, the Court also noted that no amount of evidence will allow a non-moving party to survive summary judgment when an essential element of the case is missing. 306 S.C. 116, 410 S.E.2d 546.

Here, Petitioners argued that the Lower Court's failure to rule on their Motion to Compel prevented them from calculating the full measure of their damages so they should be allowed to have a jury infer their damages. However, again, Petitioners misconstrue the Court of Appeals' holding. The Court of Appeals, held, "Although Holt may testify to the value of the property, he provided no explanation for how he determined what the

approximate value of the property would be if there was no illegal competition.” (App., p. 290.)

Further, the case cited by Petitioners regarding the importance of pending discovery motions is not on point. Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638 (1950) was an insurance subrogation case in which this Court held that when all of the other elements of a claim are present, uncertainty as to the exact amount of damages will not ordinarily defeat a claim. Here, the issue is whether Petitioners suffered any damages at all. The Court of Appeals held Petitioners failed to prove any nexus between Respondents’ actions and Petitioners’ alleged damages and Petitioners failed to explain or offer any evidence of the calculation of what Petitioners’ property values would be without illegal competition. Additional discovery cannot remedy this failure.

Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) was a breach of contract case involving a case of prevention. The Court of Appeals held that when the buyer had to prove something could have occurred if it had not been prevented by the seller, speculation as to what would have happened had the seller’s conduct not taken place is necessary so the seller cannot take advantage of the uncertainty created by his own wrongdoing as otherwise it would be impossible to prove a case of prevention. (Id. at 121-122.) This is not a breach of contract or prevention case, and the Court of Appeals’ decision does not contradict the holding in either of these cases as they are factually distinct.

5. The Court of Appeals’ decision does not conflict with any prior Supreme Court decision regarding statutory standing or usurping the authority of a South Carolina municipality.

Petitioners try to circumvent the holding in Carnival by insisting they have “statutory” standing under City Ordinance. 54-905. This City ordinance allows persons damaged by another person’s use of their property to seek injunctive relief. (Ord. No. 54-905.) Petitioners cite to Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012) to support their argument. Freemantle states that constitutional standing is not applicable when standing is conferred by statute. However, City Ordinance 54-905 does not confer standing and this case is not about constitutional standing. When a person disagrees with a Board of Zoning Appeals zoning decision, Ordinance 54-904 permits an appeal to circuit court to review the Board of Zoning Appeals’ decision. When a person or persons challenge a zoning issue, they must first prove standing pursuant to the two-part test set forth in Carnival.

The case cited by Petitioners are distinguishable factually. Taylor v. Aiken County, 402 S.C. 559, 741 S.E.2d 31 (Ct. App. 2013) is a tax assessment case that has nothing to do with zoning. In Taylor, relying on state tax law, the Court of Appeals held a property owner could appeal a tax assessment to the Administrative Law Court. Bevivino v. Town of Mt. Pleasant Zoning Appeals, 402 S.C. 57, 783 S.E.2d 863 (Ct. App. 2013) involved an appeal of a Board of Zoning Appeals’ decision. Here, Petitioners never went to the Board of Zoning Appeals or appealed a Board of Zoning Appeals decision to circuit court so this case is not on point. The statute considered by the Court of Appeals in Bevivino (S.C. Code § 6-29-820) has nothing to do with the enforcement of a zoning ordinance. Enforcement of zoning is addressed in S.C. Code § 6-29-950. Again, none of these cases overturn the holding in Carnival which addresses standing in a zoning case.

CONCLUSION

For all of the above reasons, Respondents respectfully request this Court dismiss Petitioners' Petition for Certiorari as the Court of Appeals' decision does not conflict with any Supreme Court precedent. In the alternative, in the event this Court issues a writ of certiorari, Respondents respectfully request this Court summarily affirm and dispense with Petitioners' appeal.

Respectfully submitted,

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Date: September 29, 2021