THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Dorchester County
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2015-CP-427
Submitted April 1, 2015 – Filed August 19, 2015
Appellate Case No. 2014-000141

William McFarland..... Petitioner

v.

Sofia Mazell, Michael Mazell, Pierceton Mazell, and Faith Mazell.....Respondents.

PETITION FOR A WRIT OF CERTIORARI

Amanda R. Maybank
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422
(843) 766-8101
Email: amanda@maybanklaw.com
Attorneys for Appellant William McFarland

Other Counsel of Record:

Attorneys for Respondents Sofia Mazell,
Michael Mazell, Pierceton Mazell, and Faith Mazell
William B. Jung, Esquire
1156 Bowman Road, Unit 100 D
Mount Pleasant, SC 29464
(843) 416-1104
Email: bradjung@msn.com

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1156 Bowman Road, Unit 100 D
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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 17, 2015

QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing the appeal as moot based on the fact that the restraining order had expired?

2. To the extent the Court determines review of the restraining order meets the exception to the mootness doctrine, the restraining order was improperly granted as none of the instances described in the restraining order meet the definition of stalking or harassment as defined by S.C. Code Ann. 16-3-1700.

STATEMENT OF THE CASE

This appeal stems from what started as dispute between residents of the same neighborhood[1]. On September 25, 2012, the Respondents, (hereinafter "the Mazells"), filed a motion for a restraining order against the Appellants, (hereinafter "Mr. McFarland"), based on stalking and/or harassment. On October 12, 2012, the matter was heard by the magistrate. Following the hearing, the Magistrate issued a "Mutual Restraining Order." On October 22, 2012, Mr. McFarland timely filed a Motion for Reconsideration. The motion was heard on February 1, 2013, and an order denying reconsideration was issued on March 8, 2013.

On March 26, 2013, McFarland filed a Notice of Appeal with the Circuit Court. On November 12, 2013, the Circuit Court heard arguments on the appeal, and issued an order affirming the magistrate's order on December 10, 2013. Notice of Appeal to this Court was filed on January 13, 2014.

[1] The Mazells no longer live in the neighborhood.

The Court of Appeals considered the matter without oral arguments and issued an order dismissing the appeal as moot on August 19, 2015. A petition for rehearing was timely filed, and the Court of Appeals issued an order denying the petition for rehearing on September 17, 2015.

STATEMENT OF THE FACTS

McFarland and Respondents were residents of the same neighborhood, and lived next door to one another when the dispute began. At the time, Mr. McFarland was the president of the neighborhood's homeowners association, ("HOA"), and two of the three alleged incidents in the complaint can be connected with HOA matters. (R. pp. 220, 223). In September of 2012, the Respondents filed a motion for a restraining order against McFarland alleging harassment pursuant to S.C. Code Ann. §16-3-1700(a) and stalking under §16-3-1700 (B) or (C). Specifically, the motion alleged three incidents. The first involved a dispute over a check written by Respondent to the HOA, which was cancelled prior to presentment. The second incident involved a photograph taken by Mr. McFarland with his cell phone of Respondent while in a parking lot outside an HOA meeting. The third involved an incident in which the Respondent and Mr. McFarland exchanged words while on a shared property line. (R. pp. 223, 224, 226).

While it is clear that the parties are not friendly with one another, none of the incidents contained in the complaint rise to the level to meet the statutory definition of "Harassment" or "Stalking."

Despite this fact, a restraining order in this case was issued by the magistrate on October 12, 2012, and was entitled "mutual restraining order." Its effective dates were October 12, 2012 through April 12, 2013. However, the appeal was not heard until November 12, 2013, and the form 4 order from the circuit court denying the appeal was not signed until November 25, 2013, well after the

expiration of the mutual restraining order. In fact, during the time this case has been on appeal, a subsequent related lawsuit brought against Mr. McFarland was dismissed on summary judgment. (see Supplemental Citation dated April 8, 2015).

The Court of Appeals dismissed the appeal as moot based on the fact that the restraining order had expired and any issue pending before it will have no practical effect on the parties. This ruling was in error as the restraining order falls into the capable of repetition yet evading review exception to the mootness doctrine. Moreover, the restraining order was improperly issued and should be reversed.

I.
ARGUMENT

1. THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL AS MOOT BECAUSE THE MUTUAL RESTAINING ORDER FALLS INTO THE CAPABLE FO REPETITION YET EVADING REVIEW EXCEPTION OF THE MOOTNESS DOCTRINE.

Standard of Review

When acting in appellate capacity pursuant to S.C. Code Ann. §18-7-170, the circuit court has a broad scope of review. However, the Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law. *Hadfield v. Gilchrist*, 343 S.C. 88 (S.C. Ct. App. 2000). However, the Court may reverse if there are errors of law.

The Court of Appeal's order states that that ruling on the issue pending before it will have no practical effect on the parties, and therefore the issue is moot. First, the issue does affect Mr.

McFarland because as it currently stands, there is an outstanding, granted, expired restraining order that was filed against him. As discussed in the brief, Mr. McFarland is a businessman and travels internationally. The restraining order may affect client perception of him and may affect his ability to travel. Moreover, the restraining order is public record which may affect his perception in the community.

Second, the Court may address an issue despite mootness when 1) the issue raised is capable of repetition yet, evading review and 2) when the questions considers matters of important public interest. *Curtis v. State of South Carolina*, 345 S.C. 557, 549 S.E.2d 591, 596 (2001). In evaluating whether a moot issue is capable of repetition, yet evading review the Court does not require that the complaining party be subject to the action again. *Byrd* 321 S.C 426, 431, 468 S.E.2d 861, 864.

In *Bryd*, the Court was faced with whether a student suspension, which had since been served, fell within the exceptions to the mootness doctrine. The Court held that short term student suspensions will evade review because they are "by their very nature, completed long before an appellate court can review the issues they implicated." *Id.*

This case is falls into the very exception recognized by *Bryd*. The nature and effective time-period of a restraining order is limited, whereas, the appellate process takes years to complete. In this case, the restraining order was issued in October 2012 and expired in April of 2013. Yet, the circuit court did not hear the appeal until November 12, 2013, almost seven months after the expiration of the restraining order.

In holding that the restraining order is moot, essentially, there is no checks and balances procedure in place as to the issuance of restraining orders as they are typically expired before they can be reviewed by the circuit court as the first step of the appellate process.

Additionally, holding that the restraining order is moot and not reviewing the underlying issue surrounding its issuance can invite abuse. By the very nature and language of the statute, S.C. Code Ann. §16-3-1700 et al, contemplates criminal actions for harassment and stalking and are not meant to be used by next door neighbors who are not getting along or are in a dispute with the Home Owners Association in their neighborhoods. In this case, the Appellant was acting in accordance with his duties on the Home Owners Association Board. The Respondent, who was unhappy with the Appellant, was able to use the actions to obtain a restraining order. Allowing the restraining order to stand based on the behavior described herein invites abuse by others to file for restraining orders for alleged behavior that falls well below the harassment and stalking threshold, and amounts to petty disputes. Additionally, this will place a burden on the court system to deal with these types of disputes rather than the behavior contemplated by the statue.

As such, the Court should grant certiorari and review the restraining order at issue in this case.

2. TO THE EXTENT THE COURT DETERMINES REVIEW OF THE RESTRAINING MEETS THE EXCEPTION TO THE MOOTNESS DOCTRINE, THE RESTRAINING ORDER WAS IMPROPERLY GRANTED NONE OF THE INSTANCES DESCRIBED IN THE RESTRAINING ORDER MET THE DEFINITION OF STALKING OR HARASSMENT AS DEFINED BY § 16-3-1700.

"Harassment" is defined as "a pattern of intentional, substantial and unreasonable intrusion into the private life of a targeted person that causes the person and would cause a reasonable person in his position to suffer mental distress." S.C. Code Ann. §16-3-1700(A). The code continues to describe examples of stalking as, "(1) following the targeted person; (2) visual, physical, verbal, written or electronic contact that is initiated, maintained, or repeated after a person has been provided notice that the contact is unwanted; (3) surveillance of or the maintenance of a presence near the

targeted persons residence, place of work, school or another place regularly occupied by the targeted person, and (4) vandalism and property damage."

"Stalking" is defined as a pattern of words, conduct, written or electronic that is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's potion to fear:

(1) Death of the person or a family member;

(2) Assault upon the person or a member of his family;

(3) Bodily injury to the person or a member of his family;

(4) Criminal sexual contact on the person or a member of his family

(5) Kidnapping of the person or a member of his family; or

(6) Damage to the property of the person or a member of his family

S.C. Code Ann. §16-3-1700(B).

Respondent presented no evidence in the complaint or in the subsequent testimony that would satisfy any of the above elements of stalking. The only possible section upon which the restraining order could be issued is S.C. Code Ann. §16-3-1700(A). This section requires a person to show "... a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose . . ." Each alleged incident is discussed below, and accordingly, Respondent failed to show that the alleged "intrusion" constituted a pattern as defined by S.C. Code Ann. §16-3-1700(D).

A. September 20, 2012 – Worthless Check Investigation

As stated above, Respondents alleged that the Defendant somehow engaged in stalking and/or harassment as defined by S.C. Code Ann. §16-3-1700 as a result of the First Circuit

Solicitor's Office sending a letter concerning a worthless check. (R. p. 54).

Initially, the contact with Respondent was initiated by the First Circuit Solicitor's Office, and did not involve visual or physical contact by McFarland. S.C. Code Ann. §16-3-1700 does not contemplate contact by third-parties. The letter received by the Respondents was from the First Circuit Solicitor's Office and only referenced a dishonored check to "Live Oak Village HOA," who is not a party to this action.

Not only does this alleged incident not involve visual or physical contact by McFarland, but McFarland also had a legitimate purpose as contemplated by S.C. Code Ann. §16-3-1700. Mr. McFarland, as HOA board president was seeking to deposit HOA dues when he presented the check for payment. While there is a dispute about when or how the check was received by McFarland on July 21, and why there was a delay in presentment, what is clear is that Mr. Mazell stopped payment on the check on July 27, 2012. (R. p. 136, lines 1-4). Yet, Respondent was emailing Mr. McFarland on September 5, 2012, 40 days after the stop payment was issued, that his check for HOA dues check had not cleared. There is nothing improper about Mr. McFarland's actions in reporting the check to the worthless check division after receiving the email informing him that the Respondent's check had not yet cleared, and accordingly presenting the check for payment.

The subsequent letter from the worthless check division does not meet the criteria or the definition of harassment and/or stalking, nor does it constitute an intrusion into the private life of Respondents.

B. September 12, 2012 – Cell phone picture of Respondents' vehicle

The Respondents alleged that she was taking her daughter to dance, when Mr. McFarland approached her vehicle and began taking pictures of her. (R. p. 95, lines 10-25). However, a review

of the transcript, including the testimony of Respondent's own witness, reveals otherwise.

This incident took place in a parking lot outside the public library where a duly noticed meeting of the HOA was scheduled, a meeting at which Respondent knew that Mr. McFarland would be present at this location at that specified time. Respondent even admitted that she had notice of the meeting and knew that Mr. McFarland would be at this location during this time frame. (R. p.103, lines 10-24).

As explained, by Mrs. McFarland's testimony, she and Mr. McFarland where present at the library for a meeting. (R. p. 175, lines 13-18). After dropping Mrs. McFarland off at the door, Mr. McFarland had to park in the adjacent parking lot as the library parking lot was full. (R. p.176, lines 17-22). According to both Mrs. McFarland and Respondent's witness, the adjacent parking lot (where Respondent was parked when the McFarland's arrived), is used as overflow parking when the library lot is full. (R. p. 116, lines 2-10; R. p. 192, lines 15-25).

After seeing Respondent sitting in her vehicle talking to Ms. Capps who was standing outside of her car which was parked in the parking lot from the library conference room, Mr. McFarland went outside to ascertain whether Respondent was coming to the meeting. (R. p. 177, lines 15-20 and R. p.178, lines 1-2). In the past, Respondents had expressed concern about attendance at the meetings. (R. p. 179, lines 6-11). Mr. McFarland did take a photograph to document that Respondent was present at the library and could have attended the meeting to prevent any future claim by Respondents that they were not given proper notice of the meeting. (R. p. 179, lines 1-6; p. 61-62).

Again, this action by Mr. McFarland does not meet the definition of harassment and/or stalking. Moreover, Mr. McFarland had a legitimate purpose in 1) being at the library for the duly

noticed HOA meeting, and 2) documenting via the photograph that Respondent was present in the area and could have attended the meeting, to prevent any future claim to the contrary.

C. July 11, 2012 – dispute at the mutual property line

This incident occurred after Respondent approached Mr. McFarland at their mutual property line and was "repeatedly asked questions by the McFarlands." (R. p. 97, lines 5-8; p. 109, lines 10-11). Again, S.C. Code Ann. §16-3-1700, does not contemplate such a situation. In this incident, the Respondent left her home, walked across her yard and approached Mr. McFarland on the shared property line. Mr. McFarland clearly has a "legitimate purpose" to be present on his own property. Even the complaint that Respondent demanded from the police department lists Respondent, Mrs. Mazell, as the "subject" and Mrs. McFarland as the "victim." (R. p. 63)).

As with the previously described instances, none rise to the circumstances encompassed by S.C. Code Ann. §16-3-1700, nor does the behavior of either party meet the statutory definition of harassment or stalking[2]. Instead, we see a pattern in which Respondent has continually and intentionally put herself in situations in which she knew Mr. McFarland would be present.

CONCLUSION

The restraining order at issue in this case falls into the capable of repetition yet evading review exception of the mootness doctrine. Moreover, the restraining order was improperly issued as none of the incidents met the definition of stalking or harassment as defined by S. C. Code Ann. 16-3-1700. As such, Mr. McFarland respectfully requests the Court to grant the petition for a writ of certiorari.

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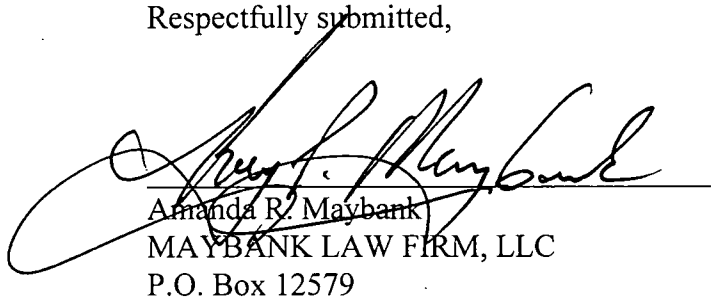
[2] Additionally, the order is defective on its face as it does not comport with S.C. Code Ann. §16-3-1750(E), which requires that a restraining order remain in effect for "not less than one year."

Respectfully submitted,



Amanda R. Maybank
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422
(843) 766-8101
Attorneys for Petitioner William McFarland

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PROOF OF SERVICE

I certify that on October 15, 2015 I have served a copy of Appellant William McFarland's Petition for a Writ of Certiorari and Appendix by placing same in the U.S. Mail with the appropriate postage affixed and addressed to the following:

William B. Jung, Esquire
1156 Bowman Road, Unit 100 D
Mount Pleasant, SC 29464
Attorney for Respondents

MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422
(843) 766-8101
Attorneys for Appellant William McFarland