THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-12-0323

Mell Woods ..... Petitioner,

v.

John D. Hinson; Christine Jones; John C. Hinson; Kathy Huffstickle; Charles J. Hinson; William L. Hinson; Lois Hinson; Robert Breakfield, as Personal Representative of the Estate of Reba P. Hinson; Elaine H. Hensley; Robert H. Hinson; George Stanford, as Personal Representative of the Estate of Linda H. Stanford; William C. Hinson, Jr.; Darrell W. Hinson; Mary Roe and John Doe, fictitious names used to designate all other parties, whose names are unknown, and any and all other persons claiming any right,title, estate interest or lien upon the real estate described in the complaint; ..... Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner's question no. 1 for review is not preserved for further review by Writ of Certiorari because the question was not raised in Petitioner's Petition for Rehearing to the Court of Appeals. (Petitioner's question no. 1.)

2. The Court of Appeals correctly decided that the proper summary judgment standard was applied by the trial court and that Petitioner failed to demonstrate a genuine issue as to any material fact. (Petitioner's question no. 1.)

3. Petitioner's question no. 2 for review is not preserved for review by Writ of Certiorari because it does not relate to the issue actually decided by the Court of Appeals, and Petitioner has not shown an error of law. (Petitioner's question no. 2),

4. The Court of Appeals correctly decided that the issue described in Petitioner's Question no. 2 was not preserved for appellate review because it was not raised to and ruled on by the trial court.(Petitioner's question no. 2.)

5. The Court of Appeals correctly affirmed the trial court's grant of summary judgment because the evidence before the trial court established that the proper construction of Levie Hinson's last will showed that Reba Hinson was devised a life estate. (Petitioner's question no. 3.)

6. The Court of Appeals correctly ruled that Petitioner had no claim to the land by adverse possession because Petitioner would have to tack his adverse possession with that of his predecessor, Reba Hinson, who, as a life tenant, could not have been in adverse possession as against the remaindermen to her life estate. (Petitioner's question no. 4.)

CERTIORARI

Certiorari is an appellate proceeding for a higher court's reexamination of an action or decision of an inferior tribunal and provides a remedy to correct errors of law of inferior tribunals. Black's Law Dictionary (rev. 4th ed. 1968), 287; Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987); Jacoby v. South Carolina State Bd. of Naturopathic Examiners, 219 S.C. 66, 64 S.E.2d 138 (1951). Because a writ of certiorari is a matter of judicial discretion, there is no finite list of grounds or reasons for granting review by writ of certiorari, but Rule 242(b), SCACR, sets forth the most commonly recognized reasons.

Review on certiorari is confined to an examination of the decision of the Court of Appeals for errors of law or for findings of fact which are wholly unsupported by the evidence. Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009).

"Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR (emphasis added.); Kleckley v. Nw Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000.)

Petitioner does not explain how any of the Rule 242(b), SCACR, factors apply to his Petition.

COUNTER STATEMENT OF THE CASE

Appellant filed this action against members of the Hinson family, including the two personal representative defendants, on June 22, 2011. (R. pp. 591-603) In his Complaint Appellant describes the action as trespass to try title (R. p. 592, ¶ 3), and he alleges that he

is the owner of fee simple title to the land in question because he contracted to by the land from Reba Hinson who then owned the fee simple title (R. p. 596, ¶12); alternatively that he is a good faith purchaser without notice that Reba Hinson owned only a life estate (R. p. 596, ¶11); and, alternatively, that he and Reba Hinson, now deceased, together adversely possessed the property at issue for over 20 years (R. p. 598, ¶ 15).

The Respondents served their joint Answer and Counterclaim on August 25, 2011. In the Counterclaim, Respondents sought a declaratory judgment that the Defendants-remaindermen are the owners of the property at issue and an order requiring Appellant to vacate the property. (R. pp. 611-618.)

Notwithstanding the Appellant's characterization of his action, Respondents assert that in actuality this is a will construction case because the content of the Levie Hinson Last Will governs the outcome of the case. As will be made more clear below, the central question presented to and decided by the trial court was whether the Levie Hinson last will devised a life estate or fee simple title to Reba Hinson. It is well settled that "(t)he character of an action is determined by the main purpose of the complaint ...." Pate v. Thomas, 262 S.C. 365, 204 S.E.2d 571 (1974); Alford v. Martin, 176 S.C. 207, 180 S.E. 13 (1935).

Simultaneously with the service of the Answer and Counterclaim, Respondents filed and served a Motion for Summary Judgment (R. pp. 625-626) and supporting Affidavit of Defendant Breakfield, in his capacity as Personal Representative of the Estate of Reba Hinson. (R. pp. 627-635 and Ex. A [p. 636], Ex. B [p. 637], Ex. C [pp. 622-624], Ex. D. [pp. 638-643].)

Appellant filed and served a verified Response to Defendants' Motion for Summary Judgment dated September 28, 2011. (R. pp. 644-650.)

The Respondents' Motion for Summary Judgment was heard on November 9, 2011, Judge Goldsmith presiding. By Order dated December 29, 2011 the Respondents' Motion for Summary Judgment was granted. (R. pp. 701-704.)

Appellant served a Rule 59(e) Motion for Reconsideration on January 14, 2012. (R. pp. 705-721.) Respondents served their Amended Return to the Motion for Reconsideration on March 13, 2012. (R. pp. 722-729.) Judge Goldsmith elected to decide the Motion for Reconsideration without further oral argument. (R. p. 730.) By Order dated April 23, 2012, Appellant's Rule 59(e) Motion for Reconsideration was denied. (R. p. 731.)

Appellant served his Notice of Appeal on June 21, 2012. Unpublished opinion no. 2014-UP-010 was filed January 8, 2014. (A, 93-96.) Petitioner filed a Petition for Rehearing that was denied by Order filed February 20, 2014. (A, 09-10.) Petitioner's Petition for Writ of Certiorari was served on March 24, 2014.

ARGUMENTS

1. **Petitioner's question no. 1 for review is not preserved for further review by Writ of Certiorari because the question was not raised in Petitioner's Petition for Rehearing to the Court of Appeals (Petitioner's question no. 1), and**
2. **The Court of Appeals correctly decided that the proper summary judgment standard was applied by the trial court and that Petitioner failed to demonstrate a genuine issue as to any material fact. (Petitioner's question no. 1.)**

Petitioner's question no. 1 herein is the same as his Issue Presented no. 1 in his Appellant's Brief to the Court of Appeals. (A., 026, ¶ 1.) His argument is that the trial court used a higher evidentiary standard than the scintilla of evidence standard when it granted Respondents' motion for summary judgment and that there was at least a scintilla of evidence in the record to overcome the motion for summary judgment. (Appellant's Brief, A-032).

A. This issue was not raised in Petitioner's Petition for Rehearing to the Court of Appeals. (A., 01-07.) None of his grounds for rehearing mention the scintilla of evidence summary judgment standard or the existence of evidence in the record satisfying that standard. Accordingly, this issue is not preserved for review on certiorari. Rule 242(d)(2), SCACR; Kleckley v. Nw Nat'l Cas. Co., 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000.)

B. Alternatively, Respondents incorporate herein by reference their argument to the Court of Appeals on this question. (Respondents' Brief, A., 068, l. 13 to 074, l. 5.)

3. **Petitioner's question no. 2 for review is not preserved for review by Writ of Certiorari because it does not relate to the issue actually decided by the Court of Appeals and Petitioner has not shown an error of law. (Petitioner's question no. 2), and**

4. **The Court of Appeals correctly decided that the issue was not preserved for appellate review because it was not raised to and ruled on by the trial court.(Petitioner's question no. 2.)**

A. Petitioner's question no. 2 herein is identical to his Issue on Appeal no. 2 in his Appellant's Brief to the Court of Appeals. (A., 026, ¶ 2.) The Court of Appeals addressed the issue in its opinion by concluding that the issue was not preserved for appellate review because it was not raised to and ruled on by the circuit court and was raised for the first time in Petitioner's Rule 59(e) motion for reconsideration. (A. 096, ¶ 2). Petitioner has now simply stated the same issue/question and made the same argument that he made to the Court of Appeals. He has not raised the question of whether the Court of Appeals committed an error of law in its decision, and he has not demonstrated an error of law.

B. Alternatively, Respondents incorporate herein by reference their argument to the Court of Appeals on this question. (Respondents' Brief, A., 074, l. 6 to 075, l. 9.)

5. The Court of Appeals correctly affirmed the trial court's grant of summary judgment because the evidence before the trial court established that the proper construction of Levie Hinson's last will showed that Reba Hinson was devised a life estate. (Petitioner's question no. 3.)

Petitioner's argument is that his verified complaint, without more, created a genuine issue of material fact. (Petition For Writ of Certiorari, p. 7.) The Court of Appeals addressed this issue by concluding that the interpretation of a last will is question of law, that the ambiguity in Levie Hinson's last will was a patent ambiguity properly resolved as a matter of law, that rules of construction require that the provision of the last will providing for a remainder interest could not be ignored, and that the verified complaint contained only conclusory allegations of title that were insufficient to withstand summary judgment. (A.

094 to 096.)

As a part of his question no. 3, Petitioner alleges in his Petition that the Court of Appeals did not give proper consideration to the case of Moore v. Sanders, 15 S.C. 440 (1881.) (Petition for Writ of Certiorari, p. 1, ¶ 3.) Although Petitioner included the cite to Moore v. Sanders in his Issue Presented no. 3 in his Appellant's Brief to the Court of Appeals (A. 026, l. 14) he did not cite the Moore case in his Appellant's Brief argument to the Court of Appeals on the issue. (A. 034.) The Court of Appeals did not cite to the Moore v. Sanders case in its opinion. (A. 093-096.)

Being cognizant of the principle that because decisions involving wills are fact-specific, and case law precedent can provide only general guidance in will construction cases, Guaranty Bank and Trust Co. v. Byrd, 287 S.C. 96, 337 S.E.2d 231 (Ct. App. 1985), an examination of Petitioner's reliance on Moore v. Sanders, 15 S.C. 440 (1881) will be made.

Moore is a will construction case. The testator's will devised an estate in fee, and then used language determined by the court to be a condition subsequent. The Supreme Court affirmed the Circuit Court's order that the will devised a fee interest and that the condition subsequent was void because it was repugnant to the fee. How this advances Petitioner's argument herein is a mystery. Although the Court of Appeals did not cite the Moore case, it did rely upon and cite other more recent cases that address the same principles of law. The primary case cited by the Court of Appeals was Wates v. Fairfield Forest Products Co., 210 S.C. 319, 42 S.E.2d 529 (1947) (after clearly making a gift in a last will, words of doubtful import found in a subsequent clause will not cut down the estate previously granted unless the subsequent words are at least as clear as the words in which the

interest was first given).

Petitioner's reliance on Moore v. Sanders, 15 S.C. 440 (1881) is misplaced. There was no error of law.

6. The Court of Appeals correctly ruled that Petitioner had no claim to the land by adverse possession because Petitioner would have to tack his adverse possession with that of his predecessor, Reba Hinson, who, as a life tenant, could not have been in adverse possession as against the remaindermen to her life estate. (Petitioner's question no. 4.)

This is the same argument made to the Court of Appeals in Appellant's Brief. (A. 035-036.) Petitioner argues that the case of Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992) is controlling and that the Court of Appeals did not follow the law of Miller. As explained in Respondents' Brief to the Court of Appeals:

> Appellant's reliance on Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992) is misplaced. In Miller, the court addressed a situation where a statute of limitations for adverse possession had commenced and subsequently, a life estate was created. The argument was that the subsequent creation of the life estate would stay or "arrest" the running of the adverse possession period. The court in Miller disagreed. Here, Reba Hinson's life estate was not created after her alleged adverse possession limitations period started to run. Assuming that Reba Hinson had an adverse possession claim, its limitations period would have started to run at the exact same time as her life estate was created, namely at the death of Levie Hinson.
>
> Unlike Miller there is nothing in this case that can give rise to a claim that the statute of limitations period was ever suspended. Miller is a limitations period case, whereas the case on appeal herein is a period of possession case.
>
> (A. 087, l. 3-14.)

The balance of Respondents' argument to the Court of Appeals in their Respondents' Brief is incorporated herein by reference. (A. 083, l. 9 to 087, l2.)

CONCLUSION

There is nothing in this case warranting the discretionary grant of the Petition for Writ of Certiorari. Petitioner has used the court system and the time-consuming process of litigation to extend his occupancy of land belonging to the Hinson family. The history of Petitioner's litigation with the Hinsons is set out in the Statement of Facts in Respondents' Brief to the Court of Appeals. (A. 057-068.) Since that part of the Brief was written, the following has occurred:

In case no. 1 (Court of Appeals appellate case no. 2011-191876), the Court of Appeals decided the appeal adversely to Petitioner in an unpublished per curiam opinion, and a Petition for Writ of Certiorari has been filed by Petitioner and is pending in the Supreme Court (Supreme Court appellate case no. 2013-01947).

In case no. 2 (Court of Appeals appellate case no. 2011-201066), the Court of Appeals decided the appeal adversely to Petitioner in an unpublished per curiam opinion, and a Petition for Writ of Certiorari has been filed by Petitioner and is pending in the Supreme Court (Supreme Court appellate case no. 2013-01946).

In case 3 (Court of Appeals appellate case no. 2012-212429), the Court of Appeals recently decided the case adversely to the Petitioner in an unpublished per curiam opinion, 2014-UP-158, filed April 2, 2014.

In case no. 4, the Court of Appeals recently decided the case adversely to the Petitioner in an unpublished per curiam opinion, 2014-UP-076, filed February 26, 2014. Petitioner's Petition for Rehearing has been filed.

There is the above-captioned case, also decided adversely to the Petitioner by an unpublished per curiam opinion, followed by a Petition for Writ of Certiorari.

Five cases decided adversely to the Petitioner in the trial court; five unsuccessful appeals to the Court of Appeals by the Petitioner herein, each decided by an unpublished per curiam opinion; three Petitions for Writ of Certiorari filed, with two other Petitions for Writ of Certiorari no doubt on the way.

For the reasons described herein, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

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April 7, 2014

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CERTIFICATE OF SERVICE

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondent in the above-captioned matter, do hereby certify that I have served the Petitioner, Mell Woods, with copies of **Respondents' Return to Petition for Writ of Certiorari,** postage prepaid and return address clearly indicated on said envelope, on this 7th day of April, 2014 at the following address:

Mell Woods
P. O. Box 2603
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Plaintiff, pro se

Linda T. Abernethy