THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED
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SC SUPREME COURT

Carmen Mullen, Circuit Judge
Marvin H. Dukes, III, Master-In-Equity

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S.C. Ct. App. Unpublished Opinion No. 2015-UP-146
Submitted February 1, 2015 - Filed March 18, 2015

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OLESYA MATYUSHEVSKY, CITIZENS OPPOSING DOMESTIC ABUSE, CHRISTINE VARG and LILING SUN ...................... Respondents

v.

JOSEPH C. SUN ........................ Petitioner

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# PETITION FOR A WRIT OF CERTIORARI

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Arguments:

1. The Court of appeals should not have affirmed circuit court's dismissal of Petitioner's claim against Respondent LiLing because the cause of action is a claim for personal injury and monetary damages on which the family court has no jurisdiction. 4

2. The Court of Appeals should not have affirmed the circuit court's dismissal of Petitioner's claims against Respondents Matyushevsky and CODA, and all but one of his claims against Respondent Varg, and its denial of Petitioner's motion for leave to amend his complaint. 9

3. The Court of Appeals should not have affirmed the circuit court Order issued on July 18, 2012 as circuit court had erred in granting Respondent Varg summary judgment and abused its discretion in denying Petitioner's motion for continuance by not allowing Petitioner to complete his discovery or amend his complaint prior to the hearing. 13

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## CERTIFICATE OF COUNSEL

Petitioner pro se Joseph Sun certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 29, 2015.

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the circuit court's dismissal of Petitioner's claims against Respondent LiLing Sun, and by doing so in conflict with the prior decision of this court in the case of *Thompson v. Ballentine,* 298 S.C. 289, 379 S.E.2d 896 (1989) and the case of *Charleston County School District v. Harrell,* 393 S.C. 552, 713 S.E.2d 604 (2011)?

2. Did the Court of Appeals err in affirming the circuit court's dismissal of Petitioner's claims against Respondents Matyushevsky and CODA, and all but one of his claims against Respondent Varg, and abuse its discretion in denying Petitioner's motion for leave to amend his complaint.

3. Did the Court of Appeals err in its affirmance of the Circuit Court's granting of summary judgment in favor of Respondent Varg, and overlook that circuit court had abused its discretion in denying Petitioner's motion for continuance by not allowing Petitioner to complete his discovery and amend his complaint to clarify his allegations especially regarding the breach of the prenuptial agreement by Respondent LiLing Sun in conspiracy with the other respondents.

## STATEMENT OF THE CASE

On about June 15, 2011, Petitioner Joseph Sun filed a pro se complaint at the Beaufort County Court of Common Pleas against Respondents Olesya Matyushevsky (hereinafter Olesya), Citizens Opposing Domestic Abuse (hereinafter CODA), Christine Varg (hereinafter Varg) and LiLing Sun (hereinafter LiLing). (R.60) Respondent LiLing moved to dismiss the complaint. After a brief hearing, on November 9, 2011, circuit court entered an order dismissing the complaint as to LiLing Sun. (R.10-14) Petitioner timely filed a Notice of Appeal on about

November 27, 2011.

On December 12, 2011, Petitioner filed a motion to Amend and Supplement and a proposed Amended Complaint. (R.81) Remaining Respondents Olesya, CODA and Varg filed a motion to dismiss on December 12, 2011. Circuit Court held a hearing on March 13, 2012 (the order was not entered until April 6, 2012) (R.15) dismissing all claims against remaining respondents except Respondent Varg and at the hearing allowed Petitioner to amend the complaint in 15 days against Respondent Varg. Petitioner's Amended Complaint was filed on March 26, 2012 (R.84) and all Respondents filed their Answer to the Amended Complaint on April 11, 2012. (R.98) Petitioner Sun timely filed a Notice of Appeal on about April 21, 2012.

Petitioner Sun had noticed the Respondents' counsel his desire to take the deposition of the Respondents in December 2011 and again in May 2012. (R.232) Respondent Varg filed a motion for summary judgment on June 5, 2012 (R.115) and a hearing was scheduled for July 12, 2012. Petitioner filed a motion for continuance on June 25, 2012 on the ground that discovery was not complete (R.126) and his opposing affidavit (R.121). After the aforesaid hearing, on July 18, 2012, circuit court entered an order granting Respondent Varg summary judgment, (R.20-23) and denying Petitioner's motion for continuance. Petitioner Sun timely filed a Notice of Appeal on about July 30, 2012.

On June 6, 2013, the South Carolina Court of Appeals entered an order consolidating the three (3) appeals into one Appeal Case No. 2011-204367.

## ARGUMENT

Due to financial difficulty and the complexity of the case, Petitioner had to proceed in the entire case without the benefit of counsel. Albeit unprofessionally done in his complaint (R.60-70) and Amended Complaint (R.84-97), Petitioner Sun in summary, alleged that Respondent LiLing and he after signing a prenuptial agreement (R.61), were married in 1999.

After several years of marriage, Respondent LiLing then pretentiously and fraudulently misrepresented to Petitioner and his parents that she would be a good wife and in law, thereby gaining trust and access to Petitioner's family assets and business. Respondent LiLing was already writing email and seeing a younger man met on the internet. In early 2009, Respondent LiLing moved out of the marital home into an apartment that she already leased in a nearby town. She then used false pretense of domestic abuse and sought legal assistance at Respondent CODA where respondents Matyushesky and Varg conspired with LiLing and represented her in filing a divorce suit at the Beaufort County Family Court based initially on domestic abuse. As there was no allegations or evidence of any domestic abuse, Petitioner Sun and Respondent were granted a divorce by the Beaufort Family Court on October 13, 2010 based on their 12 months separation.

At the temporary hearing in June 2009, Respondent Olesya presented a warranty deed altered by respondent LiLing and a false Certified Mail Receipt to cause Petitioner to be denied continuance even though he was served the notice of hearing only the day before. Based on the outdated altered warranty deed, Petitioner Sun was evicted from the marital home which was a house bought by his mother.

His pleadings may be insufficient to a professional standard, Petitioner alleged in his complaint, Paragraph (7), (R.p.61, line 22) and in his Amended Complaint, Paragraph (6), (R.p.85,

line 22) that Respondent LiLing and he signed a prenuptial agreement before marriage. In Paragraph (27), (R.p.68, line 1) of the complaint and Paragraph (28) (R.p.93, line10) of Amended Complaint, Appellant alleged that the respondents broke in his temporary home in a nearby town, destroyed the Sentry Safe and stole numerous valuables including the original prenuptial agreement. A copy of the Prenuptial was already filed in the Divorce Case No. 2009-DR-07-00628 at the temporary hearing when Petitioner was appearing pro se without counsel. Soon afterwards, Petitioner was repeatedly arrested and put in jail for fabricated charges lodged by Respondents LiLing and Olesya. All charges have been dismissed by the prosecutor or acquitted in courts after the divorce decree was entered.

The Prenuptial Agreement was never presented to the divorce court because Petitioner was in jail for about six months, most of the time during the divorce proceeding. Petitioner was brought to the final trial of the divorce in handcuffs from jail where he had no access to any court record. Prior to the trial, Respondent LiLing in conspiracy with Respondent Olesya and Varg, broke in Petitioner's temporary home in another Town and stole all the contents in his safe including the original Prenuptial Agreement. When Petitioner Sun appeared at the final hearing of divorce, Respondent LiLing and Olesya had already made a settlement with Petitioner's 90 year old mother in Canada during the time when Petitioner was in jail, and a Settlement Agreement was already reached and signed by Respondent LiLing and Petitioner's mother without Petitioner's knowledge, where Respondent LiLing would receive $75,000.00 from Petitioner's mother, a 2010 Toyota car and a 1 ½ carat diamond ring. The final hearing was only to determine the custody and visitation of the minor child of the parties.

Most of the aforesaid facts were alleged in Petitioner's complaint (R.60-70) and Amended

Complaint (R.84-97). Respondent's breach of the prenuptial agreement had caused Appellant to suffer damages, in addition to his loss of numerous valuables, he had to pay for the unnecessary rents and expenses for rooms and apartment for the next 18 months. In its affirmance, the court of appeals overlooked that the Family court had no jurisdiction to award damages and injury suffered by the Petitioner, and that Respondent LiLing presented several "Judicial Notice" at the hearing, including the County Sheriff's Report (R.108-115) of which Petitioner's had no prior knowledge.

As alleged in aforesaid Paragraphs (27) and (28), of his complaint (R.p.68&93), the respondents conspired to break in Appellant's home (separate from the marital), destroyed his safe and stole all the valuables, again in breach of the prenuptial agreement. Even though the breach went unnoticed at the divorce court caused by the respondents' conspired wrongful acts, Petitioner Sun should be allowed to address his claim in the within action filed at the circuit court. It is error of the court of appeals in affirming the circuit court's order which based on the ground that the Family Court had exclusive jurisdiction on the matter, dismissing Petitioner's claim of monetary damages and personal injury against Respondent LiLing.

Petitioner alleged the theft of his prenuptial agreement by the Respondents in both his complaint (R.61, 68) and Amended Complaint (R.85, 93-95). Because some, but not all, wrongful acts committed by the respondents occurred during the pendency of the divorce, the circuit court and the court of appeals in its opinion overlooked the issue of breach of prenuptial agreement and ruled that "the family court has exclusive jurisdiction to hear and determine actions for settlement of all legal and equitable rights of the parties in the action." citing *Appeal of Sexton*, 298 S.C. 359, 360, 380 S.E.2d 832,833 (1989).

The cited case in the opinion is irrelevant and inapplicable in the within appeal as

Petitioner was not seeking the determination of "whether the Family Court has subject matter jurisdiction to equitably apportion property owned by a third party" which was the issue on the cited case. In the within case, Petitioner was only claiming award on damages and injury on which Family Court had no subject matter jurisdiction. Petitioner cited *Thompson v. Ballentine,* 298 S.C. 289, 379 S.E.2d 896 (1989) on Page 15 of his Amended Final Brief and Page 3 of his Amended Reply Brief where the South Carolina Supreme Court held that "The family court are courts of limited jurisdiction, as provided by S.C. Code Ann. § 20-7-420 (1976), . . . . . . . nor did it have jurisdiction to award damages." Court of Appeals' opinion in affirming circuit court order of November 9, 2011 (R.10) is in conflict with *Thompson*, supra.

Furthermore, the court of appeals overlooked Petitioner's citation of *Bailey v. Bailey,* 330 S.C. 326, 498 S.E.2d 891 (1998) on Page 15 of his Amended Final Brief where the Appellate Court properly held that "property excluded from the marital estate by written contract or antenuptial agreement of the parties is considered non-marital property over which the family court has no jurisdiction. See S.C.Code Ann. § 20-7-473 (Supp.1997) ("The [family] court does not have jurisdiction or authority to apportion nonmarital property."); S.C.Code Ann. § 20-7-473(4) (Supp.1997) (Property excluded from the marital estate by written contract of the parties is considered non-marital property)." *Id.* The within case sought to determine that Respondent LiLing aided and abetted by other respondents had falsely claimed the two houses as her property, broke in one of them, avoided criminal prosecution, and stole numerous valuables from Petitioner during the divorce proceeding causing damages and injury to the Petitioner who had to seek and pay for a temporary residence for over 18 months.

Transcript of the hearing (R.p.131) shows Respondent LiLing presented the Sheriff's

Report (R.p.108), the Divorce Decree (R.40) and an Order on a Rule to Show Cause which was "evidence outside the pleadings" as her "judicial notice" to the circuit court. Contrary to Respondent's intention, the Sheriff's Report actually showed evidence that there was an unresolved disputed issue of whether the home Respondent LiLing broke in and stole numerous items was in violation of the prenuptial agreement (R.p.102). There could be no lawful excuse for Respondent LiLing to break in a marital house through the back window causing damages.

Only the circuit court, not the family court, had jurisdiction on the determination on the prenuptial agreement and award damages. Pro se Petitioner may have failed to allege clearly and succinctly to a professional standard that respondents' conspiracy of and actual break in and theft of his personal non-marital items were in violation of the prenuptial agreement, his allegations are sufficient pursuant to *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), where the United States Supreme Court held that "As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Id., at 520-521, 92 S.Ct. at 596, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)."

The court of appeals overlooked that the circuit court in its court order of November 9, 2011 "analysis" (R.p.11, lines 10-12), already found that Appellant[Petitioner] "appears to allege fraud, adultery, forgery, wrongful arrest and incarceration, libel and slander, burglary, theft, trespass and conspiracy." As Petitioner was seeking recovery of damages and injury he had suffered, caused by the respondents' wrong doings, the circuit court already acknowledged Petitioner's several causes of action showing allegations were sufficient and that circuit court had

jurisdiction. Furthermore, as recognized by the circuit court, fraud, libel and slander and conspiracy involved other respondents over whom Family Court had no jurisdiction.

In considering a motion to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint; the motion may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory. Rules Civ.Proc., Rule 12(b)(6). *Charleston County School District v. Harrell,* 393 S.C. 552, 713 S.E.2d 604 (2011) Respondent LiLing presented several documents as her judicial notice without showing any details regarding those documents or giving Petitioner Sun a notice prior to the hearing. (R.135-142) It is error of the circuit court and an abuse of its discretion in relying on several unexplained documents as Judicial Notice, to grant Respondent LiLing's motion to dismiss on November 9, 2011. (R.10-14)

Pleadings in a case should be construed liberally and, in considering a motion to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, the Court must presume all well pled facts to be true so that substantial justice is done between the parties. Rules Civ.Proc., Rule 12(b)(6). *Id.* Petitioner alleged several claims as aforesaid which were recognized by the circuit court in its Order (R.10-14) and the Respondent's Counsel at the hearing (R.135). The circuit court abused its discretion in allowing the unexplained documents presented by Respondent LiLing at the hearing and further erred by ruling only the family court has exclusive jurisdiction to hear those claims and granting Respondent LiLing's motion to dismiss. (R.14)
CONCLUSION TO QUESTION 1: Court of appeals should not have affirmed circuit court's dismissal of Petitioner's claim against Respondent LiLing because it is error for the circuit court to

rule that only family court has exclusive jurisdiction on Petitioner's claim for personal injury and monetary damages, and an abuse of discretion in allowing all the unexplained "judicial notice".

Regarding the dismissal of Respondents Matyushevsky, CODA and Varg from the complaint, the circuit court erred in assuming all acts however malicious and wrongfully committed by these respondents were done "in the performance of their professional activities on behalf of and with the knowledge of their client" therefore, they enjoy immunity pursuant to *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 339 S.E.2d 887 (1986). The circuit court and court of appeals have overlooked that, in *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995) the South Carolina Supreme Court held that, "nothing in Gaar renders an attorney immune for acts taken **outside the scope** of the professional relationship." The Court further made reference to a number of "jurisdictions which recognize that an attorney may be held liable where he acts in bad faith or for his own personal motivations." *Stiles*, at 299. Without allowing any discovery while all the respondents have not explained or justified all their wrongful tortuous acts as their "professional relationship", such as using a wrong Certified Mail receipt to defraud the family court judge to cover up the fact that service of notice of temporary hearing was made the day before the hearing, the use of an altered warranty deed to gain temporary possession of the marital home and commission of burglary and theft against the Petitioner and much more. The Court of Appeals should not have affirmed the circuit court dismissal, as it is error of circuit court to make favorable assumption for the Respondents and hastily grant Respondents' motion to dismiss.

The S.C. Supreme Court further held in *Stiles, supra,* that "Consistent with Gaar and the above cited cases, we find that an attorney may be held liable for conspiracy where, in addition to

representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client. Accordingly, we hold that the trial court erred in dismissing the complaint on the basis that Gaar provides absolute immunity to an attorney under any and all circumstances." *Stiles,* at 300. In addition, this court overlooked that there was allegations that Respondent Matyushesky committed numerous libel and slander[1], conspired with others to falsely incarcerate Petitioner, then to burglarize Petitioner's home in violation of the prenuptial agreement, and to pressure Petitioner's ailing mother in Canada for money or they would subpoena her to court in South Carolina and much more, all done as her vendetta against Appellant's accusation and exposure of her wrong doing and filing of bar complaint. Petitioner alleges in his complaint and amended complaint that up to this date, all respondents including CODA are still in possession of numerous valuable items they conspired with LiLing to steal from Appellant at the Knowles Island Home and the Bluffton home. (R.93, lines 12-18) The Family Court has no jurisdiction over other respondents or to determine the amount of damages or the whereabouts of the stolen items, only circuit court has that jurisdiction.

In its opinion, the Court of Appeals correctly cited *Gaar v. N. Myrtle Beach Realty Co.,* 287 S.C. 525, 339 S.E.2d 887 (1986), but failed to explain that the better rule is that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. Accordingly, an attorney who acts in good faith with the *529 authority of his client is not liable to a third party in an action for malicious prosecution. The *Gaar* case does not give unconditional immunity to an attorney who had committed numerous wrongful acts against the Petitioner some unrelated to the divorce case.

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[1] Calling Appellant a criminal to numerous others based on charges she and her clients fabricated and were all dismissed or acquitted.

This court in *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995), held that,

> "Consistent with Gaar and the above cited cases, we find that an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client. Accordingly, we hold that the trial court erred in dismissing the complaint on the basis that Gaar provides absolute immunity to an attorney under any and all circumstances."

This court further held in *Stiles, supra* that,

> "The ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint. *State Board of Medical Examiners v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990). A Rule 12(b)(6) motion **603 may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987)."

In the court of appeals' opinion, it cited *Gaar v. N. Myrtle Beach Realty Co.,* 287 S.C. 525, 528-29, 339 S.E.2d 887-89 (1986) where "An attorney is immune from liability to third persons ......... with the knowledge of his client. Accordingly, an attorney who acts in good faith with the authority of his client is not liable to a third party in action for malicious prosecution." The court overlooked that the *Gaar* case gave immunity to attorneys **only** under the conditions of "acting in good faith" and "with the knowledge of his client." Those are genuine issues of material facts to be determined by the jury. Appellant might have failed to specifically allege that Respondent Matyushesky acted "outside the scope" of her professional relationship with client LiLing, he alleged several acts of fraud[2], libel and slander and conspiracy to commit burglary against the Petitioner. Even without the specific words, those wrongful acts, some criminal in nature (such as

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[2] using a false Certified Mail Receipt, a forged warranty deed and coaching her client to steal the car title, all valuables and Prenuptial Agreement by breaking in Appellant's home using electric grinder, crow bar and sledge hammer pretentiously claiming the items were marital because the Prenuptial was stolen. Then Respondent CODA and Olesya kept and stored all the stolen property up to this date.

conspiracy to break in and enter and storage of stolen property from the Petitioner) should be construed to be outside of professional conduct, bad faith and malicious per se.

The court of appeals overlooked Petitioner's cited case of *Brazell v. Windsor,* 384 S.C. 512, 682 S.E.2d 824 (2009), Page 17 Amended Final Brief, where the South Carolina Supreme Court held that "If the facts and inferences drawn from the facts alleged in the complaint, viewed in light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Gentry v. Yonce,* 337 S.C. 1,5, 522 S.E.2d 137,139 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in light most favorable to the plaintiff, states any valid claim for relief. *Id.*" In light most favorable to the Petitioner, Respondent LiLing had breached the prenuptial agreement, committed fraud, forgery, burglary, theft, trespass and conspiracy against the Petitioner as found by the circuit judge who erroneously ruled that only Family had jurisdiction. Further in light most favorable to the Petitioner, Respondents LiLing, Matyushesky, Varg and CODA conspired with one another and other individuals and acted in bad faith, some without the client's knowledge on the numerous malicious wrongful acts against the Petitioner causing him damages and injury. The circuit court, not the family, has jurisdiction on Petitioner's complaint.

CONCLUSION TO QUESTION 2: It is error of the Court of Appeals in affirming the circuit court's dismissal of Petitioner's claims against Respondents Matyushevsky and CODA, and all but one of his claims against Respondent Varg, and denial of his motion for leave to amend his complaint, as by doing so, its opinion is providing absolute immunity to an attorney under any and all circumstances in conflict with the supreme Court of South Carolina's holding in *Stiles v.*

*Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995). It is also an abuse of discretion for the circuit court to deny Petitioner's motion to amend his complaint.

Petitioner shortly after filing his complaint against the Respondents was faced with a motion to dismiss filed by Respondent LiLing. Soon after Respondent LiLing was granted her motion to dismiss, between December 2011 and May 2012, Petitioner Sun noticed Respondent counsels his desire to take the deposition of Respondents LiLing, Olesya and Varg. (R.232) Respondents prior counsel Baker responded and stated to wait until the disposition of their motion to dismiss. (R.236, Exhibit 1) Immediately after the circuit judge granted respondents' motion to dismiss on April 6, 2012 but left respondent Varg in the case (R.15-19), Respondent Varg filed a motion for summary judgment. At the July 12, 2012 hearing, circuit judge stating that the case was already a year old and denied Petitioner any opportunity of discovery and granted Respondent Varg summary judgment. Petitioner was not given any opportunity of discovery.

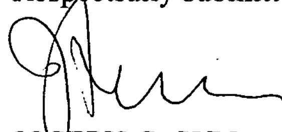
CONCLUSION TO QUESTION 3: The Court of Appeals errs in its affirmance of the Circuit Court's granting of summary judgment in favor of Respondent Varg, and overlook that circuit court had abused its discretion in denying Petitioner's motion for continuance, thereby not allowing Petitioner to complete his discovery and amend his complaint to clarify his allegations especially regarding the breach of the prenuptial agreement by Respondent LiLing Sun in conspiracy with the other respondents.

## CONCLUSION

For the reasons stated, Petitioner asks this court to grant the petition for a writ of certiorari.

May 28, 2015.

Respectfully submitted,



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**PROOF OF SERVICE**

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I certify that I have this date served all the Respondents the Petition for a writ of certiorari by depositing a copy of same in the U.S. Mail postage prepaid, on May 28, 2015, addressed to their attorneys on record as follows:

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May 28, 2015
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