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
Supreme Court Appellate Case No. 2013-000432

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.

REPLY TO RETURN TO 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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REPLY ARGUMENT

The Petitioner (Defendant Grady) respectfully files this Reply to the Return filed by the Respondent (Plaintiff). Defendant Murdaugh, who is also a Respondent to the petition for a writ of certiorari to the Court of Common Pleas, did not file a Return.

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

Plaintiff never addresses the merits of whether the trial court erred in denying the motion to change venue. His only "response" is that the order is not appealable "[e]ven if Grady is correct about everything he says in this argument (*and he is not*), . . ." and that "[t]he trial court properly rejected Grady's contention on the merits . . .." (Cert. Return at 10) (emphasis added). Plaintiff never denies that Defendant Murdaugh has no personal interest or stake in the outcome of the litigation, nor does Plaintiff deny that Defendant Murdaugh waived his contractual right to an outright dismissal with prejudice and agreed (for no additional consideration) to re-enter the case as a sham, immaterial and nominal defendant solely to accommodate Plaintiff. For these reasons, and for the reasons set forth in Defendant Grady's certiorari petition, it is respectfully submitted that this Court should address the novel question presented here and hold that the residency of a defendant is irrelevant to venue when that defendant settles under a covenant not to execute or other document whereby the defendant has no personal interest or stake in the outcome of the litigation.[1]

[1] In his Statement of the Case, Plaintiff seems to argue waiver of any objection to venue based on the failure to plead it in the Answer and the withdrawal of the prior motion to change venue. (Cert. Return at 6). Neither argument has any merit. Improper venue was not raised in the Answer, because Defendant Murdaugh had not yet settled out of the case. The prior motion was withdrawn at the April 4, 2011, hearing when everyone agreed that the stipulations of dismissal were ineffective for violations of Rule 41, SCRCP, and, at the time of this withdrawal, Defendant Grady and the trial court were unaware that Defendant Murdaugh and Plaintiff had already entered a covenant not to execute. (See Cert. Petition at 8-11).

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

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).

Plaintiff never addresses Defendant Grady's argument that the denial of the motion to change venue is immediately appealable under § 14-3-330(2)(a) pursuant to this Court's analysis in *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005). (Cert. Return, *passim*). In *Hagood*, 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 here, because it will be impossible to prove prejudice in appeal after judgment, *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.*

Plaintiff's only "response" on this issue is the following: "In fact, as *Breland* recognized, any order denying a motion to transfer venue fails to meet any of §14-3-330(2)'s subparts." (Cert. Return at 12, *citing Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11 (S.C. 2000)). There simply is no such ruling or recognition in *Breland* – this Court never mentioned and never discussed § 14-3-330(2)(a) in *Breland.* Rather, this Court addressed only the question of whether an order denying a motion to transfer venue was immediately appealable under § 14-3-330(2)(c). See *Breland,*, 529 S.E.2d at 12-13 (stating the question as appealability under § 14-3-330(2)(c) and quoting only "[t]he *relevant portion* of section 14-3-330," *i.e.* quoting only sub-part (2)(c)) (emphasis added).

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

Here, Plaintiff simply recites this Court's analysis in *Breland, supra*, without addressing any of the specific arguments made by Defendant Grady. (*Compare* Cert. Petition at 16-20 *with* Cert. Return at 11-12). Plaintiff correctly observes that this Court relied on the judicial policy against piecemeal litigation in denying an immediate appeal in *Breland*, but he mis-states Defendant Grady's argument as being "nothing more than a disagreement over the policy." (Cert. Return at 12). Defendant Grady's argument, however, is not one of "disagreement." Rather, it is an argument not considered by this Court in *Breland*, to-wit: (1) § 14-3-330 is an expression of policy by the General Assembly to permit so-called "piecemeal" appeals under certain circumstances; (2) here, the appeal satisfies the express requirements of § 14-3-330(2)(c); and (3) any judicial policy against piecemeal appeals must yield to the General Assembly's policy of allowing immediate appeals. (See Cert. Petition at 16, 18-19).

Plaintiff makes no responsive argument to any other arguments by Defendant Grady, including but not limited to the following: (1) the availability of relief by granting a new trial after judgment is not a basis for denying the right to an immediate appeal granted by the General Assembly in § 14-3-330(2)(c); (2) numerous other types of cases in which the General Assembly authorized immediate appeals under § 14-3-330 could also be remedied by a new trial; and (3) any rule against permitting immediate appeals from venue orders creates the undesirable anomaly of giving defendants a "free shot" at the first trial. (See Cert. Petition at 17-18, 19-20).

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.

Here, Plaintiff relies on this Court's decision in *Peterkin v. Brigman*, 461 S.E.2d 809 (1995) but, in *Peterkin*, this Court denied appealability under subsections (1) and (2) of § 14-3-330 without considering appealability under subsection (4). Plaintiff does not respond to Defendant Grady's argument regarding "pendent" appellate jurisdiction.

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.

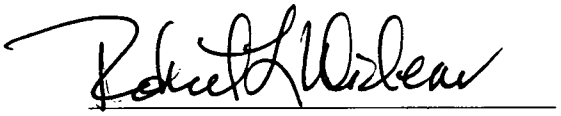
Here, Plaintiff simply disagrees on whether the present case satisfies the test for granting common law certiorari. Defendant Grady submits certiorari is warranted here because: (1) the appeal presents important and novel questions regarding the new venue statute, which has never been considered by this Court; (2) the appeal presents important and novel questions on the interplay between the new venue statute 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)); and (3) resolving

these issues now will provide much needed guidance to the bench and bar, particularly given the increasing use of covenants not execute as a means for settling cases.

CONCLUSION

For the reasons stated above, and in the certiorari petition, it is respectfully submitted that this Court should issue a writ of certiorari to the Court of Appeals or, in the alternative, to the Court of Common Pleas.

Respectfully Submitted,



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July 29, 2013
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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Reply to Return to 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 July 29, 2013 addressed to the attorneys of record, as follows:

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