

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2013-UP-034 (S.C. Ct. App. Filed January 16, 2013)

Clark D. Thomas, Petitioner,

V.

Bolus & Bolus
Attorneys Keith Bolus, Officially
Michael T. Bolus, Officially
and Individually, Respondent.

**PETITIONER'S REPLY TO RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Did the Court of Appeals err in holding trial court did not err in granting Respondents' motion to dismiss because Petitioner did not plead he was innocent of the underlying criminal charges and, for failing to timely amend the complaint in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution?
2. Did the Court of Appeals err in holding Petitioner's proposed amended complaint failed to state a cause of action because he did not allege facts that show he is innocent of all criminal charges filed against him in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution?
3. Did the Court of Appeals err in holding Petitioner failed to preserve his remaining arguments for review in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution?

ARGUMENT

I.

The Court of Appeals erred in holding trial court did not err in granting Respondents' motion to dismiss because Petitioner did not plead he was innocent of the underlying criminal charges and, for failing to timely amend the complaint in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution.

Alleging Innocence

Arguments I & II in the Respondents' *Return* are both in rebuttal to Thomas' line of reasoning set forth in the above-captioned Argument as it is likewise entitled therein his *Petition for Writ of Certiorari*. "Court considered two issues lumped together under one issue on appeal." (Internal quotations omitted) (citation omitted). Jean Hoefler Toal, Shahin Vafai, Robert A. Muckenfuss, Appellate Practice in South Carolina at 209 (2nd Edition 2002). With that in mind, Thomas distinguished Brown v. Theos, 550 S.E.2d 304 (S.C. 2001) to the extent that the findings in that case are inapposite to the instant matter. (Petition for Writ, p. 7). In fact, it is those dissimilarities between *Brown* and Thomas' case that present novel questions of law and, that should compel this Court to grant the *Petition for Writ of Certiorari*. In other words, unlike the circumstances in *Brown*, Thomas' single failure to plead his innocence in the original *Complaint* is not fatal to his cause of action.

Motion to Amend

Also, the Respondents have asserted that Thomas had eight months to seek leave to amend his *Complaint*, but waited until five days prior to the *Motion to Dismiss* hearing to do so; thereby, rendering the request untimely. (Respondents' *Return*, p. 5). However, the Respondents failed to observe and/or argue against the fact that Thomas moved to amend to conform to the evidence pursuant to Rule 15(b), SCRPC; which shall be granted at any time.

(Petition for Writ, pp. 9 – 16). “If an appellee fails to respond to an issue ..., the [appellate] court may treat the failure to respond as a confession that the appellant’s position is correct.” (Brackets in original). First Union Nat. Bank v. FCVC Comm., 469 S.E.2d 613, 617 (S.C.App. 1996). Moreover, the Respondents contend that even if Thomas’ *Motion to Amend* in the case at bar had been timely, his proposed *Amended Complaint* still failed to state a cause of action. Be that as it may, Michael J. Virzi’s *affidavit* categorically confirmed otherwise. After all, this Court recognizes Virzi to be an irrefutable authority on legal malpractice and legal ethics. (App. pp. 183 - 188).

Therefore, in light of the foregoing facts and binding authorities, Petitioner’s *Motion to Amend* was timely; the trial court erred when declining to entertain it and, the Court of Appeals erred when affirming that decision.

ARGUMENT II.

The Court of Appeals erred in holding Petitioner's proposed amended complaint failed to state a cause of action because he did not allege facts that show he is innocent of all criminal charges filed against him in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution.

Facts Purporting Innocence

The Respondents have alleged—in their Argument III—that because Thomas' proposed *Amended Complaint* stipulates only that he is innocent of the underlying criminal charges against him, Thomas has failed to allege facts showing his innocence. This line of reasoning is flawed whereas the proposed *Amended Complaint* Thomas sought to file does. (App. pp. 107 - 108, ¶ 37). However, the Respondent did correctly identify Thomas' claim of innocence as being conclusory pursuant to *Brown, 550 S.E.2d at 306*. (App. p. 103, ¶ 16).

It should be duly noted that even though Thomas has sufficiently alleged facts showing his innocence, he has asked this Court in the *Petition for Writ of Certiorari* to observe distinctive amendments clarifying, *inter alia*, (1) that the alleged victim was the witness whose testimony was conflicting and contradicted her written statement, (App. p. 107, ¶ 37(c)); and (2), that these inconsistent statements are singularly significant in their probative value and were made over 46 times. Moreover, because of the Respondents' negligence in failing to reveal this fact, Thomas' underlying criminal convictions will eventually be reversed as a direct result. Therefore, the Court of Appeals incorrectly found that Petitioner's request to amend would have been futile.

ARGUMENT III.

The Court of Appeals erred in holding Petitioner failed to preserve his remaining arguments for review in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, § 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution

Preservation of Issues

The Respondents have alleged—in their Argument IV—that Thomas is unclear to which specific issues the Court of Appeals erred in declining to hear in both his *Petition for Rehearing En Banc* and *Petition for Writ of Certiorari*; and that Thomas failed to offer any substantive arguments that are material to issue preservation. (Respondents' Return, pp. 6 - 7). Be that as it may: in the *Petition for Rehearing En Banc* and *Petition for Writ of Certiorari* that Thomas filed, he clearly pursued the issue of (1) fraud; (2) the tolling of the statute of limitations; and (3), the violation of his constitutional rights. (App. pp. 302 - 303) (*Petition for Writ*, pp. 19 - 24). Moreover, Thomas pursued these issues in arguments grounded on, among other things, the procedures set forth as material to issue preservation therein Chief Justice Toal's *Appellate Practice in South Carolina*. Therefore, it appears that the Respondents are suggesting those procedures are not valid.

Fraud

The Respondents have also alleged that their guilt of fraud and civil conspiracy was raised for the first time in Thomas' appellate brief. (Respondents' Return, p. 8). However, in the *Final Brief of Appellant* that Thomas filed—to include every other pleading he filed excluding the *Complaint* and proposed *Amended Complaint*—he raised and argued the issues of fraud and civil conspiracy time and time again. (*Petition for Writ*, p. 21). With that in mind: in addition to the request that sanctions the imposed upon the Respondents for fraud and civil conspiracy,

Thomas is now formally seeking leave to amend the complaint because justice so requires and, to conform to the evidence of these issues, *inter alia*, pursuant to Rule 15(b), SCRCPP. And in reply to the Respondents' want of understanding, (Respondents' Return, p. 8, Subsection B), Thomas hereby again makes it clear that he is seeking redress of the violation of his constitutional rights; and, that justice be done respective to, among other things, the Respondents' foregoing transgressions of fraud and civil conspiracy.

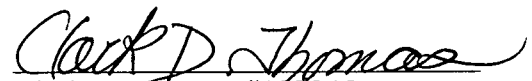
Therefore, in light of these facts, the Court of Appeals incorrectly declined to entertain the issue of (1) fraud and civil conspiracy; (2) the tolling of the statute of limitations; and (3), the violation of Thomas' right to due process and equal protection of the laws.

CONCLUSION

The Petitioner prays that in light of the facts presented herein and for the following character of reasons, this Court will issue the *Writ of Certiorari*:

1. The facts in this legal malpractice action as distinguished from those in the case of *Brown v. Theos* present novel questions of law;
2. The decision of the Court of Appeals regarding amendments to conform to the evidence is in conflict with prior decisions in the Supreme Court;
3. The erroneous application of Rule 6(d), SCRCP, in this case and inconsistent application of this Rule in the lower courts and, the failure of the Court of Appeals to observe binding case law involve substantial state constitutional issues of due process and equal protection of the laws; and,
4. There is also a federal question of due process and equal protection of the laws regarding paragraphs 2 and 3 above and the standards imposed upon unlearned *pro se* litigants in that the decisions of the Court of Appeals conflict with decisions of the United States Supreme Court.

Respectfully submitted,



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August 15, 2013
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the document listed below has been sent

by U.S. Mail to:

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1. *Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari.*

August 15, 2013
Columbia, SC

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