

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HAMPTON COUNTY
In The Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case No. 2009-CP-25-285

Gary Smart, Respondent,

v.

James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling, Randolph Murdaugh, III, Defendants,

Of whom James Allen Grady is Petitioner,

And Randolph Murdaugh, III, is Defendant/Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS
or in the alternative,
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 1, 2013. (Appx. 1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying the motion to change venue.
2. Whether an order denying the substantial right to proper venue is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a) or (2)(c).
3. Whether the order denying the motion to compel execution of the stipulations of dismissal is immediately appealable under S.C. Code Ann. § 14-3-330(4) and, if so, whether this Court should exercise its discretion to review the venue questions presented here, assuming the venue orders are not otherwise immediately reviewable.
4. Whether this Court should issue a writ of certiorari to the Court of Common Pleas and immediately review the venue questions presented here, assuming the appealed orders are not immediately appealable.

STATEMENT OF THE CASE

I. INTRODUCTION & SUMMARY OF PRINCIPAL ISSUES

This wreck case raises important questions regarding the new (2005) amendments to the venue statute, the impact of covenants not to execute on the integrity of the judicial system, and whether orders denying the substantial right of proper venue are immediately appealable.

The Plaintiff commenced this action in Hampton County. Venue was proper in Hampton County solely because Defendant Murdaugh was a resident of Hampton County. Absent Defendant Murdaugh's presence in the case, Jasper County was the only proper venue.

The Plaintiff settled with Defendant Murdaugh under an agreement that required the Plaintiff to dismiss his claim against Murdaugh with prejudice. Thereafter, for no additional consideration, Defendant Murdaugh voluntarily agreed to forego an outright dismissal and re-enter the case under a Covenant Not To Execute whereby: (1) the settlement between the

Plaintiff and Defendant Murdaugh remained in place; (2) but Defendant Murdaugh remained a defendant in the case. Under the Covenant, Defendant Murdaugh had no exposure to any personal liability for any judgment the jury might render against him. Thus, Defendant Murdaugh had become a sham, immaterial or nominal defendant with no personal interest in the outcome of the litigation.

The Petitioner (Defendant Grady) moved to change venue to Jasper County based upon the settlement and Defendant Murdaugh's resulting lack of personal interest in the outcome of the litigation. The trial court denied the motion, and Defendant Grady appealed. Relying on this Court's opinion in *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000), the Court of Appeals held that the order denying a change of venue was not immediately appealable and dismissed the appeal. (Appx. 3-4). Defendant Grady petitioned for rehearing and reinstatement – the Court of Appeals denied the petition.

Pursuant to Rule 242, SCACR, Defendant Grady petitions this Court for a writ of certiorari to the Court of Appeals upon the following principal grounds:

1. The trial court erred in denying the motion to change venue, because Defendant Murdaugh was a sham, immaterial or nominal defendant with no personal interest in the outcome of the litigation and, therefore, his residency should be disregarded for purposes of venue.
2. The order denying change of venue is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976), an issue never addressed by this Court.
3. The order denying change of venue is immediately appealable under S.C. Code Ann. § 14-3-330(2)(c) (1976), and this Court should overrule its contrary decision in *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000).

In the alternative, and assuming “venue orders” are not immediately appealable, Defendant Grady petitions this Court for a writ of certiorari to the Court of Common Pleas so that this Court may review immediately the important venue issues presented in this case.

II. THE NEW VENUE STATUTE

This appeal arises against the backdrop of the significant 2005 amendments to the general venue statute. Prior to the amendments, S.C. Code Ann. § 15-7-30 (Rev. 2005) required civil actions to be tried in the following venues:

1. If there was one resident defendant, the action had to be tried in the county where that defendant resided at the time of the commencement of the action;
2. If there was more than one resident defendant, the action had to be tried in the county where one of the resident defendants resided at the time of the commencement of the action;
3. If no defendant was a resident, the action could be tried in any county selected by the plaintiff.

The 2005 amendments substantially changed venue – most significantly, the new amendments eliminated the plaintiff’s ability to sue a non-resident defendant in any county desired by the plaintiff. Here, the Plaintiff has avoided the effect of this amendment with the continued presence of Defendant Murdaugh under a covenant not to execute, whereby Defendant Murdaugh remains in the case but has no personal interest in the outcome of the case.

Under the 2005 amendments to § 15-7-30, absent a special venue statute (none here), civil actions must now be tried in the following venues [changes indicated in brackets]:

1. If there is one resident defendant, the action must be tried in the county where that defendant resided at the time the cause of action arose [rather than commenced] or the county in which the most substantial part of the act or omission giving rise to the cause of action occurred [new]. § 15-7-30(C)(1) and (C)(2) (Supp. 2012).
2. If there is one non-resident defendant, the action must be tried in the county where the most substantial part of the act or omission giving rise to the cause of action occurred [new], or the county where the plaintiff resided at the time the cause of action arose [new]. § 15-7-30(D)(1) and (D)(2) (Supp. 2012) (abrogating plaintiff’s right to bring action against non-resident in any county).
3. If there is more than one defendant, the action may be tried in any county where the action may be properly maintained against one of the defendants [new]. § 15-7-30(B) (Supp. 2012).

As shown below, the present case involves a novel yet recurring issue that arises at the intersection between the 2005 venue amendments and the use of covenants not to execute. At issue is whether a defendant remains relevant to venue if he settles with the plaintiff but remains in the case with no personal interest in the outcome of the litigation.

III. THE ACCIDENT

The accident occurred in Jasper County. The petitioner (Defendant Grady) was hauling an ATV on a trailer, and the ATV fell off the trailer. Defendant Moffett (Truck Driver) was driving an 18-wheeler and ran into the ATV. Defendant Randolph Murdaugh III came upon the accident scene and pulled his car to the side of the road to provide assistance, leaving his bright lights on and facing oncoming traffic. Plaintiff Gary Smart came around a corner into the path of Defendant Murdaugh's bright lights, was distracted by the headlights, and crashed into the back of the 18-wheeler. (Appx. 79, ¶ 5; 16, ¶5; see also n.1, *infra*).

IV. PROCEDURAL HISTORY

Alexander Murdaugh is the son of Defendant Murdaugh and was with him at the accident scene. Both Murdaughs are attorneys. Alexander Murdaugh undertook the representation of the Plaintiff and his wife. He filed a loss of consortium action for the wife in Jasper County against Defendant Grady, the Truck Driver and his employer, Defendant Brantley Hauling (the Trucking Defendants). His father, Defendant Murdaugh, was listed as a defendant on the summons but not in the caption of the complaint, and no relief was requested against him. (Appx. 71-74). It is unknown whether the summons and complaint was served on Defendant Murdaugh.

Jasper County was the only proper venue because: the accident occurred in Jasper County; Patrice Smart was a resident of Jasper County; and no defendant was a resident of South Carolina. Thus, the action had to be "brought *and tried* in [Jasper County]." § 15-7-30(D)(1),

(D)(2) (Supp. 2012) (emphasis added). Since there was complete diversity amongst the parties, the case was removable to federal court. To avoid this, Patrice Smart filed a stipulation that her damages did not exceed \$75,000.00 (the jurisdictional minimum for diversity jurisdiction) and that she would not attempt to collect any judgment in excess of \$75,000.00. (Appx. 75). Thereafter, Alexander Murdaugh withdrew as counsel, and Patrice Smart dismissed her Jasper County action without prejudice on May 26, 2009. (Appx. 76).

One month later, on June 24, 2009, the Plaintiff's current counsel (Mark Tinsley) filed separate actions on behalf of the Plaintiff for personal injury and his wife (Patrice Smart) for loss of consortium in Hampton County. Both complaints added Randolph Murdaugh as a defendant and alleged the cause of their injuries was that the Plaintiff "collided with [the 18-wheeler] due to absence of any warning devices and the bright lights of Defendant Murdaugh, thereby causing [the Plaintiff] to be seriously injured." (Appx. 77, ¶ 5; 16, ¶5). The Plaintiff testified at deposition that Defendant Murdaugh's headlights distracted him as he approached the accident scene, and he therefore did not see the 18-wheeler until it was too late to avoid the accident.¹

Adding Randolph Murdaugh as a defendant changed the cases in two ways. First, he was a South Carolina resident, so the cases could not be removed to federal court based on diversity jurisdiction. Second, he was a resident of Hampton County, so the new actions could be filed in Hampton County as permitted *but not* required by § 15-7-30(C)(1) (Supp. 2012) (action against a "resident individual defendant must be *brought and tried* in" his county of residence or where act

¹ The Plaintiff testified: (1) he approached a curve in the road at approximately 50 miles per hour; (2) the accident occurred approximately 300 yards on the other side of the curve; (3) as he came out of the curve, the headlights of Defendant Murdaugh's car came into his vision; (4) believing them to be the high beam headlights of an oncoming car, he flashed his high beams once or twice; and (5) by the time he turned his attention back to the roadway in front of him, the stopped 18-wheeler was immediately in front of him and he slammed into the back of it, not having time to swerve away and barely having time to hit his brakes immediately before impact. (Appx. 216-241).

or omission occurred) (emphasis added). The Plaintiff was free to bring the action in his home county (Jasper), because that is where the accident occurred, but he chose Hampton County.

The Trucking Defendants (driver and employer) removed the cases to federal court, claiming fraudulent joinder of Defendant Murdaugh to defeat diversity jurisdiction. The federal district court remanded the case to state court, because there was no evidence of a covenant not to execute or some other document demonstrating the Plaintiffs did not intend to recover and enforce a judgment against Defendant Murdaugh. (Appx. 88-99).

After remand to state court, the parties engaged in discovery for the next 10 months. During that time, on April 1, 2010, the Plaintiff filed an offer of judgment for \$2.75 million dollars and his wife filed an offer of judgment for \$500,000.00 on her consortium claim. Both offers were for all defendants collectively. (Appx. 101-103).

The parties mediated the case on August 4, 2010. By this time, the Plaintiff's medical bills exceeded \$76,000.00. (Appx. 253-255). The Plaintiff and his wife settled with the Trucking Defendants for \$1.0 million dollars, assigning only \$5,000.00 to the Plaintiff's personal injury claim and assigning the remaining \$995,000.00 to his wife's consortium claim. The Plaintiff and his wife settled with Defendant Murdaugh for \$100,000.00, again assigning only \$5,000.00 to the Plaintiff's personal injury claim and assigning the remaining \$95,000.00 to his wife's consortium claim. Thus, of the \$1.1 million dollars in settlement proceeds, the Plaintiff received only \$10,000.00 for his personal injuries (despite already having approximately \$76,00000 in medical bills), but his wife received \$1.09 million dollars for her consortium claim. The wife's settlement was 109 times greater than the Plaintiff's settlement, approximately 15 times greater than he previously filed stipulation of damages, and more than double the amount of her prior

offer of judgment. The obvious purpose of this apportionment was to minimize any set off against any verdict the Plaintiff might receive against Defendant Grady.

In exchange for these payments, the Plaintiff and his wife agreed to fully release the Trucking Defendants and Defendant Murdaugh, and to dismiss with prejudice both lawsuits pending against the Trucking Defendants and Defendant Murdaugh. The settlement documents reserved the Plaintiff's personal injury claim against Defendant Grady but nothing else. Thus, according to the settlement documents, Defendant Grady was the only remaining defendant in the personal injury action by the Plaintiff. As a result, Jasper County would have been the only proper venue for the trial of the case.²

² There were three basic settlement documents. First, there was an August 4, 2010, "Settlement Agreement" that recited the apportioned payments, required the settling defendants to provide a Release and Stipulation of Dismissal with the settlement checks, and stated the settlement was "a resolution of all claims of Patrice Smart against the parties [and] a partial settlement [that did] not affect the claims of Gary Smart against [Defendant] Grady." This agreement was signed by the Plaintiff, his wife, their attorney, the attorney for the Trucking Defendants, and the attorney for Defendant Murdaugh. (Appx. 205-207).

Second, there was a September 3, 2010, "Full, Final and Complete Release" that stated in the title: "This Release Ends All Claims" and stated above the signature block: "This Is A Full Final And Complete Release." (Appx. 207). The Plaintiff, his wife, and their attorney signed the Release (*id.* at 210-211), which acknowledged receipt of the apportioned settlement payments under the "Settlement Agreement" and recited the following:

a. The plaintiffs "do hereby release, forever discharge, and *promise never to sue*" the Trucking Defendants and Defendant Murdaugh. (*Id.* at 207) (emphasis added). The plaintiffs released these defendants "from *any and all* injuries . . . actions, causes of action, demands, damages, suits at law or in equity . . . of whatsoever kind or nature . . ." (*Id.*) (emphasis added).

b. The plaintiffs accepted the Release "in *full* compromise and *release* of *all* injuries or damages allegedly suffered by them . . ." (*Id.*) (emphasis added).

c. "[The Release was] in *full and final* settlement of *any and all* claims that the [plaintiffs] now has or may have in the future arising out of the alleged accident *against the Settling Defendants*. However, it is understood that the settlement of the claims of Gary Smart is only a partial settlement and does not affect his claims against Defendant Grady." (*Id.* at 208) (emphasis added).

d. "The parties agree to a *dismissal, with prejudice*, of [the Trucking Defendants and Defendant Murdaugh] from the actions presently pending . . ." (*Id.*) (emphasis added).

Third, there was a "Stipulation of Dismissal (Partial Settlement)" signed by the attorney for Plaintiff Gary Smart and an attorney for Defendant Murdaugh. (Appx. at 104-106). This Stipulation of Dismissal provided the case had "been compromised and settled as to" the Trucking Defendants and Defendant Murdaugh, and it further provided the case was "ended with prejudice as to" the Trucking Defendants and Defendant Murdaugh. (*Id.* at 104). As with the "Settlement Agreement" and the "Full, Final And Complete Release," the Stipulation of Dismissal reserved Gary Smart's claims against Defendant Grady. (*Id.*)

As required by the settlement documents, on October 6, 2010, the attorney for the Trucking Defendants filed Stipulations of Dismissal in both lawsuits, which dismissed with prejudice all claims by both the Plaintiff and his wife against the Trucking Defendants and Defendant Murdaugh. (Appx. 104-109). Rule 41(a)(1)(B), SCRPC, governs such stipulations and provides a plaintiff may dismiss its action against a defendant without a court order, and with or without prejudice, “by filing a stipulation of dismissal signed by *all parties who have appeared* in the action.” (Emphasis added). Here, the stipulations filed with the court were defective, because they were not signed by all parties. The stipulations had been executed by the Plaintiffs’ attorney and by one of the attorneys for Defendant Murdaugh (Attorney Tiller), but not by the attorney for the Trucking Defendants, the attorney for Defendant Grady, or the other attorney for Defendant Murdaugh (Attorney Dean). (*Id.*)³ Had the stipulations filed on October 6, 2010 been properly executed, Defendant Grady would have been the only remaining defendant, and Jasper County would have been the only proper venue for the trial of the case.

The Plaintiff and his wife did not settle with Defendant Grady at the mediation, but Defendant Grady offered his \$300,000.00 policy limits only four weeks later. (Appx. 249-250). The Plaintiff and his wife refused the limits tender, and Defendant Grady made an offer of judgment to the Plaintiffs of \$300,000.00 on October 18, 2010. (Appx. 110-111).⁴

Defendant Grady had not been copied on any correspondence related to the drafting, signing, or filing of the stipulations. He learned of the filed Stipulations of Dismissal in February 2011, whereupon he sought discovery of the Release and received it on March 2, 2011. Defendant Grady moved on March 24, 2011 to *inter alia* change venue to Jasper County based

³ Defendant Murdaugh had two attorneys, because he had two insurance policies with different carriers that provided potential liability coverage – his personal policy and his employer’s policy.

⁴ The Plaintiff believes that offering the policy limits only four weeks after the mediation came too late and, therefore, he contends the carrier’s failure to tender the policy limits sooner was a bad faith refusal.

on the dismissal of Defendant Murdaugh. At the hearing before Judge Mullen on April 4, 2011, the Plaintiffs' attorney agreed the Stipulations were ineffective, because they did not comply with Rule 41, SCRPC. Thus, the motion to change venue was not heard – it had become moot, because it hinged on the dismissal of Defendant Murdaugh. (Appx. 164-165). However, unbeknownst to Defendant Grady, Defendant Murdaugh had earlier agreed on March 31, 2011, to waive his right to dismissal with prejudice and remain in the litigation under a covenant not to execute that rendered him a sham, immaterial or nominal defendant with no personal interest in the outcome of the litigation. The Plaintiff had executed the Covenant on Saturday, April 2, 2011, two days before the April 4th hearing, but never mentioned it during the hearing.

To cure the Rule 41, SCRPC defect, Defendant Grady sent Stipulations dismissing Defendant Murdaugh to all counsel on June 22, 2011. (Appx. 242-243). One of Defendant Murdaugh's attorneys (Erin Dean) immediately signed and returned the Stipulations, but Defendant Grady never received fully executed Stipulations. (Appx. 244-246). On June 23, 2011, despite the express terms of the settlement documents, the Plaintiff's attorney advised that he did not intend to dismiss Defendant Murdaugh, stating that the Plaintiff had entered a covenant not to execute with Defendant Murdaugh. (Appx. 247-248).

On July 7, 2011, Defendant Grady moved to compel execution of the stipulation dismissing Defendant Murdaugh from both actions, and to consolidate the personal injury and consortium actions for trial. (Appx. 112-116). On July 8, 2011, Defendant Grady moved to transfer venue to Jasper County. (Appx. 117-122). On that same day, the Plaintiff sent Defendant Grady a copy of the Covenant Not To Execute, dated April 2, 2011.

Under the Covenant, the Plaintiff promised not to execute on any judgment against Defendant Murdaugh and the purported purpose of the Covenant was to protect the Plaintiff's

right to seek UIM coverage. At this time however, and unbeknownst to Defendant Grady, the Plaintiffs' attorney had received a June 28, 2011, check for the UIM limits of \$50,000.00. (Appx. 251-252). The Plaintiff refused this tender of limits, and Defendant Murdaugh remained a party in the litigation. The effect of not dismissing him was to avoid a change of venue from Hampton County to Jasper County.⁵ In any event, and assuming there were no tender of UIM benefits or assuming the Plaintiffs have a valid reason for not accepting the tender, Defendant Murdaugh is nevertheless a sham, immaterial or nominal defendant with no personal interest in the outcome of the litigation, and he should be disregarded for purposes of venue.

Judge Mullen heard Defendant Grady's motions to compel execution of the stipulation and to change venue. Defendant Murdaugh did not appear at the hearing and or oppose the motions.⁶ In defense of both motions, the Plaintiff asserted that Defendant Murdaugh had waived the prior release of him and agreed to replace it with a covenant not to execute, so that the Plaintiffs could pursue potential UIM coverage. (Appx. 187-189). The Plaintiff submitted the covenant not to execute and an affidavit from one of Defendant Murdaugh's attorneys (Attorney Tiller) in support of this defense. In his affidavit, Attorney Tiller stated the Plaintiff

⁵ The Plaintiff was driving someone else's car at the time of the accident, so there were two potential UIM policies – the policy on the car and the Plaintiff's policy. State Farm issued the policy that covered the Plaintiff personally – his wife was the named insured – and this policy provided \$50,000.00 in UIM coverage. State Farm sent a check for these limits to the Plaintiffs' attorney. There was no UIM coverage on the car driven by the Plaintiff, so the State Farm policy was the only potential UIM coverage. As with the refusal of the limits on Defendant Grady's policy, the Plaintiff believes the UIM tender came too late and, therefore, gave rise to a bad faith refusal claim.

⁶ The notice of appeal inadvertently failed to show Defendant Murdaugh as a respondent. Defendant Murdaugh was timely served with the notice of appeal and has been served with all filings in this Court and the Court of Appeals, but he has never made an appearance in either court. Defendant Grady moved in the Court of Appeals to amend the caption to include Defendant Murdaugh as a respondent – again, Defendant Murdaugh did not file a response, which highlights his lack of personal interest in the outcome of this litigation. The Court of Appeals never ruled on this motion, because the Court dismissed the appeal and thereby mooted the motion. Since Defendant Murdaugh did not appear at the hearing on the motion to change venue and presented no arguments on that issue, it is questionable whether he has any standing to present any issues on appeal. To the extent necessary, however, Defendant Grady hereby moves this Court to amend the caption and add Defendant Murdaugh as a respondent – he has been served with this certiorari petition. In an abundance of caution, Defendant Grady has also filed a Motion to Amend Caption contemporaneously with this Petition. As explained in that motion, the caption now identifies Murdaugh as “Defendant/Respondent,” because the alternative request for a writ of certiorari to the Court of Common Pleas is an original filing to which Murdaugh is a respondent.

asked for the waiver of dismissal, and he drafted the requested Covenant and sent it to the Plaintiff on March 31, 2011, who executed the Covenant on Saturday, April 2, 2011. (Appx. 215). The Covenant does not recite any consideration for Defendant Murdaugh's voluntary waiver of his right to be dismissed from the case – the only consideration mentioned was the \$100,000.00 already paid under the original settlement and dismissal with prejudice. (Appx. 212-214). In short, Defendant Murduagh voluntarily re-entered the case as a defendant.

Judge Mullen denied both motions. (Appx. 69). On that same day, she dismissed the consortium action in its entirety (including the claim against Defendant Grady) upon the request of the Plaintiffs' attorney and therefore found the motion to consolidate was moot. (Appx. 70). The Plaintiff's request was based on the release and dismissal provisions of the settlement documents. The obvious purpose of voluntarily dismissing the consortium action against Defendant Grady was to avoid a jury valuation of the consortium claim and thereby protect the grossly disproportionate division of the settlement proceeds. As a result of the dismissal of the consortium claims, the only pending case was the Plaintiff's personal injury claim against Defendant Grady, with Defendant Murdaugh and the Trucking Defendants remaining as nominal defendants with no personal interest in the outcome of the litigation.

On August 8, 2011, Judge Buckner granted the Plaintiff's motion to dismiss the Trucking Defendants – this motion was based on the release and dismissal provisions of the settlement documents. As a result, the only pending case was the Plaintiff's personal injury claim against Defendant Grady, with Defendant Murdaugh remaining in the lawsuit as a sham, immaterial or nominal defendant with no personal interest in the outcome. Defendant Grady immediately appealed. The appeal included an appeal from Judge Mullen's August 3rd orders. Defendant

Grady withdrew his appeal from Judge Buckner's oral ruling, so the appeal to the Court of Appeals concerned only the orders issued by Judge Mullen.

Defendant Grady moved in this Court to certify his appeals and for related relief. This Court denied the motion. The Court of Appeals dismissed the appeals – Defendant Grady petitioned for rehearing and reinstatement of the appeal against the Plaintiff.⁷ The Court of Appeals denied the petition.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO CHANGE VENUE.

It is well-settled that a defendant joined for the purpose of establishing venue is a sham, immaterial or nominal defendant who must be disregarded when deciding the proper venue of an action. See, e.g., *Williams v. Chrysler Motors Corp.*, 193 S.E.2d 524, 525 (S.C. 1972); *McMillan v. B.L. Montague Co.*, 121 S.E.2d 13, 15 (S.C. 1961); *Seegars v. WIS-TV*, 114 S.E.2d 502, 505 (S.C. 1960). Research reveals no case on the specific question presented here – whether a defendant becomes nominal and immaterial for purposes of venue when he settles with the plaintiff but remains in the case under a covenant not to execute or otherwise with no personal interest in the outcome of the litigation. This Court, however, has found that covenants not to execute “must be carefully scrutinized in order to determine their efficiency and *impact upon the integrity of the judicial process.*” *Poston v. Barnes*, 363 S.E.2d 888, 890 (S.C. 1987) (emphasis added).

Here, venue is “proper” in Hampton County solely because Defendant Murdaugh remains in the case. He is a sham, immaterial or nominal defendant in the truest sense of the words, because he has no personal interest in the outcome of the litigation. He is also a mere volunteer,

⁷ Defendant Grady did not seek rehearing or reinstatement of the appeal involving the Plaintiff's wife.

because he voluntarily waived his contractual right to an outright dismissal and agreed to remain in the case solely to accommodate the Plaintiff and for no consideration. Absent his presence in the case, Jasper County would be the only proper venue.

The federal courts have long held that defendants settling under covenants not to execute and similar documents are nominal defendants and are disregarded in determining the existence of diversity jurisdiction. For example, in *Bumgardner v. Combustion Eng'r, Inc.*, 432 F. Supp. 1289 (D.S.C. 1977), Judge Chapman applied this well-established rule to the following facts:

1. The South Carolina plaintiff sued numerous defendants in state court.
2. There was only one South Carolina defendant, and its presence in the lawsuit prevented removal for diversity jurisdiction.
3. The plaintiff settled with the South Carolina defendant under a covenant not to execute.
4. As a result of the covenant, the South Carolina defendant no longer had an interest in the outcome of the litigation and, therefore, was a nominal defendant.
5. Accordingly, the case was properly removed to federal court under diversity jurisdiction despite the continued presence of the South Carolina defendant.

Defendant Grady respectfully submits this Court should adopt the same rule for venue when a defendant remains in the case after settling under a covenant not to execute or other instrument whereby the defendant no longer has a personal interest in the outcome of the litigation.

This Court adopted similar reasoning under the former venue statute in *McMillan* and *Seegars*, both *supra*. In *McMillan*, this Court ruled that once a defendant is deemed immaterial, “for venue purposes this defendant must be *disregarded* and the *sole inquiry* is whether the [remaining defendant] is subject to suit in that county [resident county of the immaterial defendant].” 114 S.E.2d at 505 (emphasis added). In *Seegars*, this Court ruled that a defendant could be irrelevant for venue purposes even if there existed a facially valid claim against him:

The fact that a complaint may state a cause of action against a sham or immaterial defendant is not ipso facto conclusive, and [the] defendant may be mala fide requiring [the] granting of [a] motion to change venue even though allegations and proof apparently available may be sufficient to submit [the] case to [a] jury.

121 S.E.2d at 15 (emphasis added). Although *Seegars* and *McMillan* involved defendants who had been joined for the purpose of establishing venue, the underlying rationale for this Court's rulings applies equally here. Neither defendant had a real interest in the outcome of the litigation, because there was no meaningful exposure to personal liability. The same is true here. Accordingly, the trial court erred in denying the motion to change venue.

II. AN ORDER DENYING THE SUBSTANTIAL RIGHT TO PROPER VENUE IS IMMEDIATELY APPEALABLE UNDER § 14-3-330.

The jurisdiction of all courts, including the appellate courts, flows from the Constitution in one of two ways: (1) a direct grant of jurisdiction in the Constitution; or (2) a directive in the Constitution that the General Assembly define a court's jurisdiction by statute. See, e.g., S.C. Const. art. V, §§ 5, 9, 20. At issue here is the meaning and application of the S.C. Code Ann. §14-3-330 (1976 & Supp. 2012), which is the general appellate jurisdiction statute. As with all statutes, the controlling inquiry is the intent of the General Assembly. Here, appealability is controlled by § 14-3-330(2) (1976), which grants the appellate courts appellate jurisdiction over:

An order *affecting a substantial right* made in an action *when such order* (a) in effect determines the action and *prevents a judgment from which an appeal might be taken* or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

§ 14-3-330(2) (emphasis added). The right to trial in the proper venue is a statutory right granted by the General Assembly and, therefore, it manifestly is a "substantial right." See, e.g.; *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 292 (S.C. 2005) (venue right granted by former venue statute is a "substantial right"). Thus, the only question is whether the denial of the motion to change venue to the statutorily required venue satisfies subparts (a), (b), or (c) of § 14-3-330(2).

A. An order denying the substantial right to proper venue is immediately appealable under § 14-3-330(2)(a).

In *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005), this Court held that an order disqualifying an attorney in a civil case is immediately appealable under § 14-3-330(2)(a), because the right to choose one's counsel is a "substantial right" and because "an appeal after final judgment and a new trial, if granted, *would not adequately protect* a party's interest because it would be *difficult or impossible* for the affected party or the appellate court to ascertain by any objective standard *whether prejudice resulted* from the disqualification." *Id.* at 710 (emphasis added). The same is true for an appeal after final judgment in a "venue" case. It will be impossible to prove prejudice, *i.e.*, that a different jury in a different county would have reached a different result. Thus, an order denying the substantial right to the statutorily mandated venue is immediately appealable under § 14-3-330(2)(a) and the rationale in *Hagood, supra*.

In *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000), this Court ruled that proper venue is a substantial right but orders denying that substantial right are not immediately appealable under § 14-3-330(2)(c) for striking the defense of improper venue. This Court did not consider appealability under § 14-3-330(2)(a) or the inability to prove prejudice (reversible error) on appeal. Thus, Defendant Grady submits the general rule against "venue" appeals is not applicable, because no case has considered the issue under § 14-3-330(2)(a). See *Hagood, supra*. In any event, Defendant Grady submits the "venue" cases have been wrongly analyzed and, therefore, immediate appeals have been wrongly denied in some cases. For example, as discussed later, *Breland* was rightly decided but wrongly analyzed regarding appealability.

B. An order denying the substantial right to proper venue is immediately appealable under § 14-3-330(2)(c).

1. Orders denying proper venue are immediately appealable under § 14-3-330(2)(c), and this Court should overrule its contrary ruling in *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000).

In *Breland*, this Court rejected the appellant's argument that the order was immediately appealable because it struck the defense of improper venue. Respectfully, this was error. Proper venue is a substantial right and, as noted in *Breland*, the denial of that right strikes the defense and prevents it from being considered further before trial. Thus, such an order comes within the express language of § 14-3-330(2)(c) as affecting a substantial right and "striking an answer or any part thereof or any pleading in any action." The General Assembly's policy choice prevails and, orders denying a change to the proper venue are immediately appealable.

2. *Breland* was rightly decided but wrongly analyzed as to the appealability issue.

In the published opinions on § 14-3-330(2), the courts have engaged in a "bootstrap" analysis to determine appealability. For example, in the "mode of trial cases," this Court has held an order is not immediately appealable if there was not a right to a particular mode of trial. Two cases illustrate this point.

In *Hannah v. United Refrigeration Servs., Inc.*, 409 S.E.2d 360 (S.C. 1991), the plaintiff had a right to a jury trial but failed to timely demand it. Thereafter, the plaintiff moved for a jury trial under Rule 39(b), SCRPC, which grants the trial court discretion to order a jury trial despite the failure to timely demand one. The trial court granted the motion and the defendants appealed immediately, contending they had a right to a non-jury trial. This Court dismissed the appeal without prejudice, holding that a party's failure to timely demand a jury trial did not mean the opposing party had a right to a non-jury trial. In other words, since there was no right to a non-jury trial, there was no right to an immediate appeal.

In *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 357 S.E.2d 725 (S.C. 1987), the defendants failed to timely demand a jury trial. They moved for a jury trial under Rule 39(b), SCRCP, and the trial court denied the motion. The defendants appealed immediately. This Court dismissed the appeal as premature, finding that there was no right to a jury trial since the right had not been timely demanded. In other words, since there was no right to a jury trial, there was no right to an immediate appeal.

In *Breland, supra*, this Court held: “From the record on appeal, it is clear that [the evidence] will sustain the trial court’s decision.” 529 S.E.2d at 14. In other words, the record demonstrated that the trial court did not err in denying the motion to change venue in *Breland*. Since there was no error, the order did not affect a substantial right and, therefore, there was no right to an immediate appeal.

3. The availability of relief after final judgment through a new trial is not a basis for denying the statutory right granted by the General Assembly to appeal immediately from certain pre-trial orders.

In denying immediate appeals under § 14-3-330, the courts often rely upon the general observation that relief is available after final judgment by reversing and granting a new trial. *E.g., Breland*, 529 S.E.2d at 14 (finding that the “substantial right” to proper venue was not “affected” by the order, because any error could be remedied after final judgment by granting a new trial). The same rationale, however, applies with equal force to any order that is immediately appealable under § 14-3-330(2), because virtually any error in any order can be “remedied” by a new trial.

For example, the “mode of trial” cases hold that an order denying a mode of trial to which a party is entitled as a matter of right is immediately appealable, because relief is not available in an appeal after judgment. *E.g., Creed v. Stokes*, 331 S.E.2d 351 (1985) (order

denying right to jury trial); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315 (1978) (order denying right to non-jury trial).⁸ Both of these errors, however, can be remedied by a new trial, *i.e.*, a new jury trial or a new non-jury trial.⁹ The same is true of other orders that courts have found to be immediately appealable under § 14-3-330. An order disqualifying an attorney in a civil case is immediately appealable, but that error could be remedied after final judgment by reversing and remanding for a new trial with the disqualified attorney. See *Hagood, supra*. An order that improperly substitutes one entity for another as a party defendant is immediately appealable, but that error could be remedied after final judgment by reversing and remanding for a new trial with the party that was wrongly removed from the case. See *Neeltec Enterprises, Inc. v. Long*, 725 S.E.2d 926 (S.C. 2012), *rev'g* 705 S.E.2d 57 (S.C. App. 2011).

Finally, nothing in § 14-3-330(2) supports the notion that the right to an immediate appeal granted by the General Assembly is unavailable if a new trial can remedy the error. Indeed, this judicially created limitation would render § 14-3-330(2) virtually meaningless, because exceedingly few errors in a pre-trial order cannot be remedied after final judgment by reversing and remanding for a new trial.

4. The judicial policy against “piecemeal litigation” must yield to the General Assembly’s public policy decision to allow immediate appeals from certain pre-trial orders.

In denying immediate appeals under § 14-3-330, the courts often rely on the judicially created policy against “piecemeal litigation.” *E.g., Breland*, 529 S.E.2d at 13. The entire purpose of § 14-3-330(1), (2), and (4), however, is to allow appeals before final judgment,

⁸ In *Breland, supra*, this Court cited *Creed, supra*, as an example of an order that was immediately appealable because the “substantial right could not be vindicated on appeal after the case.” 529 S.E.2d at 13. Defendant Grady respectfully submits this analysis is wrong – the denial of the right to a jury trial in *Creed* could have been “vindicated” by reversing and remanding for a new trial before a jury in the very same manner that this Court has held the denial of a venue right can be remedied by a new trial.

⁹ Defendant Grady respectfully submits that the more salient reason that such orders are immediately appealable is the same reason identified by this Court in *Hagood, supra*, to-wit: that it will be impossible for an appellant to demonstrate reversible error (prejudice), *i.e.*, that a jury would have ruled differently than a trial court or *vice versa*.

i.e., to allow “piecemeal litigation” by authorizing the immediate appeal of some interlocutory orders. The General Assembly’s plainly stated intent to allow such immediate appeals cannot be constrained by a judicial policy against piecemeal litigation. Rather, as a matter of constitutional law, that judicial policy must yield to the General Assembly’s policy choice in allowing immediate appeals from certain pre-trial orders. Thus, if an order is immediately appealable under the plain language of § 14-3-330, the judicial policy against piecemeal litigation must yield to the General Assembly’s intent to permit such appeals. Here, the appealed order denied Defendant Grady his substantial right to proper venue and struck that defense from the case. Thus, the order is immediately appealable.¹⁰

5. The rule against immediate appeals of venue orders creates an undesirable and unfair anomaly in the law.

If a plaintiff brings the action in the wrong county, the informed and well-funded defendant will move to change venue and then hope its own motion is denied, because the defendant will then have a “free shot” in the first trial, *i.e.*, the defendant can try the case and, if the result is undesirable, the defendant has an automatic reversal for a new trial in an appeal after judgment. This is a particularly inefficient use of scarce judicial resources. Moreover, it gives a well-funded defendant an unfair advantage in litigation, because that defendant can afford to avail itself of the “free shot” whereas less well funded defendants cannot. It also subjects the plaintiff to the specter of two trials. For these reasons, an order affecting the substantial right to proper venue should not only be immediately appealable, an immediate appeal should be required as it is in the “mode of trial” and other cases.

¹⁰ Public policy is the province of the legislature. *Brown v. Duke*, 270 S.E. 2d 130, 132 (S.C. 1980). “Once the Legislature has made [a public policy] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.” *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11, 14 (S.C. App. 1989) (emphasis added). Thus, under the separation of powers doctrine, the courts must yield to, follow, and promote the General Assembly’s policy choices. *Id.* “[T]he responsibility for justice or wisdom of legislation rests exclusively with the legislature, whether or not [the courts] agree with the laws it enacts.” *Adkins v. Comcar Indus., Inc.*, 447 S.E.2d 228, 230 (S.C. App. 1994).

6. This Court has established two categories for immediately appealable orders affecting a substantial right, and an order denying venue fits within that analysis.

South Carolina's jurisprudence shows that two categories of "substantial right" cases are immediately appealable under § 14-3-330(2)(a). First, an appeal is permitted if no meaningful relief can be provided in an appeal after final judgment, *i.e.*, it is possible to demonstrate reversible error (prejudice) on appeal, but no meaningful relief can be granted by the appellate court upon finding reversible error. These cases are rare. *See Doe v. Howe*, 607 S.E.2d 354, 356 (S.C. App. 2004) (denial of motion to proceed anonymously immediately appealable, because no relief would be available on appeal, thereby rendering the order "effectively unreviewable" in an appeal after final judgment). Second, though meaningful relief is available in an appeal after final judgment, an appeal is permitted when it would be exceedingly difficult if not impossible to demonstrate reversible error (prejudice) on appeal. *E.g.*, *Breland, supra*.

The cases in the second category include attorney disqualification cases (*Breland, supra*) and, as argued above, should also include venue cases and mode of trial cases. In all of these cases, it is impossible to show on appeal that "but for" the order affecting the appellant's substantial right, there would have been a different result at trial. In both categories, an immediate appeal should be required because: (1) as to the "no relief" cases, appealing immediately is the only opportunity for the appellate court to provide relief; and (2) as to the "no prejudice" cases, the immediate appeal requirement protects the substantial right and avoids the "free shot" anomaly discussed earlier.

III. THE ORDER DENYING DEFENDANT GRADY'S MOTION TO COMPEL EXECUTION OF THE STIPULATIONS OF DISMISSAL IS IMMEDIATELY APPEALABLE UNDER § 14-3-330(4) AS AN ORDER DENYING AN INJUNCTION, AND THIS COURT SHOULD REVIEW THE VENUE ORDER IN CONNECTION WITH THIS APPEAL IF THE VENUE ORDER IS NOT OTHERWISE REVIEWABLE.

Defendant Grady moved to compel execution of the stipulation of dismissal required by the settlement documents. Judge Mullen denied this motion but, at the same time she granted the Plaintiffs' request to dismiss the consortium action in its entirety. (Appx. 69-70). This dismissal included the consortium claim against Defendant Grady, even though there had been no settlement between Defendant Grady and Partice Smart (consortium plaintiff). A few days later, despite Judge Mullen's denial of Defendant Grady's motion, Judge Buckner granted the Plaintiff's request to dismiss the Trucking Defendants from the personal injury action against Defendant Grady based on the settlement documents, *i.e.*, the same basis earlier argued by Defendant Grady but rejected by Judge Mullen. Thus, the only remaining issue is whether Judge Mullen erred in denying the motion to compel the execution and filing of a stipulation of dismissal for Defendant Murdaugh.

In seeking to compel the execution and filing of the stipulations of dismissal, Defendant Grady sought a mandatory injunction order that enjoined the parties to comply with the requirements of Rule 41, SCRCF, and the settlement documents. Judge Mullen denied the requested injunction and, therefore, her order is immediately appealable as the denial of an injunction under S.C. Code Ann. § 14-3-330 (4) (Supp. 2012).

The Court of Appeals held that the motion to compel compliance with Rule 41, SCRCF, and to execute the stipulations of dismissal was akin to an order denying a motion to enforce a settlement and, therefore, the denial of that motion was not immediately appealable under this Court decision in *Peterkin v. Brigman*, 461 S.E.2d 809 (1995) (denial of motion to approve

settlement in a wrongful death case not immediately appealable). In *Peterkin*, however, this Court denied appealability under subsections (1) and (2) of § 14-3-330, but this Court did not consider appealability under subsection (4). Here, Defendant Grady sought to enjoin compliance with Rule 41, SCRCP, and execution of the stipulations of dismissal. The denial of the motion was the denial of an injunction and, therefore, it is immediately appealable under § 14-3-330(4).

Assuming the venue order is not immediately appealable, and further assuming this Court does not issue a writ of certiorari to the Court of Common Pleas, Defendant Grady respectfully requests this Court to exercise its discretion and review the venue order in connection with the order denying the motion to compel execution of the stipulations. The appellate courts have discretion to exercise “pendant” appellate jurisdiction and review an unappealable order in connection with an appeal from an order that is immediately appealable, particularly when doing so will promote judicial economy and avoid need for a future appeal after final judgment. *E.g.*, *Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 390 (S.C. 2005); *Morris v. Anderson County*, 564 S.E.2d 649, 651 (S.C. 2002). Here, reviewing the venue order now will avoid the need for a future appeal after final judgment and will also avoid the earlier-noted undesirable and unfair anomaly that results from not allowing immediate appeals from venue orders. Doing so will also permit this Court to give much needed guidance to the bench and bar on the new amendments to the venue statute and the interplay with covenants not to execute.

IV. ASSUMING THE ORDER DENYING VENUE IS NOT IMMEDIATELY APPEALABLE, THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS SO THAT THIS COURT MAY RULE UPON THE IMPORTANT AND NOVEL VENUE QUESTIONS PRESENTED BY THIS CASE.


This Court may review unappealable orders by issuing a writ of certiorari to the trial court. S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310 (1976). The writ is particularly appropriate when a case presents important novel questions of law, and early resolution of those

issues would serve the interests of judicial economy. *In re: Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). Here, the appeal presents important and novel questions on the interplay between the new venue statute (which has never been considered by this Court) and covenants not to execute (which this Court has held “must be carefully scrutinized in order to determine their efficiency and *impact upon the integrity of the judicial process.*” *Poston*, 363 S.E.2d at 890 (emphasis added)). Resolving this issue will provide much need guidance to the bench and bar, particularly given the increasing use of covenants not to execute as a means for settling cases. Thus, if any issue decided by the trial court is deemed to be unappealable at this time, it is respectfully submitted that this Court should issue a writ of certiorari to the Court of Common Pleas and review the appealed orders immediately.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully Submitted,



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June 7, 2013
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

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S.C. Supreme Court

APPEAL FROM HAMPTON COUNTY
In the Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case No. 2009-CP-25-285
Appellate Case No. 2013-00432

Gary Smart,Respondent,

v.

James Allen Grady, Louis Daniel Moffett,
Lynwood Brantley d/b/a Brantley Hauling,
Randolph Murdaugh, III, Defendants,

Of whom James Allen Grady is Petitioner.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Petition for a Writ of Certiorari to the Court of Appeals on in the alternative, Petition for a Writ of Certiorari to the Court of Common Pleas and Appendix by depositing copies in the United States Mail, postage prepaid, on June 7, 2013 addressed to the attorneys of record, as follows:

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