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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith Jr., Circuit Court Judge

Appellate Case No.: 2026-002038

Abdellah El Farissi..... Petitioner

v.

Newberry College .....Respondent

RESPONDENTS' RETURN TO PETITION FOR A WRIT OF CERTIORARI

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I. COUNTER QUESTIONS PRESENTED FOR REVIEW

A. Can *Certiorari* Be Granted When Petitioner has Failed to Preserve His Arguments?

B. Did the Court of Appeals Err in Affirming the Dismissal of Petitioner's Claim?

II. COUNTER STATEMENT OF THE CASE

A. Relevant Factual Background

Petitioner Abdellah El Farissi ("Petitioner") brings this matter as a result of his separation from his employment with Respondent Newberry College ("Respondent" or the "College"). In his Complaint, Petitioner pled that he formerly worked as an Assistant Tennis Coach for Respondent. (R. p. 8). Petitioner alleged that a former student of the College, Nastassia Chamoun ("Chamoun"), recorded a verbal conversation between Chamoun and Petitioner in Petitioner's vehicle. (*See id.*). Importantly, Petitioner alleged Chamoun herself was a participant in this conversation. (*Id.*). Petitioner further alleged that Chamoun shared the recording with three alleged College agents: former Head Tennis Coach Elias Fernandez ("Fernandez"), Associate Athletic Director Wayne Alexander, and, eventually, Athletic Director Sean Johnson (R. pp. 8, 10). Petitioner further alleged that he, "[s]trongly believe[d] that Nastassia Chamoun recorded [his] private conversation that occurred in a private setting, in [his] car, using her cell phone, which is a clear violation of [his] privacy rights." Petitioner further contended that Fernandez and Alexander terminated Petitioner's employment without consulting the College's Human Resources Department, and that when he inquired as to the reason for his termination, he was told "No Reason." (R. p. 8). Petitioner sought $750,000 in damages. (R. p. 8).

In an Amended Complaint, Petitioner set forth allegations which appeared to approximate an allegation of wrongful termination, alleged that Fernandez shared Chamoun's recording with Johnson, and increased damages $1,500,000. (R. p. 9–10).

B. Relevant Procedural Background

On February 8, 2024, Petitioner initiated this action by filing a Summons and Complaint in the Court of Common Pleas for Newberry County. (R. pp. 7–8; R. supp. p. 1). Petitioner's Complaint consisted of a series of factual allegations and was devoid of any supporting legal citations. On February 22, 2024, Petitioner filed an Amended Complaint, again with no legal citations, alleging additional facts and an increased financial demand. (R. p. 9–10).

The College filed a Motion to Dismiss the Complaint on March 7, 2024, arguing that Petitioner had failed to assert or identify a cognizable claim against the College based on his allegations. (R. p. 11). The College further argued that Petitioner also failed to state a cognizable claim related to the potential wrongful termination in violation of public policy claim. (*Id*.)

A month after filing the Complaint and Amended Complaint, Petitioner subsequently characterized his factual assertions as violations of federal and South Carolina wiretapping law in opposition to the College's Motion to Dismiss. Specifically, Petitioner argued that the College had failed to provide precedent showing how it was legal in South Carolina to wiretap a citizen without the citizen's consent. (R. p. 14). Petitioner also argued that wiretapping itself has criminal penalties. (*Id.*). Petitioner, for the first time citing federal and South Carolina wiretapping law, stated in conclusory fashion that Chamoun—a student at the College and not an employee—wiretapped Petitioner in violation of his privacy rights. (*See* R. pp. 15–16).

The College filed a Memorandum in Support of its Motion to Dismiss on May 15, 2024, again addressing Petitioner's failure to assert any causes of action against the College. (R. pp. 19–23). The Honorable Eugene C. Griffith Jr. heard the motion on July 8, 2024, granted the motion, and dismissed the Complaint with prejudice. The court entered its formal order on July 30, 2024, succinctly summarizing Petitioner's allegations as he was improperly recorded, called into a

meeting, and terminated. (R. p. 2). The court then stated that none of these statements or allegations indicated a cause of action against the College, even construed liberally. (*Id.*). First, the court stated that Petitioner had not alleged any unlawful act generally, as both the federal and South Carolina wiretap law allows for a party to a conversation to record that conversation. (R. p. 3). Second, the court stated that even if Petitioner had alleged unlawful conduct, he failed to state a claim against the College, specifically addressing the possibility that Petitioner had attempted to raise a claim for unlawful termination (*Id.*). Petitioner failed to file a motion to alter or amend the Trial Court's judgment following the issuance of the Order on appeal before the Court of Appeals. *See* Rule 59(e), SCRCP.

Petitioner filed an Appeal with the South Carolina Court of Appeals on August 15, 2024. In Petitioner's initial brief on appeal, Petitioner acknowledged that he raised federal and South Carolina wiretapping violations in his Opposition to the College's Motion to Dismiss for the first time. (Appellant Initial Br. at 3). Petitioner also stated, for the first time, that Chamoun made the recording "at the behest" of Fernandez. (*Id.*). Petitioner also took the opportunity, again for the first time, to cite the full language of 18 U.S.C. § 2511(2)(d), including the crime or tort exception to the one-party consent provision of the Federal Wiretap Act. (Appellant Initial Br. at 5). Petitioner did not explain how that exception applied. (*Id.*). In Petitioner's Final Reply Brief, Petitioner continued to develop his new argument, which, again, had been raised for the first time on appeal, that the Federal Wiretap Act prohibits interceptions made for the purpose of committing a criminal or tortious act. (Appellant Final Reply Br. at 2). Specifically, Petitioner alleged that the recording was made at the direction of Fernandez as part of a scheme to terminate his employment. (*Id*.).

On July 29, 2026, the Court of Appeals affirmed the Trial Court's decision, holding that the Trial Court had not erred in granting the College's motion and dismissing the complaint with

prejudice on the grounds that no unlawful interception occurred because Chamoun was a party to the conversation she recorded, regardless of whether Chamoun had recorded Respondent at the direction of Fernandez or not. *El Farissi v. Newberry College*, 2026-UP-389 (S.C. Ct. App. dated July 29, 2026) at 2. After the Court of Appeals denied Petitioner's Petition for Rehearing *El Farissi v. Newberry College*, S.C.Ct.App. Order dated Aug. 20, 2026, Petitioner filed a Petition for *Writ of Certiorari* ("Petition") on September 15, 2026.

III. ARGUMENTS FOR DENYING CERTIORARI

As the Appellate Court Rules require, a *writ of certiorari* will be granted only where there are special and important reasons: novel questions of law; dissent in the decision of the Court of Appeals; the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; substantial constitutional issues are directly involved; or where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. No such reasons exist here.

As a threshold matter, Petitioner continues to challenge aspects of his case he did not preserve for review on appeal. Petitioner did not sufficiently plead that Respondent committed an unlawful act at the Trial Court level, but that has not stopped Petitioner from attempting to develop an argument regarding the Federal Wiretap Act that he never made in his pleadings and has attempted to introduce in subsequent appellate proceedings.

Petitioner glosses over these failures and argues that this Court should grant a *writ* on the grounds that this matter presents novel questions of law and that the Court of Appeals' decision conflicts with a prior decision of this Court. *See* Petition, p. 7. But Petitioner's failure to properly plead his causes of action and disagreement with the Court of Appeals' decision does not give rise

to "special and important reasons" warranting *certiorari*. For this reason alone, this Honorable Court should deny Petitioner's Petition for a Writ of Certiorari.

A. Petitioner has not preserved his arguments on appeal.

As a threshold matter, new arguments raised by Petitioner in his appeal should not be considered by this Court. At the trial court level, Petitioner failed to plead a violation of the Federal Wiretap Act in either his Complaint or his Amended Complaint. At no point has he raised the issue of the "crime or tort" exception to the one-party consent provision of the Federal Wiretap Act, nor had he pled that the crime or tort applicable to him was a conspiracy to terminate him. Accordingly, these allegations have not been preserved for appellate review, and the *writ of certiorari* must be denied on preservation grounds.

"A great number of reported cases in South Carolina . . . and more recently the appellate court and rules of civil procedure have emphasized the important and *absolute necessity* of ensuring that all issues and arguments are presented to the lower court for its consideration." *Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 23, 502 S.E.2d 772, 779 (2004) (emphasis added). "Issues and arguments are preserved for appellate review *only when they are raised to and ruled on by the lower court*." *Id.* at 23, 602 S.E.2d at 779–80 (emphasis added); *see also Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'") (quoting *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) ("South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal."); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (finding that a party cannot argue one theory at trial and a different theory on appeal); Rule 210(c), SCACR (record on appeal *shall not include matter which was not*

presented to the lower court) (emphasis added). "If the [appellant] has raised an issue in the lower court, but the court fails to rule upon it, the appellant *must* file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 704, 869 S.E.2d 859, 867 (Ct. App. 2022) (quoting *I'On* at 422, 526 S.E.2d at 724) (emphasis added).

Here, Petitioner failed to raise claims for violation of the Federal Wiretap Act in his Complaint or his Amended Complaint. Petitioners also failed to file a motion to alter or amend the Trial Court's judgment following the issuance of the Order on appeal before the Court of Appeals. Further, by his own admission, Petitioner did not raise a Federal Wiretap Act claim at all until he "opposed dismissal and invoked the Federal Wiretap Act." Petition, p.6. While Petitioner goes on to say he "expressly placed before the Court of Appeals the complete language of 18 U.S.C. § 2511(2)(d)," *id.*, he neglects to say that his appellate brief was the first time he had invoked the statute in its entirety or attempted to provide context around this new position.

Even if Petitioner had properly raised a claim in the Trial Court for violation of the Federal Wiretap Act, which he did not, Petitioner also attempted to raise new arguments on appeal regarding the crime or tort exception to the one-party consent provision of the Federal Wiretap Act and alleged support for that exception to apply. Specifically, Petitioner contends that the crime or tort exception applied because agents of the College had conspired with Chamoun to terminate Petitioner.

The issues of the crime or tort exception applying and the alleged conspiracy to terminate Petitioner were not preserved for appellate review because: (i) neither was raised before or ruled upon by the lower court; and (ii) Petitioner failed to file a motion to alter or amend the lower

court's judgment following issuance of the Order. Accordingly, these issues were not preserved for appellate review and certiorari must be denied.

B. Even if Petitioner's Arguments were Preserved, this Court Should not Grant a *Writ of Certiorari* Because Petitioner's Position Does Not Create a Novel Issue of Law, Conflict with a Prior Decision of This Court or Any South Carolina Court, Nor Any Other Reason this Court Grants Petitions for *Writ of Certiorari*.

As stated above, a *writ of certiorari* will be granted only where there are special and important reasons: novel questions of law; dissent in the decision of the Court of Appeals; the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; substantial constitutional issues are directly involved; or where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. Petitioner concedes that: (1) there is no dissent in the decision of the Court of Appeals; (2) there are no constitutional issues involved in this case; and (3) no federal question is included in the Court of Appeals' decision that conflicts with a decision of the Unted States Supreme Court. *See* Petition, *passim*; *see also* Rule 242(b)(2), (4)–(5). Instead, Petitioner argues that this Court should grant a *writ* to resolve a novel issue of law and that the Court of Appeals decision conflicts with a decision of this Court. *See* Petition, p. 7. Neither of those arguments holds any weight.

First, Petitioner fails to identify any novel issue of law the Court of Appeals erred in deciding. *See* Rule 242(b)(1). Rather, Petitioner misstates the procedural history of this case in an effort to keep his case alive. Specifically, Petitioner argues that the "narrower federal question" at the heart of his Petition is "when § 2511(2)(d)'s criminal-or-tortious-purpose qualification is properly presented in a Rule 12(b)(6) case, participant status alone may dispose of the federal claim without examining whether the pleaded allegations and reasonable inferences implicate that

statutory qualification." Petition, p. 11. But, this is not a novel question of law and Petitioner's cited cases provide no support for this proposition. Indeed, South Carolina courts have considered this issue multiple times and none of those decisions are in conflict the jurisprudence of this state.

South Carolina's ample jurisprudence on this subject supports the Court of Appeals' holding and demonstrates that this issue is not novel, but well covered. *See Mays v. Mays*, 267 S.C. 490, 494, 229 S.E.2d 725, 726 (1976) ("18 U.S.C.A., Section 2511(2)(d) makes it clear that one party to a telephone conversation may lawfully tape the conversation without the other's knowledge or permission and subsequently disclose it."); *State v. White*, No. 2019-001971, 2022 WL 17665077, at *1 (S.C. Ct. App. Dec. 14, 2022) ("[T]he recordings were admissible because White consented to having his calls recorded. *See* 18 U.S.C. § 2511(2)(d) (defining the consent exception as when 'one of the parties to the communication has given prior consent to such interception')."); *State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808, 811 (Ct. App. 1996) ("Since Johnson was a party to the conversations and gave his consent to the recording, the tape was admissible. [. . .] Johnson's permission in the case *sub judice* vitiates any claims by Appellant of an unlawful interception or a violation of his expectation of privacy under the United States Constitution, and we further find there was no violation of Appellant's rights under South Carolina law. Therefore, we affirm the trial judge's ruling in this matter and hold that the taped conversations between Appellant and Johnson were properly admitted into evidence."); *see also Lancaster v. Warden, Perry Corr. Inst.*, No. 821CV03591TMCJDA, 2022 WL 1523692, at *8 n.7 (D.S.C. Apr. 14, 2022), *report and recommendation adopted sub nom. Lancaster v. Warden of Perry Corr. Inst.*, No. 8:21-CV-03591-TMC, 2022 WL 1522794 (D.S.C. May 13, 2022) (stating that 18 U.S.C. § 25111(2)(d) provides that it is not unlawful for a person not acting under color of law "'to intercept a wire, oral, or electronic communication, where such person is a party to the communication or

one of the parties to the communication has given prior consent to such interception.'"); *Sutton v. Sutton*, No. 3:08-CV-1894-CMC, 2009 WL 10710728, at *2 (D.S.C. Sept. 21, 2009) ("In his defense of the case, Defendant intends to offer evidence that any recordings were made while he was in the presence of Plaintiff, with her knowledge or consent, and/or under circumstances where she would have no expectation of privacy, activities which Defendant contends would not violate the Acts. *See* 18 U.S.C. §§ 2510(2), 2511(2)(d).").

Petitioner's reliance on *Caro v. Weintraub*, 618 F.3d 94 (2d Cir. 2010) is misplaced. *Caro* is at best, only slightly persuasive as a distant federal appellate opinion outside of South Carolina's state court purview and outside of its Federal appellate circuit. *See, e.g. Limehouse v. Hulsey*, 404 S.C. 93, 108–09, 744 S.E.2d 566, 575 (2013) (noting that the South Carolina Supreme Court often defers to the Fourth Circuit for interpreting federal law but is not obligated to do so in view of the lack of uniformity amongst the federal circuits). *Caro* does not stand for the proposition that a court must consider the crime or tort exception to the one-party consent provision of the Federal Wiretap Act. Rather, the *Caro* court's analysis was focused on whether the plaintiff's proposed amendment to a complaint would be futile under the circumstances. There, the *Caro* plaintiff did not plead any criminal or tortious conduct that would fall under the Act but argued that he would have pled as much if the district court had allowed him to amend his Complaint. *Id.* at 98. While the *Caro* court gave some thought to the crime or tort exception to the one-party consent provision of the Federal Wiretap Act, its primary focus was to assess if amendment of the complaint would be futile, not the circumstances under which such a claim would be properly pled. *See id.* at 100, 102. That is not the same procedural or analytical posture as here. Indeed, Petitioner, here, actually amended his complaint and did not include these allegations. And, perhaps more glaringly, Petitioner did not challenge the denial of his motion to dismiss at the trial level. Because the *Caro*

court undertook its analysis under circumstances not present in the instant case, namely deciding whether an amendment to a complaint would be futile, its persuasive value is nonexistent.

Likewise, Petitioner's reliance on *United States v. Jiau*, 734 F.3d 147 (2d Cir. 2013) is misplaced. *Jiau* was a suppression case answering the very narrow question of whether, when a call is made in furtherance of an insider trading conspiracy but is also recorded in the ordinary course of business, the recording is inadmissible under the Federal Wiretap Act. *Id.* at 151. Although the Second Circuit in *Jiau* did address the crime or tort exception, the particular exception was directly at issue in the matter and in an evidentiary setting, not in a pleading stage as here.

Neither of Petitioner's cases is applicable to the present matter, and neither case supports the argument that the present case provides for a novel issue of law needing review by this Court.

Put simply, this matter is not at odds with decisions of this Court, nor decisions of other South Carolina state and federal courts, regarding application of the one-party consent defense under the Federal Wiretap Act.

Therefore, because Petitioner fails to state any applicable reason for this Court to grant certiorari, this Court should decline to do so.

C. The Court of Appeals Correctly Affirmed the Dismissal of Petitioner's Complaint.

The foregoing notwithstanding, this Court need not grant *certiorari* because the Court of Appeals correctly affirmed the dismissal of Petitioner's Complaint. Even viewing the allegations in the light most favorable to Petitioner, the recording at issue was made by Chamoun, who was herself a party to the recorded conversation. South Carolina law expressly permits a person who is a party to a communication to record that communication, and such a recording does not constitute an unlawful interception. See S.C. Code Ann. § 17-30-30(C); *State v. Whitner*, 399 S.C.

547, 553, 732 S.E.2d 861, 864 (2012). Thus, as the Court of Appeals correctly held, no unlawful interception occurred regardless of whether Chamoun acted at Fernandez's request.

Petitioner's reliance on the federal statute's crime-or-tort exception does not undermine that conclusion. Neither Petitioner's Complaint nor his Amended Complaint alleged that Chamoun recorded the conversation for the purpose of committing a criminal or tortious act. Petitioner instead attempted to develop that theory during the appellate proceedings by alleging a conspiracy to terminate his employment. A court reviewing a Rule 12(b)(6) dismissal is limited to the allegations contained in the complaint, and Petitioner cannot avoid dismissal by relying on a theory and supporting allegations that were neither pleaded nor preserved below. The Court of Appeals therefore properly affirmed the dismissal based on the pleadings and issues that were actually before the Trial Court.

The Court of Appeals also correctly declined to consider Petitioner's claim that the Trial Court failed to demonstrate fairness and impartiality. Petitioner did not raise a specific objection concerning bias or impartiality before the Trial Court and did not obtain a ruling on that issue. His general statement that he intended to appeal did not inform the Trial Court that he was asserting judicial bias and was insufficient to preserve the issue for appellate review. Accordingly, the Court of Appeals correctly applied settled preservation principles, and its decision provides no basis for granting certiorari.

IV. CONCLUSION

This Court must deny the Petition for a *Writ of Certiorari*. Petitioner's arguments are not preserved. And, even if they were, Petitioner has not shown that this case presents a novel question of law or a conflict with any decisions of this Court or any South Carolina court, nor any other reason for which a petition for a writ of certiorari should be granted. Moreover, the Court of

Appeals properly affirmed the dismissal of Petitioner's complaint. Accordingly, for the reasons established above, this Honorable Court should deny the Petition for a *Writ of Certiorari*.

Respectfully submitted,

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