

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY

S.C. SUPREME COURT

Court of Appeals

The Honorable Judges Geathers, Hill and Lockemy (acting)

Appellate Case No. 2022-000882

Court of Appeals Case No.: 2020-000506

Circuit Court Appellate Case No.: 2020-CP-23-1501

Return to Petition for Writ of Certiorari

Raymond A. Wedlake, as Member of
Woodington Homeowners' Association, Inc.

Appellant,

v.

Scott Bashor, William Craigo, Christopher
Edwards, Dennis Esteve and Charles Koshis,
in their capacity as Board Members of the
Current Board of Directors of Woodington
Homeowners' Association, Inc. and Doe
Entities 1-10, and John & Jane Does 1-10

Respondents.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3-4

STATEMENT OF THE CASE.....5

ARGUMENT.....6-12

 I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE PETITION DOES NOT RAISE ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION.....6

 II. THE PETITIONER, WHO ASSERTED DISCOVERY WAS NEEDED, FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 56, SCRPC, AND IS NOT ENTITLED TO ANY RELIEF.....7

 III. THE PETITIONER FAILED TO DEMONSTRATE BY AFFIDAVIT OR OTHERWISE THAT THE LIKELIHOOD OF FURTHER DISCOVERY WOULD UNCOVER ADDITIONAL RELEVANT EVIDENCE AND THE PETITIONER IS THEREFORE NOT ENTITLED TO RELIEF.....8

 IV. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS.....8

 V. PETITIONER IS ASSERTING ISSUES OF FACT AND THUS IS NOT ENTITLED TO ANY RELIEF.....9

 VI. PETITIONER’S CLAIM OF DISCRIMINATION HAS NOT BEEN PROPERLY PRESERVED FOR APPEAL.....10

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).....8

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).....8,9

Woodson v. DLI Properties et al 406 S.C. at 528, 753 S.E.2d at 434 (2014).....9

Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22, 24 (1943).....9

McKnight v. Smith, 182 S.C. 378, 189 S.E. 361(1937).....9

Young v. Sapp, 167 S.C. 364, 166 S.E. 354 (1932)9

Smith v. Saye, 130 S.C. 20, 125 S.Ed. 269 (1924).....9

State ex rel. Davis v. State Board of Canvassers, 86 S.C. 451, 68 S.E. 676 (1910).....9

Charles v. Byrd, 29 S.C. 544, 8 S.E. 1 (1888).....10

State ex rel. Sawyer v. Fort, 24 S.C. 510 (1886).....10

State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003).....11

State v. Dial, 838 S.E.2d 501 (2020).....11

State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001).....11

City of Columbia v. Felder, 274 S.C. 12, 13, 260 S.E.2d 453, 454 (1979).....11

Statutes and Rules

Rule 242, SCACR.....6

Rule 242(b), SCACR.....6

Rule 56, SCRCPP.....7, 10

Rule 56(f), SCRCPP.....7

Rule 38(d), SCRCPP.....8

Rule 39(a), SCRCPP.....8

Rule 56(c), SCRCP.....9
South Carolina Non-Profit Corporation Act (SCNPCA).....10

STATEMENT OF THE CASE

The Petitioner commenced this action on March 23, 2019 by filing a Summons and Complaint in the Greenville County Court of Common Pleas. This action arises out of Petitioner's belief that the 2018 incarnation of the Respondent, Board of Directors of Woodington Homeowners' Association, Inc., comprised of Scott Bashor, William Craigo, Christopher Edwards, Dennis Esteve and Charles Koshis (Respondents), breached its fiduciary duty to the members of the Woodington Homeowners Association ("WHOA") by accepting a legal invoice from the law firm McCabe, Trotter & Beverly, P.C., who represented The Board in a previous lawsuit filed by the plaintiff, *C.A. No.: 2017-CP-23-06301*, which was a suit for a declaratory judgment as it pertained to the interpretation of the WHOA bylaws. The Petitioner also alleges that The Board violated its fiduciary duty by improperly counting votes from WHOA members in violation of the WHOA bylaws and covenants.

The Board's Motion for Summary Judgment was heard by the Honorable Edward W. Miller on February 27, 2020. By an Order dated March 13, 2020, Judge Miller granted Respondents' motion for summary judgment.

On March 16, 2020, the Petitioner filed a Notice to Appeal. Judge Miller's decision was affirmed by a unanimous opinion of the Court of Appeals in an unpublished decision filed April 27, 2022. The Petitioner moved to reconsider upon the following grounds:

1. That the Respondents did not show a preponderance of evidence warranting summary judgment.
2. Many genuine issues of material fact were supported by facts and by evidence.
3. Genuine issues of material fact are found in the Order.
4. Ten disputed material facts were itemized in Brief of Appellant.

5. Three requirements for ‘breach of duty’ were covered in Brief of Appellant.
6. A right to a jury trial was subverted by Summary Judgment from the bench, denying a jury trial from all parties.

The Petition for Rehearing was denied by an Order filed June 23, 2022, and the Petition for Writ of Certiorari was filed thereafter.

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE PETITION DOES NOT RAISE ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION

Rule 242, SCACR, governs the granting of Petitions for Writ of Certiorari and provides, “[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will granted only where there are special or important reasons.” The Rule provides a list of non-exclusive reasons why a Petition for a Writ of Certiorari might be granted. The reasons for the Supreme Court granting a writ of certiorari are:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

The Petition is not based on any of the five reasons listed above. The Petition does not identify any other special or important reason for granting a Writ of Certiorari. The Court of Appeals certainly found nothing special or important about the case. Its decision was unanimous, unpublished and of no precedential effect. No special or important reason is presented for this Court to exercise its discretion to grant a Writ of Certiorari. As such, the Petition for Writ of

Certiorari should be denied.

II. THE PETITIONER, WHO ASSERTED DISCOVERY WAS NEEDED, FAILED TO COMPLY WITH THE REQUIREMENTS OF RULE 56, SCRC, AND IS NOT ENTITLED TO ANY RELIEF

The Petitioner did not raise any outstanding discovery issues in his Memorandum in Opposition to Respondent's Motion for Summary Judgment, and did not provide an affidavit to resist summary judgment because of the need for discovery. The Petitioner only briefly raised the issue of "pending discovery" to Judge Miller during oral argument while opposing the motion. It should be noted that at the time of the hearing, Petitioner had previously served Requests to Admit, which were answered by the Respondents, and held questionnaire/depositions of WHOA members at the Greenville Public Library. Additionally, Respondents had previously served Interrogatories and Requests for Production which were answered by the Petitioner. Pursuant to Rule 56(f) of the SCRC, Petitioner cannot simply show up at the hearing and defeat a summary judgment motion by making a general, non-specific argument that discovery is needed. Rule 56(f) sets forth specifically what a party opposing a summary judgment motion must do:

"When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." Rule 56(f).

Here, the the Petitioner did not file an affidavit as required by Rule 56(f). Rule 56(f) is clear and unambiguous. Rule 56(f) is binding on litigants and the Court as well. Since no Rule 56(f) affidavit was filed, there was no error in failing to deny and/or postpone Respondents' summary judgment motion to allow for additional discovery. The Petition for Writ of Certiorari should be denied.

III. THE PETITIONER FAILED TO DEMONSTRATE BY AFFIDAVIT OR OTHERWISE THAT THE LIKELIHOOD OF FURTHER DISCOVERY WOULD UNCOVER ADDITIONAL RELEVANT EVIDENCE AND THE PETITIONER IS THEREFORE NOT ENTITLED TO RELIEF

At the hearing before Judge Miller, on February 27, 2020, Petitioner briefly argued that “discovery has not been completed and mediation has not occurred in this case.” Petitioner did not identify any specific discovery that he had pending or needed that would create a question of fact and defeat Respondent’s motion for summary judgment.

It has long been the law in South Carolina that if the non-moving party seeks to avoid summary judgment on the basis that discovery is not complete, the non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a “fishing expedition”. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

Since the Petitioner, both in his motion papers and at oral argument, failed to demonstrate a likelihood that further discovery would uncover additional relevant evidence creating a question of fact, Judge Miller’s decision to grant summary judgement was correctly affirmed and the Petitioner is not entitled to a Writ of Certiorari.

IV. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS

The Petitioner argues that certiorari should be granted because his case was dismissed via summary judgment, and therefore he was denied his Constitutional right to a jury trial. In South Carolina, a Court order, by motion or on the court's initiative, on the ground that no right to a jury trial on some or all of the issues does not exist (note that this is not truly the loss of a right, because no right ever existed). Rules 38(d) and 39(a), SCRCP.

Summary judgment is properly granted when, viewing the evidence and inferences to be

drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCCP; *Woodson v. DLI Properties et al* 406 S.C. at 528, 753 S.E.2d at 434. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

The claims Petitioner brought against the Respondents were dismissed via summary judgment. Judge Miller held that no issues of genuine material fact existed, and issued a judgment on the merits of the case. Since Judge Miller found that no triable issues of fact existed, and subsequently granted the Respondents' motion for summary judgement, the right to a jury trial was extinguished. Judge Miller correctly decided this issue on the law and his decision was correctly affirmed by the Court of Appeals. This issue provides no basis for the issuance of a Writ of Certiorari.

V. PETITIONER IS ALLEGING ISSUES OF FACT WHICH ARE NOT A BASIS FOR THE ISSUANCE OF A WRIT

Petitioner argues that genuine issues of material fact exist, and thus summary judgment should not have been granted. The purpose and scope of writs of certiorari are clearly expressed by the Supreme Court of South Carolina in *Feldman v. South Carolina Tax Commission*, 203 S.C. 49, 26 S.E.2d 22, 24, where it states: "A writ of certiorari cannot be made a substitute for an appeal or writ of error, as seems to have been done in this case. We have held in numerous cases that this Court on writ of certiorari will confine its review to the correction of errors of law only, and will not review the findings of fact of an inferior Court or body except when such findings are wholly unsupported by the evidence." *McKnight v. Smith*, 182 S.C. 378, 189 S.E. 361; *Young v. Sapp*, 167 S.C. 364, 166 S.E. 354; *Smith v. Saye*, 130 S.C. 20, 125 S.Ed. 269; *State ex*

rel. Davis v. State Board of Canvassers, 86 S.C. 451, 68 S.E. 676. Judges of the Courts of Common Pleas are bound by the same rule and limitation. *Charles v. Byrd*, 29 S.C. 544, 8 S.E. 1; *State ex rel. Sawyer v. Fort*, 24 S.C. 510.

Here, there is no dispute about the facts of the case. The Respondents 1) hired an attorney to defend themselves against a lawsuit brought by the Petitioner; 2) Respondents accepted the legal invoice from the law firm that they hired for the legal services rendered in defending the lawsuit brought by the Petitioner; 3) Respondents sent out ballots to WHOA members to vote on as it related to the issue of a potential assessment to pay for those legal fees; 4) Respondents counted those ballots in accordance to the WHOA bylaws and covenants.

The Petitioner argues that the above constitute a violation of the Respondents' fiduciary duty to the WHOA as well as violate the South Carolina Non-Profit Corporation Act (SCNPCA). The Circuit Court and the Court of Appeals have correctly held that the Respondents did not violate their fiduciary duty to the WHOA and did not violate the SCNPCA. In actuality, the Petitioner is not arguing that there are genuine facts in dispute, but is simply disputing the legal rulings of Circuit Court's and the Court of Appeals' that went against his positions. As such, Petitioner's assertion that there are genuine issues of facts in dispute, is without merit, and provides no basis for the issuance of a Writ of Certiorari.

VI. PETITIONER'S CLAIM OF DISCRIMINATION HAS NOT BEEN PROPERLY PRESERVED FOR APPEAL

Petitioner makes bald assertions that because he is a *Pro-Se* litigant, he has been discriminated against by the Courts due to not being a member of the "legal brethren buddy buddy club." However, this is the first time throughout the entirety of Petitioner's multiple lawsuits brought against the various incarnations of The Board that he has raised the issue of

being discriminated against due to his *Pro-Se* status. As such, this issue has not been preserved by appeal and should not be addressed by this Court.

It is well settled that in order for an issue to be preserved for appellate review, the issue must have been raised and ruled upon by the trial judge. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Issues not raised and ruled upon by the trial court will not be considered on appeal. *Id.* at 142, 587 S.E.2d at 694. See also *State v. Dial*, 838 S.E.2d 501 (2020) (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court.”). As the court of appeals recognized, this established rule applies in appeals from magistrate court to circuit court. See *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) (“In criminal appeals from magistrate ... court, the circuit court ... reviews for preserved error raised to it by appropriate [objec]tion.” (citing *City of Columbia v. Felder*, 274 S.C. 12, 13, 260 S.E.2d 453, 454 (1979))).

Here, the Petitioner failed to raise this issue in his appeal before the Greenville County Court of Common Pleas, and also failed to raise the issue in his appeal before the Court of Appeals. The first time that Petitioner has raised the issue of being discriminated against as a *Pro-Se* party because he is not a member of the “legal brethren buddy buddy club,” was in his Petition for a Writ of Certiorari to this Court. Therefore, this issue should not be addressed by this Court, and provides no basis for the issuance of a Writ of Certiorari.

CONCLUSION

This action was commenced on March 23, 2019 and the motion for summary judgment was not heard until almost 11 months later. Clearly, there was ample opportunity to conclude discovery, and Petitioner had sufficient notice of the summary judgment motion. During that period, Petitioner served Requests to Admit, which were answered by the Respondents, and held

questionnaire/depositions of WHOA members at the Greenville Public Library. Respondents served Interrogatories and Requests for Production, which were answered by the Petitioner. Although Petitioner argued that further discovery was needed, Petitioner did not identify any pending or proposed discovery that would yield relevant evidence and create genuine issue of material fact. Petitioner only made a general, non-specific argument that additional discovery was needed. This argument is insufficient under South Carolina law. The requirements and mandates set forth in Rule 56 are enforceable. Moreover, the holdings of the South Carolina Supreme Court, which are set above, are binding on the Court. Judge Miller did exactly what a judge should do. He followed and applied the law. The Court of Appeals was correct in unanimously affirming Judge Miller's Order. Four experienced, seasoned judges have now held that summary judgement was proper. There is no basis for the issuance of a Writ of Certiorari. Respectfully, the Petition should be denied.

Respectfully Submitted by:

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