

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Judge

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S.C. SUPREME COURT

Unpublished Opinion No. 2022-UP-331 (Filed August 10, 2022)
Lower Court Case No. 2015-CP-04-00667

Ex Parte: Donald L. Smith,
Petitioner,

In Re: Greg Battersby, Plaintiff

v.

J. Kirkman Moorehead, Krause, Moorhead &
Draisen, P. A.,

Respondents.

APPELLATE CASE NO.: 2020-000070

RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

INTRODUCTION.....	1
COUNTER STATEMENT OF THE CASE.....	2
ARGUMENT.....	4
I. The Court of Appeals Correctly Found that the Trial Court Did Not Abuse Its Discretion in Assessing Sanctions Against Petitioner.....	4
A. All of Petitioner’s Contentions Are Waived.....	4
B. The Circuit Court Did Not Abuse Its Discretion in Finding That the Complaint Was Frivolous.....	6
II. Petitioner Has Not Identified an Issue Warranting Review.....	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

	Page(s)
<i>Pond Place Partners, Inc. v. Poole</i> , 351 S.C. 1 (2002)	9
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006)	9
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71 (1998)	8

Other

South Carolina Code Ann. § 15-36-10	6,8
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INTRODUCTION

The instant Writ Petition stems from a frivolous suit that Petitioner Donald Smith brought against Respondents Krause, Moorhead & Draisen, P.A. and J. Kirkman Moorhead (collectively “Respondents”), in connection with Respondents’ representation of an individual who sued Petitioner’s client, Greg Battersby, for sexual misconduct.

That complaint was so frivolous, in fact, that Petitioner promptly conceded during the summary judgment hearing that six out of the seven claims against Respondents had no merit. Thereafter, the circuit court correctly held that the that the seventh claim – civil conspiracy – was clearly barred by the attorney-immunity doctrine and devoid of any evidentiary support.

Petitioner never appealed that order. When Respondents moved for sanctions, Petitioner all but conceded in his opposition that there was no evidentiary or legal support for the claims against Respondents.

The circuit court properly granted Respondents’ application for sanctions. Petitioner has unsuccessfully challenged that order three times. This latest attempt is his most brazen: he now asserts that the sanctions order was an abuse of discretion because his claims were actually meritorious. This is nothing more than a transparent attempt, seven years after the fact, to relitigate the circuit court’s un-appealed order dismissing Petitioner’s claims. Having failed to appeal that order, every one of the arguments in the Writ Petition is waived.

The Petition should be denied for an additional reason, independent of the merits (or lack thereof) of Petitioner’s attack on the circuit court’s sanction order. The instant Petition raises no issues of first impression, no conflicts of law between the circuit court order and federal law or this Court’s precedents, nor any question of legal significance. In short, the Petition fails to

identify any reason why this Court should exercise its discretionary power to review the decision below.

For these reasons, the Petition should be denied.

COUNTER STATEMENT OF THE CASE

On May 30, 2014, Petitioner brought a complaint against Respondents alleging seven causes of action, including false arrest, defamation, malicious prosecution, and civil conspiracy in connection with Respondents' representation of Jan Morton in her lawsuit against Petitioner's, Mr. Battersby.¹ The Complaint alleged that Respondents conspired with Ms. Morton to concoct a story that Mr. Battersby indecently exposed himself to her and that Respondents advised her to report the incident to the authorities. Ms. Morton reported the incident and Mr. Battersby was arrested and charged.

Respondents filed a motion to dismiss, which the circuit court converted into a motion for summary judgment. At the hearing on said motion, Petitioner stipulated that Respondents were entitled to summary judgment as to six of the seven causes of action. Appendix 78. The only claim that Petitioner did not immediately abandon was the civil conspiracy claim.

On July 10, 2015, the circuit court granted summary judgment in Respondents' favor as to all claims. The court held that Respondents were, at all times, acting within the scope of their representation of Ms. Morton and were therefore entitled to immunity from suit based on the advice they gave her. Appendix 76-84. Petitioner failed to appeal the July 10, 2015 order.

Shortly thereafter, Respondents moved for sanctions pursuant to South Carolina Code Ann. § 15-36-10 and Rule 11. In opposition, Petitioner did not identify any case law or any

¹ A summary of the allegations is contained in the lower court's July 10, 2015 Order dismissing the complaint in its entirety. *See* Appendix 76-84.

factual information that would support his claims against Respondents. Instead, he reiterated his “good faith belief” that Respondents had met with their client to bring a false claim and argued that sanctions were inappropriate because he had withdrawn the claims and because he had never been sanctioned before.

Notably, Petitioner did not present any law supporting his claim that the Respondents could be held liable under his theory of wrongdoing; nor did he argue that Respondents had failed to prove that he acted with an improper motive.

A hearing was held on October 2, 2015, and, on February 3, 2016, the circuit court denied the motion for sanctions under § 15-36-10 but granted it as against Petitioner under Rule 11. Appendix 86. In imposing Rule 11 sanctions, the court noted that Petitioner immediately conceded at the summary judgment hearing that South Carolina law foreclosed six of the seven causes of action, thus indicating that Petitioner “filed the claims without researching the law on attorney immunity to determine whether the claims were viable and supported by law.” *Id.* at 88. The court concluded that “no reasonable attorney would have brought the Plaintiff’s claims against [Respondents] given the well-established case law on attorney immunity and the facts of the case.” *Id.* at 88-89.

As to the remaining civil conspiracy cause of action, the circuit court found that the claim was “based upon mere suspicion without any supporting evidence” and that Petitioner’s strategy could be best described as ““throw it against the wall and see if it sticks.”” *Id.* at 90. The court then detailed each of Petitioner’s arguments in support of the civil conspiracy claim and explained why they were frivolous. The court noted that there was no support for Petitioner’s “troubling” proposition that an attorney steps outside the scope of representation when they advise a client to report a possible criminal act or assist them in doing so. *Id.* After reviewing the

record, the court reiterated that Petitioner had “presented no evidence to support [his] bald assertion that [Respondents] made up or embellished facts to strengthen their case.” *Id.* at 91.

On February 18, 2016, Petitioner moved for reconsideration of the sanctions order. The circuit court denied that motion on April 21, 2016. *Id.* at 94.

Petitioner failed to pay the monetary sanction and, on October 15, 2019, Respondents filed a Motion for Entry of Sanctions awarded against Petitioner as a Judgment on the Judgment Rolls. On December 16, 2019, the trial court granted the motion. *Id.* at 97-98. On January 13, 2020, Petitioner appealed the December 16, 2019 Order.

On August 10, 2022, the Court of Appeals denied the appeal, holding that circuit court’s factual findings were supported by the record and that the circuit court did not abuse its discretion in imposing sanctions. *Id.* at 31. The Court of Appeals further held that Petitioner had waived the following contentions by failing to raise them before the circuit court: (1) “that the circuit court applied the incorrect standard in imposing sanctions”; (2) that Respondents “failed to allege or prove improper motive”; or (3) that the “sanctions were imposed contrary to the purported end of Rule 11.” *Id.* at 32, n.2.

Petitioner moved for rehearing. That motion was denied on November 14, 2022. *Id.* at 1-2.

ARGUMENT

I. The Court of Appeals Correctly Found that the Trial Court Did Not Abuse Its Discretion in Assessing Sanctions Against Petitioner²

A. All of Petitioner’s Contentions Are Waived

² The two Questions Presented in the Petition are entirely duplicative and will be addressed under this one heading.

Petitioner argues that the circuit court abused its discretion because the complaint against Respondents “sufficiently established the elements of the cause of action for conspiracy.” That issue was already litigated and decided against Petitioner in the July 10, 2015 Order, which held that the civil conspiracy claim were legally and factually baseless. Petitioner failed to appeal that order.

Petitioner also failed to contest any of the findings in the July 10, 2015 Order in his opposition to the motion for sanctions. In that opposition, he declined to defend the legal merits of his claims, nor did he offer any evidence substantiating his belief that any law had violated. In fact, his challenge to the sanctions application consisted solely of the following five arguments: 1) the claim was in good faith because Respondents had met with Ms. Morton to “solidify [her] claims” against Petitioner; (2) Respondents continued to represent Ms. Morton even though the criminal charges against Mr. Battersby had been dropped; (3) sanctions were inappropriate under § 15-36-10 because Petitioner withdrew the complaint; (4) sanctions were inappropriate under § 15-36-10 because Petitioner had never previously violated that provision; and (5) Rule 11 sanctions were inappropriate because Petitioner “made a good faith argument based on his belief that [Respondents] and [Ms. Morton] had set out to recover money damages for something that did not occur.” Notably absent from his opposition was any attempt to argue that “solidifying” false claims or seeking money damages for something that “did not occur” would constitute a *legal violation* or fall outside the attorney-immunity exception.

Having failed to appeal the July 10, 2015 Order, and having failed to argue before the circuit court that sanctions were inappropriate because the complaint was legally or factual viable, Petitioner is barred from doing so here. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (1998)

(“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

B. The Circuit Court Did Not Abuse Its Discretion in Finding That the Complaint Was Frivolous

Putting the waiver issue aside, nothing in Petitioner’s rambling submission remotely demonstrates that the circuit court abused its discretion in finding that the complaint was frivolous.

The circuit court correctly held that the allegations in the Complaint were barred by the well-established rule that “an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

The circuit court correctly held that all of the alleged wrongdoing identified in the complaint – *e.g.*, advising Ms. Morton to file criminal charges and assisting her with the mechanics of filing – are clearly privileged. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23 (Ct. App. 2002). (“The absolute privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court.”).

The circuit court also correctly held that Petitioner had failed to identify any exception to the immunity rule. As to the alleged violation of Rule 3.4 (falsifying evidence), the court noted that there was no evidence that remotely supported Petitioner’s allegations. Appendix 144-47. None of the evidence cited in the Petition – which, it warrants repeating, was *not* raised in any prior challenge to the sanctions order – suggests otherwise. Petition 16. Petitioner merely identifies a few alleged inconsistencies in Ms. Morton’s statements – inconsistencies which are trifling (*e.g.*, whether Battersby was wearing a towel or a robe when she invited him over) and

which do not implicate Respondents in any way. There is no evidence that *Respondents* bear any responsibility for any of the inconsistencies. As to the alleged violation of Rule 3.3, the circuit court correctly held that, “[b]y its plain language, . . . [this Rule] does not impose upon [attorneys] a duty” to the opposing side, but rather imposes only a duty of candor to the tribunal. Appendix 145.

After eight years, Petitioner still cannot cite to a single fact or furnish a single case that remotely supports his theory that an attorney can be held liable for civil conspiracy under the circumstances presented here. There is, accordingly, no cause for any further review of the order below.

II. Petitioner Has Not Identified an Issue Warranting Review

Even if Petitioner had a viable challenge to the sanctions order, it would not warrant review. Supreme Court review “is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. SCACR 242(b). Such review is limited to instances where:

- (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.

Id.

The instant matter does not implicate any of the above. The Petition does not ask the Court to reconsider any of the precedent that underly the circuit court’s finding that his claims were frivolous; nor does it identify a novel issue of law or any conflicts. For that reason alone, this Court should deny the Petition.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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