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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

In Re: John W. Gardner, The Gardner Law Firm, P.A.

Appellate Case No. 2024-001130

RETURN TO PETITION FOR ORIGINAL JURISDICTION

Respondents John W. Gardner[1] and The Gardner Law Firm, P.A. (hereinafter "Gardner") submit the following in return and opposition to the petition filed seeking to have this Court hear this petition in its Original Jurisdiction. The petition should be denied for multiple reasons, including procedural deficiencies, the nature of the underlying dispute, and the dispute's procedural posture, all of which combine to make this petition fundamentally incompatible with this Court's policy of limited and infrequent invocation of original jurisdiction.

Further responding, Gardner submits the following:

I. THE PETITION IS PROCEDURALLY DEFICIENT.

Pursuant to Rule 245(c), a petition for original jurisdiction requires that a petitioner[2] serve "a complaint setting forth the claim for relief in the manner specified by Rule 8, SCRCP." No such complaint has accompanied this petition. Further, the petition was nearly exclusively a

[1] Gardner is a lawyer licensed to practice in Florida since 1988 and maintains his office in Brandon, Florida.

[2] No party or person was identified as "Petitioner" in the caption or signature block accompanying the filing. It is respectfully submitted that the true party in interest are the plaintiff and/or their counsel in a related action pending in circuit court, as discussed in paragraph 2, infra.

recitation of "facts" that are disputed as to content and meaning, not evidencing a useful and settled factual record upon which this Court could fulfill its "primary function" which "is to act as an appellate court to review appeals from the trial courts." *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356, 357 (1991).

II. NO SIGNIFICANT PUBLIC INTEREST OR EMERGENCY JUSTIFIES EXERCISE OF ORIGINAL JURISDICTION GIVEN THE PENDING CIRCUIT COURT ACTION ADDRESSING THE UNDERLYING DISPUTE.

While Article V, § 5, of the South Carolina Constitution vests this Court with the authority to entertain actions in its original jurisdiction, it has stated previously that it "will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State." *Key* at 357. "Only when there is an extraordinary reason" should this Court exercise such jurisdiction. *Id*.

Presently, a near identical dispute is pending in the Court of Common Pleas for Orangeburg County, captioned as *Tony-T Automotive Group, LLC d/b/a Tony T Chrysler Dodge Jeep Ram of Orangeburg v. UniFirst Corporation et al* (Case No. 2024-CP-38-00826). In that matter, the plaintiff has filed suit against UniFirst Corporation, two of its named agents, and "John Doe, in his official capacity as UniFirst agent." **Exhibit A**. The complaint in that action does not name Gardner as a defendant, but discusses the same correspondence, communications, and actions of Gardner that are attributed to Defendant UniFirst within its factual allegations that go on for pages upon pages, nearly verbatim to that included in this petition directly against Gardner in this Court (and including same exhibits in both courts). *Id*. at pp. 14-24, and Pet. pp. 1-8.

In the circuit court action, the plaintiffs seek damages and other specific relief. In contrast, with this petition, the concluding prayer for relief simply requests that this Court "make whatever

determination the Court may deem just and proper." (Pet. p. 11). Stated otherwise, Plaintiff seeks tangible relief in the circuit court, and Petitioner a mere advisory opinion in this forum, highlighting the lack of "extraordinary" circumstances that would compel this Court to intervene. It appears Petitioner wants the circuit court action to wait for this Court to act on this petition, where if anything, precedent provides that the circuit court should resolve all disputes and issues first.

III. CITED PRECEDENT JUSTIFIES DENIAL OF A GRANT OF THIS PETITION.

The petition cites a case where this Court "recently addressed" an allegedly similar circumstance. (Pet. p. 9). If the Court has addressed a similar circumstance, then that would justify *denial* of this petition, as it would fail to represent a novel or important issue, especially if the Court had "recently" done so. Efficiency and precedent both favor this Court declining to take up an allegedly similar issue again.

Nevertheless, the case cited in the petition, *Ex parte Westbrook* 429 S.C. 618, 840 S.E.2d 926 (2020),[3] is distinguishable on its facts, even if petitioner's slanted factual recitation in the petition is accepted as accurate. That cited case involved an LLC, not a licensed lawyer from another jurisdiction, and an LLC is precluded from even representing itself in legal proceedings. S.C. Code § 40-5-320; *Renaissance Enter. v. Summit Teleservices*, 334 S.C. 649, 515 S.E.2d 257, (1999).

Further, the cited case involved the LLC openly stating that it would control locally licensed counsel, and the LLC threatened to file a lawsuit even when the underlying agreement precluded such a lawsuit (i.e. making obvious mistakes a lawyer would not). None of that

[3] The petition cites this case on page 9, but does so as "*In Re: The Murkin Group, LLC*, Appellate Case No. 2018-002263 Filed March 18, 2020."

happened in this instance, which a complete factual record, like the one being developed in the pending circuit court matter, would ultimately confirm. Existing precedent is more than sufficient for the circuit court to address this issue on the merits, and this Court's extraordinary intervention is not necessary or appropriate.

IV. THERE EXISTS A SEPARATE AND ADEQUATE PROCESS TO INVESTIGATE CONDUCT AND CLAIMED JUSTIFICATION THEREFORE AFTER A PROPER FACTUAL RECORD IS ESTABLISHED.

Petitioner references a review of the South Carolina public index to object to the level of presence of UniFirst therein, but acknowledges "all of the filed matters are done via one of two South Carolina law firms with South Carolina licensed lawyers." (Pet. p. 7). Petitioner then merely speculates as to other supposed activity of Gardner, but fails to acknowledge what it disclosed in the Petition on page 5, that Gardner openly articulated the basis by which he was acting himself in the effort to resolve the contractual dispute via alternative dispute resolution mechanisms, and why he believed doing so was proper.

The relevant and cited Rule of Professional Conduct states that a lawyer in good standing and licensed in another jurisdiction "may provide legal services on a temporary basis in this jurisdiction that… (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction." Rule 5.5(c)(3), RPC, Rule 407, SCACR. The RPC are often open to interpretation and application in context, as they state directly. See Rule 407, Preamble ("Within the framework of these Rules, however, many difficult issues of professional discretion can arise.").

Gardner's invocation of Rule 5.5(c) is *not* an after-the-fact, discovered defense, but good faith, contemporaneous explanation and belief grounded in the RPC, and specifically the portion

thereof that recognizes that interests of the public are furthered by promotion of ADR. Comment to that rule explains the inherent ambiguity in the rule and (c) exception:

> There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis…

Rule 5.5, Comment 6, RPC.

Whether that rule and related restrictions on such activity (such as those found in Rule 404(j) and (k), SCACR) were fully met by Gardner in these specific circumstances, and what to do if they were not, are first and foremost factual issues not yet ready for this Court's consideration given the absence of a record. That is true even though this Court certainly is the final arbiter as to whether someone has complied with the Rules of Professional Conduct and other Appellate Court Rules that this Court promulgates pursuant to its authority. *See* S.C. Code § 40-5-20 ("The Supreme Court may from time to time prescribe, adopt, promulgate and amend such rules and regulations as it may deem proper (a) defining and regulating the practice of law… [and] (c) prescribing a code of ethics governing the professional conduct of attorneys at law…").

While the State Constitution commits to this Court the duty to regulate the practice of law per S.C. Const. art. V, § 4 and S.C. Code Ann. § 40-5-10, it additionally is the "sole authority to discipline attorneys and decide appropriate sanctions rests with this Court." *In re Wern*, 431 S.C. 643, 649, 849 S.E.2d 898, 901 (2020) (citations omitted). Nevertheless, this Court is also empowered to "prescribe, adopt, promulgate and amend such rules and regulations as it may deem proper… (d) prescribing the procedure for disciplining, suspending, disbarring and reinstating attorneys at law" pursuant to S.C. Code § 40-5-20, and under that authority has established an obvious and detailed process whereby such issues, and the conduct of individuals in such context,

must be investigated and a factual record developed before the Court must make such final determinations and consider related action. *See* Rule 413, SCACR ("Rules for Lawyer Disciplinary Enforcement").

Consideration of the conduct of lawyers, especially in the context that is specifically contemplated and provided for under the Rules of Professional Conduct, are not appropriately accelerated past that Court-established RLDE mechanism and into this Court for its initial consideration in any but the most extreme and rare instances wherein the public record is sufficient alone to justify action. *See In re Murdaugh*, 437 S.C. 15, 16, 875 S.E.2d 625, 626 (Mem.)(2022)("we take this step today based on our ability to conclude from the public record..."). Generally, as discussed supra, invocation of this Court's Original Jurisdiction requires extraordinary circumstances, but bypassing the procedures set forth in the RLDE are even more rare and exceptional. Moreover, such circumstances are clearly not present in this matter, as it otherwise already is proceeding towards a resolution in a lower court, and could be proceeding in another forum created by this Court.

CONCLUSION

Setting aside the procedural defects of the petition in this matter, it is abundantly clear that the extraordinary relief of this Court's original jurisdiction is not warranted here. The companion litigation currently pending in Orangeburg county, can more than adequately be addressed by the trial court in that action, and any other consideration by this Court premised upon application of, or compliance with, rules governing the courts or practice of law should not bypass the processes established to provide a suitably thorough record upon which this Court may then examine, determine, and pronounce as may be appropriate.

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Respectfully submitted,

s/ Harvey M. Watson III

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