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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200636

Caryn Herfurth and Priscilla G. Anderson

v.

Gulf Shores Board of Zoning Adjustment

Appeal from Baldwin Circuit Court
(CV-20-900844)

EDWARDS, Judge.

Caryn Herfurth and Priscilla G. Anderson appeal from a judgment entered by the Baldwin Circuit Court ("the trial court") granting an area

variance to Mark Bradley.[1] Herfurth and Anderson had appealed to the trial court from a decision of the Gulf Shores Board of Zoning Adjustment ("the board"), which likewise had granted Bradley an area variance.

Bradley purchased a vacant 50-foot by 60-foot parcel of property in Gulf Shores ("the Bradley property") some time after March 12, 2019, but before January 7, 2020. The Bradley property was zoned as "BT-3 (Medium-High Density Tourist Business District)," which allows a building to be used for single-family residential use as a matter of right, among other uses. The Bradley property was surrounded by properties that were also zoned BT-3, which included properties with buildings being used for residential purposes and for commercial purposes.

The size of the Bradley property was the result of a 1964 subdivision of a larger parcel of property into three parcels: the Bradley property; a parcel equal in size to the Bradley property that, at the time of the appeal

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[1]An "area variance" "permit[s] deviation from zoning requirements regarding the construction and placement of structures on the property" whereas a "use variance" "permit[s] deviation from the zoning requirements regarding the use of the property." Ferraro v. Board of Zoning Adjustment of Birmingham, 970 So. 2d 299, 304 (Ala. Civ. App. 2007).

to the trial court, was owned by David Swiger, who was using a building on that property as a walk-up deli; and a parcel twice the size of the Bradley property that was owned by Paul Lartigue and that contained a 1,400-square-foot commercial duplex, one unit of which was rented as a wine bar and the other as a residence. Swiger's property was located south of the Bradley property, and Lartigue's property was located west of those properties. The Bradley property had no frontage but had street access via a 10-foot ingress-and-egress easement across Swiger's property, which had frontage on West Beach Boulevard; the easement was created as part of the 1964 subdivision of a larger parcel.

Anderson's property was a 50-foot by 120-foot parcel that abutted the Bradley property at its northwest corner and contained a 1,400-square- foot residential duplex. Herfurth's property also was a 50-foot by 120-foot parcel, which was located north of the Bradley property and which contained a two-story house. The lot to the east of the Bradley property was a 100-foot by 240-foot parcel that was undeveloped but that could have been developed for either commercial or residential use.

As to the BT-3 zoning requirements, the relevant Gulf Shores zoning ordinance includes a minimum lot-size requirement, setback requirements, and other requirements. Per that ordinance, the pertinent setback requirements for a residential building are a 30-foot rear setback, a 20-foot front setback, and 8-foot side setbacks. Based on the size and nature of the Bradley property, he could construct a residential building on the property without violating the setback requirements, provided that the building footprint was no larger than 10 feet by 34 feet. Bradley also could use the property for commercial purposes; commercial-building setback requirements were less restrictive than those for residential buildings.

When the 1964 subdivision occurred, the Bradley property included a 20-foot by 20-foot single-family residence located near the rear (north) property line. That residence was subsequently demolished after it was damaged during Hurricane Frederic in 1979. In 1984, an application for a setback variance was granted for a proposed single-family residence on the Bradley property, but no construction occurred and that approval for the variance lapsed. On March 12, 2019, a person interested in

purchasing the Bradley property applied for multiple variances (front and rear setbacks, maximum-building coverage, and impervious coverage) relating to a proposed single-family residence on the Bradley property, but that person withdrew his application after the surrounding property owners objected and the board hesitated to grant the application. Bradley subsequently purchased the Bradley property, and he filed an application requesting a setback variance for a proposed two-story, five-bedroom residence with a 24-foot by 34-foot building footprint (816-square feet per story). Bradley requested a reduction in the rear-setback requirement from 30 feet to approximately 15 feet. On January 7, 2020, the board denied Bradley's first variance application. Bradley modified his plan for the property, and he filed a second variance application, which requested that the board approve a setback variance for a proposed two-story, four-bedroom residence with a 22-foot by 34-foot building footprint (748-square feet per story). Bradley's second variance application requested a reduction in the rear-setback requirement from 30 feet to 28 feet and in the front-setback requirement from 20 feet to 10 feet.

On July 7, 2020, the board considered Bradley's second variance application at a public hearing, after which the board approved the variance. See Ala. Code 1975, § 11-52-80(d)(3). According to the minutes of that board meeting, "[o]ne person spoke in favor of the variance" and five neighbors "objected to the variance based on the house size vs the size of the lot, the magnitude of the variance request, and concerns about the house being rented and parking issues." The minutes also stated that Bradley noted he had "reduced the size of the home to appease neighbors' concerns."

Herfurth and Anderson filed a notice of appeal with the board. See Ala. Code 1975, § 11-52-81.[2] On July 20, 2020, the notice of appeal was docketed as a complaint in the trial court, see Carter v. Prattville Bd. of Zoning Adjustment, 976 So. 2d 459, 462 (Ala. Civ. App. 2007), and thereafter Herfurth and Anderson were listed as the plaintiffs and the board was listed as the defendant. Bradley was not made a party, and he

[2]Third parties may be aggrieved parties under § 11-52-81. See Ex parte City of Huntsville, 684 So. 2d 123, 124 (Ala. 1996); see also Crowder v. Zoning Bd. of Adjustment of Birmingham, 406 So. 2d 917, 918 (Ala. Civ. App. 1981).

did not seek to intervene in the appeal to the trial court. Compare Greater Washington Park Neighborhood Ass'n v. Board of Adjustment of City of Montgomery, 24 So. 3d 443, 444-45 (Ala. Civ. App. 2009) ("The [applicant] Church subsequently intervened in the appeal" from the decision of the board of adjustment.). On December 31, 2020, the board filed with the trial court a certified transcript of the July 2020 board meeting, along with the exhibits that were submitted at that meeting. See § 11-52-81.

We note that § 11-52-81 authorizes an appeal to the circuit court from the decision of a board of adjustment and that "the action in such court shall be tried de novo." On appeal from a decision of a board of adjustment, "[t]he circuit court sits as the Board of Zoning Adjustment and proceeds as if no hearing has ever been held. And, as a consequence, the applicant for a ... variance has the burden of proving again its need for the variance." Board of Zoning Adjustment of Hueytown v. Warren, 366 So. 2d 1125, 1127 (Ala. 1979); see also Swann v. Board of Zoning Adjustment of Jefferson Cnty., 459 So. 2d 896, 899 (Ala. Civ. App. 1984) ("The de novo hearing provided for under state law envisions an entirely

new hearing in the circuit court as if the matter had not been tried before.").

> "It is hardly necessary to comment on the meaning of a trial de novo. A trial de novo, within the common acceptation of that term, means that the case shall be tried in the Circuit Court as if it had not been tried before, and that that court may substitute its own findings and judgment for that of the lower tribunal."

Ball v. Jones, 272 Ala. 305, 309, 132 So. 2d 120, 122 (1961); see also Louisville & Nashville R.A. v. Lancaster, 121 Ala. 471, 473, 25 So. 733, 735 (1899) (noting that an appeal for a trial de novo "operates to annul and vacate" the previous judgment). Nevertheless, in an appeal pursuant to § 11-52-81, "[t]he trial court may hear only those issues that were properly raised before a board of adjustment and that are included in the transcript of the proceedings." Ex parte Lake Forest Prop. Owners' Ass'n, 603 So. 2d 1045, 1046 (Ala. 1992). See also Warren, 366 So. 2d at 1128; Brown v. Jefferson, 203 So. 3d 1213, 1219-20 (Ala. Civ. App. 2014).

The trial court held a de novo, ore tenus trial on March 5, 2021. At the beginning of the trial, the board assumed the burden of proof as to demonstrating the propriety of Bradley's requested variance. See Arant

v. Board of Adjustment of City of Montgomery, 271 Ala. 600, 605-06, 126 So. 2d 100, 105 (1960) (discussing the burden of proof for obtaining a variance from a board of adjustment or the circuit court). After calling Jennifer Watkins, a planner for the Gulf Shores Planning Department, as a witness, the board called Bradley as a witness, after which the board rested its case. Herfurth and Anderson then called several witnesses who testified in opposition to Bradley's second variance application, including Anderson, Swiger, Lartigue, and Tara Marie McMeans.[3]

On March 10, 2021, the trial court entered a judgment making specific factual findings and concluding: "[T]he decision of the ... [b]oard ... is hereby Affirmed. The lot owner is hereby given a variance reducing the front yard setback from 20 feet to 10 feet and the rear yard setback is

[3]While Herfurth's appeal to the trial court was pending, she sold her property to McMeans, who had lived on Herfurth's property for 11 years. Rule 25(c), Ala. R. Civ. P., provides, in pertinent part, that, "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." No motion to substitute was filed as to McMeans, and no substitution or joinder of McMeans was ordered. Therefore, Herfurth had the right to continue to prosecute the action. See, e.g., Adler v. Bank of New York Mellon, 218 So. 3d 831, 835 (Ala. Civ. App. 2016).

reduced from 30 feet to 28 feet." Herfurth and Anderson timely filed a joint postjudgment motion, which the trial court denied. On May 20, 2021, Herfurth and Anderson timely filed a notice of appeal to this court.

On appeal, Herfurth and Anderson contend that the trial court erred by misapplying the law applicable to a use variance to an area variance[4] and by concluding that Bradley had established "unnecessary hardship." They also argue that this court should hold that "a variance applicant who acquired the premises, at arms length, with knowledge that a variance was necessary for a particular use, should be denied the variance in the event the property can be put reasonably to a conforming use without the granting of a variance." We pretermit discussion of those issues, however, because we conclude that the failure to make Bradley a party in the trial court, pursuant to Rule 19, Ala. R. Civ. P., requires this court to reverse the trial court's judgment.

Failure of the plaintiff or the trial court to add a party pursuant to Rule 19 can be raised by the appellate court ex mero motu. See J.C.

[4]See footnote 1, supra, explaining the difference between an "area variance" and a "use variance."

Jacobs Banking Co. v. Campbell, 406 So. 2d 834, 850 (Ala. 1981). This court ordered the parties to file letter briefs addressing whether Bradley was a necessary party to the appeal in the trial court, and Herfurth and Anderson and the board filed letter briefs in response to our request.

Rule 19(a), Ala. R. Civ. P., states:

> "A person who is subject to jurisdiction of the court shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party."

When a party who is required to be added pursuant to Rule 19 is present at trial and testifies, "it [is] incumbent upon the trial court, sua sponte, pursuant to the mandate of Rule 19, to order that [he or she] be made a party defendant and to proceed to adjudicate the respective interest of the parties." Davis v. Burnette, 341 So. 2d 118, 120 (Ala. 1976). The failure to add such a party in the trial court "necessitates" that the appellate

court "dismiss[] the cause without prejudice or ... revers[e] with directions to allow the cause to stand over for amendment." J.C. Jacobs, 406 So. 2d at 850-51. However, that principle is not without exception. See, e.g., Bonner v. Bonner, 170 So. 3d 697, 707 (Ala. Civ. App. 2015) (discussing an exception to Rule 19 under certain conditions not applicable to this case).

In their letter brief regarding the application of Rule 19, Herfurth and Anderson contend that the presence of the board as a party adequately represented the interests of Bradley as to Bradley's second variance application and that he could have intervened had he chosen to do so. Herfurth and Anderson rely on, among other authorities, Melton v. Harbor Pointe, LLC, 57 So. 3d 695, 700 (Ala. 2010), which states:

> "This Court stated in J.R. McClenney & Son, Inc. v. Reimer, 435 So. 2d 50, 52 (Ala. 1983), that ' " '[i]ndispensable parties' are persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." ' (Quoting 1 Champ Lyons, Alabama Practice, Rules of Civil Procedure, at 389 (1973).) The Court further stated in Reimer:
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> > " 'There is no prescribed formula to be mechanically applied in every case to determine

> whether a party is an indispensable party or merely a proper or necessary one. This is a question to be decided in the context of the particular case. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). The issue is one to be decided by applying equitable principles ....'
>
> "435 So. 2d at 52."

Herfurth and Anderson also rely on Byrd Cos., Inc. v. Smith, 591 So. 2d 844, 846 (Ala. 1991), which states:

> "Rule 19, Ala. R. Civ. P., provides for joinder of persons needed for just adjudication. Its purposes include the promotion of judicial efficiency and the final determination of litigation by including all parties directly interested in the controversy. Hooper v. Huey, 293 Ala. 63, 69, 300 So. 2d 100, 105 (1974), overruled on other grounds, Bardin v. Jones, 371 So. 2d 23 (Ala. 1979). Where the parties before the court adequately represent the absent parties' interests and the absent parties could easily intervene should they fear inadequate representation, no reason exists why the trial court could not grant meaningful relief to the parties before the court. Ross v. Luton, 456 So. 2d 249, 257 (Ala. 1984). Also, joinder of the absent parties is not absolutely necessary where determination of the controversy will not result in a loss to the absent parties' interest or where the action does not seek a judgment against them."

Based on "the context of th[is] particular case" and the equities before us, we disagree with Herfurth and Anderson's argument. Bradley

clearly was directly interested in the controversy over his second variance application, and we question whether the board, despite its actions in the present case, can be said to adequately represent Bradley's interests in a proceeding to grant or deny an application for a variance. The board is not the applicant for a variance; rather, it is the body that administers zoning laws for the City of Gulf Shores and "performs quasi judicial functions" as to certain zoning matters. Ball, 272 Ala. at 311, 132 So. 2d at 125. The reason why the board chose to assume the burden of pursuing Bradley's variance request on appeal to the trial court, without seeking to add him as a party, is not clear from the record. What is clear is that Herfurth and Anderson named only the board in the captions of their various filings in the trial court, and they did not request that Bradley be made a party to the appeal as to his own variance application.

The disadvantage to Bradley's ability to protect his interests as to his own variance application can be seen by considering his position as a nonparty if the trial court had ruled against, rather than in favor of, that application, because Bradley, as a nonparty, would not have been able to

appeal that decision.[5] Likewise, the disadvantage to Bradley's interests can be readily seen on appeal to this court by considering his position if we were to reach the merits of Herfurth and Anderson's appeal and rule in

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[5]In support of their argument, Herfurth and Anderson cite several "physical precedents" in which our courts have considered judgments as to a variance, special exception, or other matter but the applicant to the board of adjustment apparently was not made a party in the trial court. None of those cases addressed the issue whether Rule 19 required that the applicant be added as a party under the particular facts reflected in the record before the appellate court. See M.B. Canton Co. v. Board of Adjustment of City of Mobile, 81 So. 3d 1284 (Ala. Civ. App. 2011); Carter v. Prattville Bd. of Zoning Adjustment, 976 So. 2d 459 (Ala. Civ. App. 2007); Ferraro v. Board of Zoning Adjustment of Birmingham, 970 So. 2d 299 (Ala. Civ. App. 2007); Harris v. Jefferson Cnty. Bd. of Zoning Adjustment, 773 So. 2d 496, 499 (Ala. Civ. App. 2000); Board of Zoning Adjustment of Hueytown v. Warren, 366 So. 2d 1121 (Ala. Civ. App. 1978), rev'd on other grounds, 366 So. 2d 1125 (Ala. 1979). In other words, Herfurth and Anderson make an argument from the silence of those opinions, which have no precedential weight as to the unaddressed issue, i.e., the application of Rule 19. See Kappa Sigma Fraternity v. Price-Williams, 40 So. 3d 683, 691 (Ala. 2009) (noting that "physical precedent" does not reflect a court's judgment as to an issue); see also United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952). We need go no further in addressing this argument than to say that, based on the record before us, we consider Rule 19 to have required making Bradley a party in the trial court before the entry of a judgment addressing his variance application. Whether the respective records in the cases cited by Herfurth and Anderson would have supported a similar conclusion, if a party or this court had raised the issue of the application of Rule 19, is of no help to Herfurth and Anderson's argument.

their favor, particularly since the board has taken the position in its letter brief that it is not a party to the appeal.[6] The board's letter brief states:

> "While not a party in the above-captioned appeal, the [b]oard ... has received a copy of your notice ... relating to the appeal and submits this letter to comment on the issues raised in that notice.
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> "The [b]oard agrees that the failure to add ... Bradley as a party in the trial court necessitates the appellate court either dismissing the cause without prejudice or reversing the order of the court below with directions to allow the cause to stand over for amendment. The [b]oard expresses no opinion on which of these courses of action should be elected by the appellate court.
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> "As a matter of information possibly relevant to the court's disposition of this matter, the [b]oard is informed and believes that ... Bradley no longer owns the property on which he sought the variance in question.[7] Enclosed is a copy of a

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[6]It is unclear why the board does not consider itself a party to the appeal. Based on the certificate of service to the notice of appeal, that notice was served on the board's trial counsel, see Rule 3(d)(1), Ala. R. App. P., who apparently later informed Herfurth and Anderson's counsel that he was no longer representing the board, although the record reflects no notice of withdrawal of counsel. Herfurth and Anderson thereafter purportedly served their brief on appeal on the board, which has not filed an appellee's brief on appeal, other than the letter brief requested by this court.

[7]Section 17-5E. of the Gulf Shores Zoning Ordinance states that "[v]ariances, unless specifically conditioned by the [board], shall run with the land." The letter from the board to Bradley informed him about the

> deed on the property from ... Bradley to Paul J. Lartigue, III and Michele W. Lartigue as recorded in the probate records of Baldwin County on October 8, 2021. The current owners are understood to have an ownership interest in the improved lot immediately abutting the lot in question to the west and have not filed a request for grant of variance from the [b]oard."

A copy of a purported deed from Bradley to Paul J. Lartigue III and Michelle W. Lartigue is included with the board's letter brief. However, that deed and the factual allegations in the board's letter brief -- including whether the Paul Lartigue who testified in opposition to Bradley's variance request is the same person as Paul J. Lartigue III to whom Bradley purportedly deeded the Bradley property -- are not in the record on appeal and therefore not before us. See Cooper v. Adams, 295 Ala. 58, 61, 322 So. 2d 706, 708 (1975) ("This court is remitted to a consideration of the record alone .... The record cannot be changed, altered or varied on

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board's approval of his variance application, described the rear-setback variance and front-setback variance, and gave him "12 months to act upon the variance." The letter stated further that "[t]he building permit shall be submitted within 12 months of the approval of the variance or the variance approval is null and void." The March 2021 judgment referenced the setback variances, but made no reference to the condition regarding acting on the variance, though the judgment did state that the board's decision, which was nullified by Herfurth and Anderson's appeal, was affirmed.

appeal by statements in briefs of counsel, nor by affidavits or other evidence not appearing in the record."). We must assume that Bradley still owns the Bradley property.

Based on the foregoing, the March 2021 judgment is due to be reversed and the cause remanded for the trial court to allow the cause to stand over for amendment because Bradley was not made a party before the trial court. On remand, the trial court may also consider the issues whether this cause may have become moot or whether the Lartigues should be substituted as parties.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Hanson and Fridy, JJ., concur.

Moore, J., concurs in the result, with writing.

MOORE, Judge, concurring in the result.

I agree with the main opinion that Mark Bradley, the applicant for the area variance, is an indispensable party to the appeal filed by Caryn Herfurth and Priscilla G. Anderson to the Baldwin Circuit Court ("the circuit court"). See 101A C.J.S. Zoning and Planning § 384 (2015) ("Thus, where an appeal is taken from a decision of a zoning body, the successful applicant is an indispensable party."). In this case, Bradley appeared at the trial in the circuit court as a witness for the purpose of securing the variance, but he did not formally intervene in the case. In similar circumstances, other courts have recognized that an applicant may be deemed to have become a party to the appellate proceedings through "constructive intervention." See, e.g., Preston v. Board of Adjustment of New Castle Cnty., 772 A.2d 787, 791 (Del. 2001) (concluding that permit applicant who was not named as an appellee, but who appeared in judicial-review proceedings for the purpose of enforcing granted permit, had constructively intervened in proceedings so that proceedings were not void for lack of an indispensable party). Although Alabama law has not explicitly adopted this theory, Alabama's appellate courts have recognized

that a person who appears at trial as a witness and is afforded an opportunity to be heard as to a matter affecting his or her interest in property that is the subject of the litigation is bound to the judgment affecting that property as if the witness was a party to the case. See Owen v. Miller, 414 So. 2d 889 (Ala. 1981); Mosley v. Builders S., Inc., 41 So. 3d 806, 812 (Ala. Civ. App. 2010); Moody v. Moody, 339 So. 2d 1030 (Ala. Civ. App. 1976). Thus, it seems that Alabama would be similarly inclined to adopt the theory of constructive intervention; however, none of the parties to this case have advocated that theory, so it would be inappropriate in this case to adopt it.

On appeal from a judgment entered in the absence of an indispensable party, this court may "dismiss[] the cause without prejudice or ... revers[e] with directions to allow the cause to stand over for amendment." J.C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834, 850-51 (Ala. 1981). See also Davis v. Burnette, 341 So. 2d 118, 120 (Ala. 1976). I agree with the main opinion that the better course of action in this case is to reverse the circuit court's judgment and order that the

complaint be amended to formally name Bradley as an additional appellee and as a party to the judgment.

The Gulf Shores Board of Adjustment has informed this court that Bradley has divested himself of his interest in the property and that this appeal may be moot. This court can receive evidence outside of the record relating to a transaction that might render an appeal moot. See, e.g., Florence Surgery Ctr., L.P. v. Eye Surgery Ctr. of Florence, LLC, 121 So. 3d 386, 389 (Ala. Civ. App. 2013). However, I agree with the main opinion that, because Bradley is not a party to the appellate proceedings before this court, it would be better for the circuit court to consider on remand, after Bradley has been made a party, whether his alleged conveyance of the property has mooted the case.