

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, former Circuit Judge for the Ninth Judicial Circuit

Appellate Case No. 2015-000355

Alan Sheppard

Petitioner,

v.

William O. Higgins, Lynn McCants,
Ronald C. Owens, Russell Bennett,
Charles P. Darby, and Kiawah Resort
Associates, LP,

Respondents.

**RESPONDENTS RONALD C. OWENS, RUSSELL BENNETT, CHARLES P.
DARBY, AND KIAWAH RESORT ASSOCIATES, LP'S RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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March 24, 2015

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SC SUPREME COURT

QUESTIONS PRESENTED

- I. Has Petitioner failed to present an issue for review by this Court where the Petition for Writ of Certiorari fails to address the decision of the Court of Appeals, where the Petition fails to apprehend that the Court of Appeals reviewed the Record to determine whether any unpled claims existed that were not otherwise barred but found none, and where Petitioner has failed to assign any error to the Court of Appeals for this Court to consider for possible review?

- II. To the extent that any consideration of the Petition is necessary or appropriate, did Petitioner have a fair opportunity to present his claims where he has already asserted the claims in two different actions, where Petitioner agreed to release the claims in the first action, where Petitioner stipulated to the dismissal of all claims that were brought or that could have been brought in the prior action with prejudice, where the trial court granted judgment to Respondents on the pleadings when Petitioner attempted to reassert the claims, where Petitioner filed an appeal with the Court of Appeals asking that the Record be reviewed to determine whether there were unpled claims that might not otherwise be legally barred, and where the Court of Appeals reviewed the Record but found no such additional, unpled claims?

- III. To the extent that any consideration of the Petition is necessary or appropriate, did the lower court correctly rule that Petitioner's claims were barred by *res judicata* and release, where Petitioner's Complaint in the second action restated the same

claims that Petitioner released and dismissed with prejudice in the prior action, where Petitioner never pled any claims relating to the closing on June 28, 2008, nor sought leave to amend his Complaint, where the Court of Appeals reviewed the Record for any facts to support any unpled claims, where the Court of Appeals affirmed the lower court in result and indicated that facts to support any unpled claims did not appear in the Record?

- IV. To the extent that any consideration of the Petition is necessary or appropriate, did the lower court correctly rule that Petitioner's claims are barred by the statute of limitations where claims asserted in the Complaint all arose prior to June 27, 2008?

STATEMENT OF THE CASE

This appeal arises from two legal actions. The more recent involves a Complaint filed by Sheppard on June 27, 2011, against Respondents Ronald C. Owens, Russell Bennett, Charles P. Darby, and Kiawah Resort Associates, L.P. ("Second Action").¹ In the Second Action, Petitioner re-asserted claims that he previously asserted as counterclaims in a prior action ("Prior Action"). The Prior Action was settled June 26, 2008, through the execution of a Settlement and Release Agreement in which Petitioner agreed to release any claims of any kind against all Respondents. The parties dismissed the Prior Action with prejudice on July 15, 2008, but only after a stipulated real estate closing that was the basis of the settlement had occurred and the parties had performed their duties and obligations under the Settlement and Release Agreement.

¹ The Petition for Writ of Certiorari incorrectly states that the Second Action was filed on July 28, 2011. Petitioner filed the Second Action a month earlier on June 27, 2011.

The filing of the Second Action violated the Settlement and Release Agreement, Respondents filed a Motion for Judgment on the Pleadings on November 22, 2011, on this basis, arguing that the Second Action was barred by *res judicata*, prior release, and the applicable statute of limitations, as well as the failure to state any claim of any kind against Respondents Kiawah Resort Associates, L.P. (“KRA”) or Charles Darby. On April 25, 2012, the lower court² held a hearing on Respondents’ Motion. At the hearing, Sheppard presented an “Overview” to the trial court. Both Sheppard and the lower court twice confirmed that the Overview was accepted as a “Brief in Opposition” to Respondents’ Motion for Judgment on the Pleadings. At the close of the hearing, the lower court took the matter under advisement.

On October 12, 2012, the lower court issued a letter by electronic mail indicating that Respondents’ Motion for Judgment on the Pleadings was granted. The lower court requested that counsel for Respondents submit a proposed order no later than November 5, 2012, and only after providing Petitioner a copy at least five days in advance. Counsel for Respondents provided the proposed order on October 29, 2012, after having provided the proposed order to Petitioner five days in advance. On January 25, 2013, the lower court signed and entered a final order (“Final Order”) granting Respondent’s Motion for Judgment on the Pleadings. Sheppard filed a Motion for New Trial on January 25, 2013, which the lower court denied on February 20, 2013.

Sheppard then filed a Notice of Appeal, but the Court of Appeals issued a decision affirming the trial court on November 5, 2014. The decision was issued *per curiam*, without any dissent(s) and without need for oral argument, indicating by the authorities cited that, even when the Record was reviewed for potential additional claims

² All references to the “lower court” refer to the trial court.

that might not otherwise be barred, no facts supporting such additional claims exist. Sheppard filed a Petition for Rehearing on November 20, 2014, but did not address the decision itself in his Petition for Rehearing, which was denied on January 23, 2015. Sheppard's Petition for Writ of Certiorari followed, but also failed to address the decision of the Court of Appeals or identify any alleged error within the decision.

FACTS

In 2004, Wando River, LLC ("Wando River"),³ a South Carolina limited liability company, approached Respondents KRA and Bennett for assistance in facilitating Wando River's purchase of two tracts of real property ("Property") located in Berkeley County, South Carolina. The members of Wando River were Sheppard and Julian Simmons ("Simmons"). KRA and Bennett agreed to act as guarantors for Wando River in exchange for specific rights and interests that were memorialized in an Agreement and a Warrant ("Agreement and Warrant").

In early 2008, Respondents KRA and Bennett were required to file the Prior Action against Wando River, Sheppard and Simmons due to actions taken in violation of the Agreement and Warrant. (R. pp. 30-39). Specifically, Wando River was attempting to sell the Property to a third party, Wando E, LLC ("Wando E"), in violation of the rights of KRA and Bennett. Wando River, Sheppard and Simmons asserted counterclaims in the Prior Action against KRA and Bennett, including allegations relating to the D.R. Horton earnest money deposit and other issues that Sheppard has attempted to re-litigate in his own name through the Second Action. (R. pp. 40-47).

³ Although all alleged damages asserted in the Second Action would be the property of Wando River, as opposed to Sheppard personally, the entity is not a party to this action or appeal. Sheppard purports to bring this action and continuing appeal in his own name, even though he is not the real party in interest.

The Prior Action was resolved by consent through a Settlement and Release Agreement signed June 26, 2008. (R. pp. 48-53). The specific purpose of the settlement was to allow Wando River to proceed with the sale of the Property to Wando E, provided that the compromise amounts that were set forth in the executed Settlement and Release Agreement were paid to KRA and Bennett at the closing (“Closing”). *Id.* The Settlement and Release Agreement included a stipulation, on the part of both Sheppard and Respondents, that the agreement was intended “to memorialize a compromise enforcement of prior agreements” and “to fully resolve and discharge all rights and obligations” among the parties. (R. pp. 50-51). Petitioner executed the Settlement and Release Agreement, agreeing and intending to be bound.

On June 28, 2008, two days after the Settlement and Release Agreement was executed, the Closing occurred.⁴ Lynn McCants, Esq., who served as counsel for Wando E, handled the Closing and “disbursed the funds in accordance with the settlement agreement.” (R. pp. 44:19-45:7). In order for the Closing to occur, Petitioner’s willing involvement was required and received. Eighteen (18) days after the Closing, the Prior Action was dismissed by way of a Stipulation of Dismissal with Prejudice on July 15, 2008. The late Cotton Harness, as counsel for Wando River, Sheppard, and Simmons, signed the Stipulation of Dismissal with Prejudice on behalf of his clients. (R. pp. 55-56).

Three years passed. Then, on June 27, 2011, in violation of the Settlement and Release Agreement and the Stipulation of Dismissal with Prejudice, Sheppard refiled the

⁴ The Petition for Writ of Certiorari incorrectly states that the Closing occurred on July 28, 2008. The Closing was June 28, 2008. This error has caused Petitioner to believe that the Closing occurred after the Stipulation of Dismissal was filed. The opposite is the case.

same claims and allegations that had been released and dismissed with prejudice in the Prior Action. The Complaint indicates that Sheppard was asserting causes of action for “Public Corruption” and “Fraud,” although the Complaint did not include any allegations relating to the elements required to state a claim for fraud and no cause of action for Public Corruption exists. Sheppard served Respondents with the Complaint in October 2011.

After filing an Answer and an Amended Answer, Respondents filed a Motion for Judgment on the Pleadings on November 22, 2011, on the basis that the claims were barred by res judicata, prior release, and the statute of limitations. A hearing on Respondents’ Motion for Judgment on the Pleadings was held April 25, 2012. On the day of the hearing, Sheppard submitted an “Overview,” which he asked the lower court to accept as a Brief in Opposition. On two separate occasions during the hearing, the lower court and Sheppard both confirmed that the Overview was intended and was accepted as a brief in opposition to Respondents’ Motion. At no time during the proceedings did Sheppard ever file an amended Complaint or seek leave of court to amend his Complaint.

After taking the matter under advisement, the lower court ruled in favor of Respondents and granted judgment on the pleadings. Sheppard has brought this appeal, claiming that the lower court should have considered a different claim of fraud that Sheppard had devised but had never pled in his Complaint (“Unpled Claim”), which allegedly arose after the Settlement Agreement was signed on June 27, 2008. According to Sheppard, the Unpled Claim would circumvent the lower court’s grounds for dismissal of the Complaint because it related to the Closing itself, held on June 28, 2008. However, the entire Record contains no allegations or assertions that might embody or relate to this Unpled Claim.

As a result, when the Court of Appeals reviewed the entire record in this case as a “constructive amended pleading,” it indicated that the lower’s court Order was being affirmed on the basis that there was no articulation of any other claim that would be even minimally sufficient upon due consideration of Petitioner’s *pro se* status. The Court of Appeals affirmed the lower court’s Order. Petitioner filed a Petition for Rehearing, which was denied. The Petition for Writ of Certiorari followed, but failed to address the decision of the Court of Appeals or assign any error to the Court of Appeals.

ARGUMENTS

I. THE PETITION FAILS TO ADDRESS THE DECISION OF THE COURT OF APPEALS AND FAILS TO ASSIGN ANY ERROR TO THE COURT OF APPEALS, WHICH SHOULD PRECLUDE CONSIDERATION OF THE PETITION.

Although Petitioner does discuss the alleged errors of the lower court in his Petition, he does not raise any alleged error in the decision of the Court of Appeals. The decision indicates that the Court of Appeals affirmed the lower court in result after concluding that the Record does not include facts that would support the existence of any claim for relief that was not otherwise barred. The Court of Appeals did not find that the lower court erred, but appears simply to have chosen to address and dispose of the issue raised by Petitioner directly so that he would be “heard” on the specific issue he was seeking to raise, even if the issue itself was improper and overly creative.

In the Petition, Petitioner merely restates the arguments he made to the Court of Appeals. He does not address or analyze the decision of the Court of Appeals, which disposes of the specific allegation that other claims exist within the record that were not barred by the grounds identified in the lower court’s ruling. Having failed to identify an error in the decision issued by the Court of Appeals, Petitioner has failed to provide any

basis for possible allowance of further appellate review. This Court should deny the Petition and bring this appeal to its conclusion.

II. PETITIONER HAS BEEN AFFORDED FAR MORE RIGHTS THAN DUE PROCESS REQUIRES.

In the Petition for Writ of Certiorari, Petitioner argues that the lower court failed to consider the “Overview” document submitted by Petitioner as an “Amended Complaint.” The lower court was never asked to do so. Nonetheless, the Court of Appeals confronted this specific argument and, upon review, found it to lack merit. The Court of Appeals cited Rule 8(a) of the South Carolina Rules of Civil Procedure and related authorities to indicate that, even if the Overview was considered an amended pleading, a complaint “requires a litigant to plead the ultimate facts that will be proved at trial.” The problem for Petitioner is not any error by any court, but the absence of any facts to support any claim other than those that he has already twice litigated. The Court of Appeals ruled correctly and in a manner that afforded Petitioner more due process than he is actually due.

It is not legitimate for Petitioner to suggest that the Court is being “over-technical” or depriving Petitioner of his due process rights under both the United States and South Carolina constitutions. The trial court and the Court of Appeals have already given Petitioner all consideration that he has requested, which is that the Overview be viewed as an amended complaint or other claim for relief instead of a brief in opposition. Even when this extraordinary dispensation is given, Petitioner’s claims fail. Judgment on the pleadings was properly granted below and was properly affirmed by the Court of Appeals.

III. THE TRIAL COURT CORRECTLY RULED THAT PETITIONER'S CLAIMS ARE BARRED BY RES JUDICATA AND PRIOR RELEASE.

Although Petitioner asserts that there is a question presented for this Court whether the trial court correctly applied *res judicata* and prior release, it is not a question that this Court should address where Petitioner fails to identify any error within the decision of the Court of Appeals.

Petitioner incorrectly asserts that that the closing of the Wando River Property occurred on *July 28, 2008*, and therefore occurred after the Stipulation of Dismissal with Prejudice was filed. This is untrue. The filing of the Stipulation of Dismissal with Prejudice occurred after the closing. The specific reason for his was to ensure that the closing occurred prior to any dismissal of the Prior Action.

The lower court was correct in ruling that the claims in the Complaint were barred by *res judicata* and prior release. Furthermore, the Court of Appeals affirmed the lower court on the basis that facts that might support a claim that would not be barred did not appear within the Record. Petitioner has failed to address the decision by the Court of Appeals, which renders any consideration of this Petition unnecessary.

IV. THE TRIAL COURT CORRECTLY RULED THAT THE PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

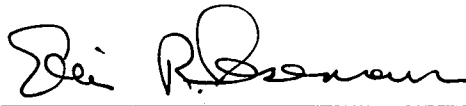
This issue does not present a question for review by this Court. The Court of Appeals has already reviewed the Record for any facts that might support any unpled claim. The decision reflects a determination by the Court of Appeals that no such claims exist. Nonetheless, the lower court was correct in ruling that the Complaint was barred by the statute of limitations. All claims asserted in the Complaint arose prior to June 27, 2008, as reflected in the pleadings, and were time-barred. The Record does not suggest

the existence of any Unpled Claim that would have been timely assuming that it had been asserted in the Second Action. This caused the Court of Appeals to affirm the lower court's ruling. No error on the part of the Court of Appeals has been identified and none exists. Therefore, the Petition should be denied.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Petition for Writ of Certiorari be denied and that the remittitur in this action be issued, along with an award of costs and fees to Respondents.

Respectfully submitted,

By: 

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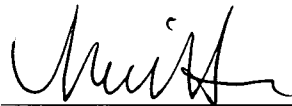
**Attorneys for Respondents Ronald C.
Owens, Russell Bennett, Charles P.
Darby, and Kiawah Resort Associates, LP**

March 24, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of Respondents **Ronald C. Owens, Russell Bennett, Charles P. Darby, and Kiawah Resort Associates, LP's Return to Petition for Writ of Certiorari** to the following counsel of record:

Mark W. Hardee, Esquire
Hardee Law Firm
2231 Devine Street, Suite 202
Columbia, South Carolina 29205
Attorney for Petitioner

By: 

Michelle A. Matthews

This 24th day of March, 2015
Charleston, South Carolina

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March 24, 2015

VIA FEDERAL EXPRESS

The Honorable Daniel E. Shearouse
Clerk of Court of SC Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

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MAR 25 2015

SC SUPREME COURT

Re: *Alan Sheppard v. Russell Bennett, Ronald C. Owens, Charles P. Darby, and
Kiawah Resort Associates, LP*
Case No.: 2015-000355

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of **Respondents Ronald C. Owens, Russell Bennett, Charles P. Darby, and Kiawah Resort Associates, LP's Return to Petition for Writ of Certiorari** in connection with the above-referenced appeal. Please file the original of this pleading with the Court and return a file-stamped copy to me in the self-addressed stamped envelope provided.

Thank you for your assistance with this matter.

With best regards,



Ellis R. Lesemann

ERL/ajs
Enclosures

cc: Mark W. Hardee, Esq.