

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM YORK COUNTY  
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

**RECEIVED**  
AUG 15 2014  
S.C. Supreme Court

Opinion No. 2013-UP-296 (S.C. Ct. App. filed Aug. 28, 2013)

Ralph Wayne Parsons, Jr. and Louise C. Parsons, ..... Respondents,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and  
South Carolina Bank & Trust, N.A., ..... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the ..... Petitioner.

**PETITIONER'S MOTION TO SERVE AND FILE SUPPLEMENTAL APPENDIX**

Pursuant to Rule 240, SCACR, Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH") hereby moves this Court to permit JWH to serve and file a supplemental appendix to include documents addressing a certified question which was outside the scope of JWH's petition for certiorari and, therefore, were not included in the Appendix.

These documents include the Affidavit of Daniel S. McQueeney, Jr., counsel of record for JWH, a copy of which is attached hereto as Exhibit A. This affidavit supports JWH's position on certiorari that the interpretation of the South Carolina Appellate Court Rules ("SCACR") advocated by the above-named respondents ("Respondents") would impermissibly create a trap for a lawyer or party under the circumstances of this case.

In addition, JWH seeks to include a March 14, 2014, letter from the Clerk of the South Carolina Court of Appeals, a copy of which is attached to the affidavit as Exhibit 1, to establish

that JWH's suggestion for rehearing *en banc* was not finally determined until March 14, 2014.

### Procedural Posture

The present matter involves an appeal from the circuit court's order denying JWH's motion to compel arbitration. **App. pp.4-8.** On June 26, 2013, the Court of Appeals issued an unpublished opinion, summarily affirming the order on appeal. **App. pp.261-263.** On July 10, 2013, JWH served and filed a petition for rehearing, including a suggestion for rehearing *en banc*, of the June 26, 2013 opinion of the Court of Appeals. **App. pp. 264-284.**

On August 28, 2013, the Court of Appeals granted JWH's petition for rehearing, withdrew its previous opinion, and re-filed a substituted opinion, again affirming the order on appeal. **App. pp.277-278.** The Court of Appeals did not address JWH's suggestion for rehearing *en banc* at this time. After contacting the Clerk of the Supreme Court of South Carolina to confirm that the Supreme Court would not accept a petition for writ of certiorari until the Court of Appeals *denied* a petition for rehearing, JWH served and filed a petition for rehearing as to the substituted opinion, which the Court of Appeals denied by order filed on March 14, 2014. **App. pp.289-310; pp.311-312; Ex. A, ¶¶10-14.** In the letter enclosing the denial of JWH's petition for rehearing of the substituted opinion, JWH was informed, for the first time, that the Court of Appeals had rejected JWH's suggestion for rehearing *en banc*. **Ex. A, ¶15-16; Ex. 1 to Ex. A.**

Pursuant to Rule 242(b), SCACR, JWH served and filed a petition for writ of certiorari to this Court on April 14, 2014. By order entered on July 14, 2014, this Court granted the petition, but requested that the parties brief the issue of whether JWH timely filed a petition for writ of certiorari under the circumstances of this case.

### Argument

In granting JWH's petition for a writ of certiorari to review a substituted opinion of the

Court of Appeals, this Court asked the parties to address the issue of whether the petition for writ of certiorari was timely filed where, as here, JWH petitioned for rehearing of the substituted opinion of the Court of Appeals.

JWH requests that the Affidavit of Daniel S. McQueeney, Jr., counsel of record for JWH in this appeal, be included in a supplemental appendix to establish that, in an abundance of caution, JWH's counsel contacted the Supreme Court of South Carolina to determine whether the Court had a policy regarding whether it would accept a petition for writ of certiorari before a petition for rehearing had been denied by the Court of Appeals. This affidavit establishes that counsel was informed that the Court of Appeals would have to deny a petition for rehearing before the Supreme Court would accept a petition for a writ of certiorari.

As a consequence, the affidavit supports JWH's position on certiorari that an interpretation of the SCACR advocated by Respondents would impermissibly create a trap for a lawyer or party, even after due diligence on the part of such lawyer or party. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (“[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . .”); see also In re November 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 641, 686 S.E.2d 683, 688 (2009) (“[C]ourts should not interpret procedural rules to create a trap for unwary lawyers.”).

Moreover, the affidavit and the March 14, 2014 letter from the Clerk of the Court of Appeals establish that the Court of Appeals had not finally acted upon JWH's initial petition for rehearing and for rehearing *en banc* because, pursuant to Rule 219(b), when a party suggests that a petition for rehearing be determined *en banc*, “the parties shall be advised that the suggestion has been rejected.” **Ex. A, ¶¶15-16; Ex. 1 to Ex. A.** JWH was not advised that the suggestion

had been rejected until March 14, 2014.

**Conclusion**

Based on the foregoing, JWH respectfully requests that JWH be permitted to file a supplemental appendix to include the affidavit attached hereto as Exhibit A and the letter attached as Exhibit 1 to the affidavit. These documents address an additional certified question by the Supreme Court of South Carolina, which was outside the scope of JWH's petition for certiorari. This issue would normally be addressed as part of a motion to dismiss, in which case the documents would have been properly includable as attachments to such motion. Consequently, JWH asserts that the motion should be GRANTED.

Respectfully Submitted,

  
PRATT-THOMAS WALKER, PA

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Ian W. Freeman (S.C. Bar #72736)  
G. Trenholm Walker (S.C. Bar #5777)  
Daniel S. McQueeney, Jr. (S.C. Bar #6802)  
P.O. Drawer 22247 (29413-2247)  
16 Charlotte Street  
Charleston, SC 29403  
Phone: (843) 727-2200  
Email: iwf@p-tw.com  
Attorneys for Petitioner John Wieland Homes and  
Neighborhoods of the Carolinas, Inc.

August 13, 2014  
Charleston, South Carolina

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In The Supreme Court

APPEAL FROM YORK COUNTY  
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

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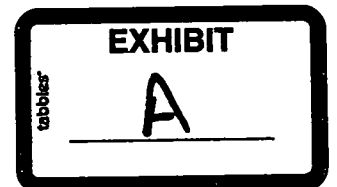
John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and  
South Carolina Bank & Trust, N.A., ..... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the ..... Petitioner.

**AFFIDAVIT OF DANIEL S. MCQUEENEY, JR.**

Daniel S. McQueeney, Jr., first being duly sworn, deposes and says:

1. I am a duly licensed lawyer admitted to the South Carolina Bar in good standing and actively engaged in the practice of law.
2. I am over twenty-one years of age and competent to make the statements set forth herein.
3. I hereby affirm the statements contained herein are known to me to be true, based upon my own personal knowledge, except as to those matters stated on information and belief, which I believe to be true.
4. Since 2007, I have practiced law with Pratt-Thomas Walker, P.A.
5. Pratt-Thomas Walker, P.A. represents Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH") in the present action, including the current appeal.



6. During this appeal, I have served as counsel for JWH, along with Ian W. Freeman and G. Trenholm Walker, also of Pratt-Thomas Walker, P.A.

7. On June 26, 2013, the Court of Appeals issued an unpublished opinion, summarily affirming the order on appeal. **App. pp.261-263.**

8. On July 10, 2013, on behalf of JWH, Pratt-Thomas Walker, P.A. served and filed a petition for rehearing, including a suggestion for rehearing *en banc*, of the June 26, 2013 opinion of the Court of Appeals. **App. pp. 264-284.**

9. On August 28, 2013, the Court of Appeals granted JWH's petition for rehearing, withdrew its previous opinion, and re-filed a substituted opinion, again affirming the order on appeal. **App. pp.277-278.**

10. On August 28, 2013, in an abundance of caution, I contacted the clerk's office of the Supreme Court of South Carolina regarding the procedural aspects of petitioning for certiorari.

11. During this conversation, I explained that I was counsel of record for a matter pending in the Court of Appeals, that a petition for rehearing had been granted in the matter, and that the Court of Appeals had withdrawn its previous opinion and re-filed a substituted opinion.

12. During this conversation, I asked whether, from an administrative perspective, the Supreme Court had a policy regarding whether a petition for certiorari would be accepted before a petition for rehearing was denied.

13. I was informed that the Supreme Court would not accept a petition for certiorari until the Court of Appeals had *denied* a petition for rehearing.


14. Based on this conversation, after communicating with other counsel for JWH, we determined that the appropriate course would be to file a petition for rehearing with respect to the

substituted opinion of the Court of Appeals.

15. With respect to JWH's suggestion that rehearing be *en banc*, I did not receive notice that the suggestion had been acted upon until I received a letter from the Clerk of the Court of Appeals, enclosing the denial of JWH's petition for rehearing of the substituted opinion.

16. The above-referenced letter, a copy of which is attached hereto as Exhibit 1, was dated March 14, 2014.

FURTHER AFFIANT SAYETH NOT!!!

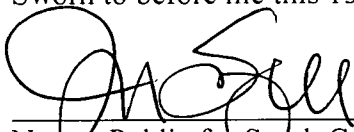
  
\_\_\_\_\_  
Daniel S. McQueeney, Jr.

August 13, 2014  
Charleston, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

I, Janet Segell, do hereby certify that Daniel S. McQueeney, Jr. personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this the 13th day of August 2014  
Sworn to before me this 13<sup>th</sup> day of August 2014

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 7/23/2023



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

March 14, 2014

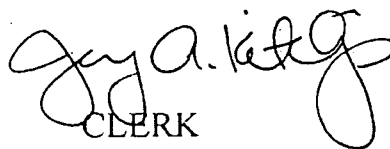
Mr. Daniel Simmons McQueeney, Jr., Esquire  
PO Drawer 22247  
Charleston SC 29413-2247

Re: Parsons, Ralph v. John Wieland Homes  
Appellate Case No. 2011-201528

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

  
CLERK

cc: George Trenholm Walker, Esquire  
Herbert W. Hamilton, Esquire  
Ian Wesley Freeman, Esquire  
Tracy Thompson Vann, Esquire  
Christi P. Cox, Esquire



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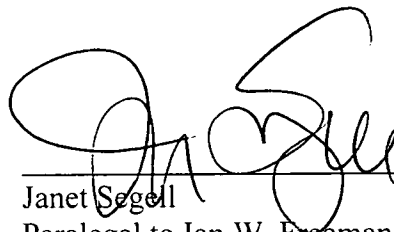
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PROOF OF SERVICE

I hereby certify that a true and correct copy of the Petitioner's Motion to Serve and File Supplemental Appendix was served on this 13th day of August, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

Herbert W. Hamilton, Esq.  
Tracy T. Vann, Esq.  
Hamilton Martens Ballou and Carroll, LLC  
130 E. Main Street  
Rock Hill, SC 29730



Janet Segel  
Paralegal to Ian W. Freeman, Esq.