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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5826 (S.C. Ct. App. Filed June 23, 2021)

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 Kenny
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,

Defendants,

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, Mary Dickerson, Maxwell Streeter, Kathleen Dougherty, David Dressman, Lindsay Davenport, Kathleen Dougherty, David Dressman, Anna Dressman, Michael Elder, Christopher Scott Farley, Michele Ghastin, Ryan Gilreath, Sonya Gilreath, Kimberly Glenn, 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 Vlack, Jr, William Waterhouse, Jennifer Waterhouse, Anne Wohlfeil, Bryan Young, Helene Kenny / Bridget Kenny 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.

PETITIONERS' REPLY TO RESPONDENTS' RETURN

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CITATION OF AUTHORITIES

CASES

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1990) 4

Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 753 S.E.2d 846 (2014) 1, 2

Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984)..... 3

’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 3

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STATUTES

City of Charleston Ordinance 54-905..... 1

RULES

Rule 220(c), SCACR..... 3

I. DISCRETE ERRORS AND INACCURACIES IN THE RESPONDENTS' RETURN.

“Petitioners filed this suit in order to enforce the City’s Short-Term Rental Ordinance against Respondents.” (Return, p. 2). Incorrect. Petitioners filed this suit in order to recover damages caused by the Respondents’ admitted violations of the City’s ordinances.

“Petitioners are merely rehashing old arguments . . .” (Return, p. 4). It is correct that the Petitioners have presented this case and its issues to the trial court and the Court of Appeals. Both courts have erred in their conclusions. This Court is the court of last resort.

“Petitioners try to circumvent the holding in [Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 753 S.E.2d 846 (2014)] 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.” (Return, p. 10). Incorrect. In Carnival, the defendant was permitted by the City to do what it was doing; here, the Respondents admit that they are breaking the law. Regarding the Ordinance, it allows persons “who would be damaged” by another’s illegal use of property to seek injunctive relief “in addition to other remedies.” (App., p. 238).

“City Ordinance 54-905 does not confer standing and this case is not about constitutional standing.” (Return, p. 10). Incorrect in part. The Ordinance does confer statutory standing on both the City and property owners to bring suit against residents who violate the zoning laws. The Petitioners agree with the Respondents that “this case is not about constitutional standing” because this case is about statutory standing.

“When a person or persons challenge a zoning issue, they must first prove standing pursuant to the two-part test set forth in Carnival.” (Return, p. 10). Inaccurate and irrelevant. Petitioners do not challenge any “zoning issue.” The plaintiffs in Carnival claimed associational

standing and did not rely upon the Ordinance. The Petitioners do not claim associational standing and rely, in part, on the Ordinance.

Respondents, on the same page, have told this Court that “this case is not about constitutional standing” and that the Petitioners must “prove standing pursuant to the two-part test set forth in Carnival.”¹ (Return, p. 10).

“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.” (Return, p. 10). Correct, but irrelevant. There was never a zoning decision or ruling by the City of Charleston to appeal.

II. “NEXUS” AND “PROXIMATE CAUSE.”

The gist of the Return is Respondents’ argument that Petitioners have failed to show any “nexus” between the Respondents’ illegal businesses and the Petitioners’ damages.²

First, this argument is factually incorrect. The record includes Robert Holt’s sworn testimony that the Respondents’ illegal businesses have damaged the Petitioners’ income streams and property values. (App., pp. 164, 165, 168-170, 172-174). To accept Respondents’ argument, this Court would have to overturn South Carolina’s “mere scintilla” and “light most favorable” common law.

Second, the Court of Appeals did not rule on this ground. The Court of Appeals used the words “nexus” and “proximate cause” only when describing the trial court’s order. The Court of

¹ It’s actually a three-part test. “For a plaintiff to possess standing three elements must be satisfied.” 753 S.E.2d at 850. Petitioners have submitted far more than a scintilla of evidence of each element.

² Petitioners note that “nexus” and “proximate cause” are not literal elements of any of their three causes of action, but agree that at trial they will need to show that it was the Respondents who damaged them.

Appeals ruled, and thus the Petition for Rehearing and Petition for Certiorari challenged, only that the Petitioners offered NO EVIDENCE of ANY damages. If there are no damages, then it does not matter what or who caused them, because they do not exist. This case has not yet gotten to the “who caused the damages?” phase because the lower courts did not allow the Petitioners to pursue discovery. The record is somewhat incomplete on this issue because the trial court did not rule on the Petitioners’ motion to compel.

The Respondents essentially take the position, “We admit we broke the law, but we’re not going to let you know exactly how and when we did it, and because you can’t show exactly what we did, you can’t sue us.” Hence the Petitioners’ citations to Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 644 (1950) (“Where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult, he must realize that in such cases ‘juries are allowed to act upon probable and inferential as well as direct and positive proof’”) and Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404, 407 (Ct. App. 1984) (defendants “tak[ing] advantage of the uncertainty created by [their] own wrongdoing.”) Unfortunately, the lower courts approved of this strategy.

Third, while the Petitioners do not agree that they have failed to produce ANY evidence of “nexus” or “proximate cause,” Petitioners acknowledge Rule 220(c), SCACR, and an appellate court’s *right* to affirm on any ground appearing in the record. However, our appellate courts do not have a *duty* to do so; this is a discretionary matter.

The appellate court **may** review respondent's additional reasons and, if convinced it is **proper and fair** to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 723 (2000) (emphasis added).

In this case, it would not be proper or fair to affirm the Court of Appeals on any ground because “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 544 (1990) (citations omitted).

This case and Baughman are similar in several respects. Baughman involved over 200 plaintiffs; this case involves over 100 defendants. Baughman reached this Court more than six years after it was filed; this case is at the Supreme Court approximately six years after it was filed. Just like the Baughman plaintiffs, Petitioners deserve full disclosure about the Respondents’ illegal businesses in order to present their full damages case, including expert testimony and causation.

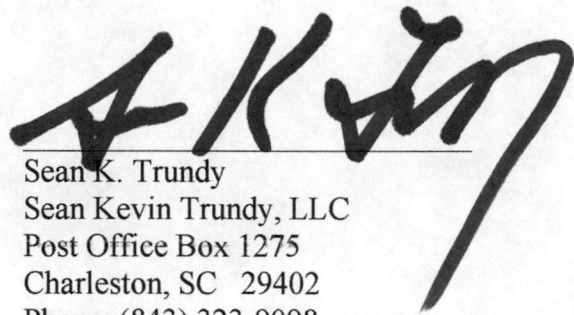
The Baughman plaintiffs were not on a “fishing expedition” and neither are the Petitioners. This record includes Robert Holt’s testimony about the short-term rental marketplace, including the variety of competing products (bedrooms, bathrooms, etc.), in Charleston. (App., pp. 87, 164-165, 168-170.) Once the Respondents are required to disclose what properties they rented out, when, and for how much, then the Petitioners (owners of the very, very few legal STR properties in Charleston) can complete their evaluation and analysis of their damages, all of which were caused by the Respondents’ illegal businesses.

Those are similarities. But there is a very important distinction between the cases, a distinction which makes reversal even more necessary here. In Baughman, the trial court ruled on the plaintiffs’ motion to compel: “On July 22, 1987, the trial court ordered Nassau to furnish complete answers to several of Plaintiffs’ interrogatories . . .” Id. at 539. In this case, on January 23, 2018, the trial court held in abeyance Petitioners’ motion to compel discovery responses from the Respondents. (App., p. 210, lines 8-17). Months later, the trial court granted the Respondents’ motion for summary judgment without ever addressing the Petitioners’ motion to compel.

“The discovery process is not a game of ‘hide the ball.’” State v. Neujahr, 540 N.W.2d 566, 574 (Neb. 1995); accord, Todd v. Bear Valley Village Apartments, 980 P.2d 973, 977 fn. 2 (Colo. 1999) (civil discovery rules are designed to eliminate “‘hide-the-ball’ and ‘hardball’ tactics”). The trial court and the Court of Appeals approved of the Respondents’ tactics by granting and affirming summary judgment. This error prevented the Petitioners from having a full and fair opportunity to present their case.

III. CONCLUSION.

The Petitioners respectfully assert that certiorari must be granted, and the Court of Appeals reversed, in order to preserve the efficacy of this Court’s longstanding common law rules regarding fair play, discovery and the standards applied to affidavits and motions for summary judgment. Denying certiorari, or affirming the lower courts, will have the practical effect of reversing scores of this Court’s opinions and radically changing the landscape of civil litigation in South Carolina.



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