

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SOUTH CAROLINA COURT OF APPEALS
Thomas E. Huff; Paul E. Short, Jr.; Aphrodite K. Konduros MAY 04 2016

SC Court of Appeals

Case No.: 2009-CP-26-3596
Consolidated With
Case No.: 2010-CP-26-11320
Appellate Case No. 2013-000714

Ronald J. Jarmuth.....Petitioner,

v.

International Club Homeowners
Association, Inc., Rosemary Toth, and
K.A. Diehl & Associates, Inc., and South
Carolina Court of Appeals Respondents.

RETURN TO PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

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OTHER RESPONDENTS

The South Carolina Court of Appeals
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QUESTIONS PRESENTED

- I. WHETHER THE SUPREME COURT HAS ORIGINAL JURISDICTION OVER THE PETITION SEEKING TO VACATE THE ORDER AWARDING COSTS ON APPEAL.

- II. WHETHER THERE IS ANY MERIT TO THE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION.

- III. WHETHER PETITIONER ABANDONED HIS PETITION FOR WRITS OF MANDAMUS AND PROHIBITION BY FAILING TO COMPLY WITH RULE 240, SCACR.

INTRODUCTION

Respondents, International Club Homeowners Association, Inc. (hereinafter “**Respondent HOA**”), Rosemary Toth, and K.A. Diehl & Associates, Inc. (collectively hereinafter referred to as “**Respondents**”) respectfully request this Court to deny the petition for writs of mandamus and prohibition and dismiss the complaint of the *pro se* Petitioner, Ronald Jarmuth (hereinafter “**Petitioner**”) because:

(I) no “public interest” or “special grounds of emergency or other good reasons exist” to justify the exercise of this Court’s original jurisdiction; and,

(II) the Petitioner failed to present evidence that justifies granting his petition for writs of mandamus and prohibition; and

(III) the Petitioner abandoned his petition for writs of mandamus and prohibition by failing to comply with the requirements contained in Rule 240 of the South Carolina Appellate Court Rules (hereinafter “**SCACR**”).

STATEMENT OF THE FACTS

The petition for writs of mandamus and prohibition and the complaint seek the granting of “a writ which vacates the Order of the South Carolina Court of Appeals awarding costs in its entirety” and directing “the South Carolina Court of Appeals to communicate this to the trial court—civil case 2009-CP-26-3596 in the Court of Common Pleas for Horry County.” Petitioner commenced Consolidated Civil Action Nos. 2009-CP-26-3596 and 2010-CP-26-11320 (hereinafter “**Consolidated Cases**”) challenging the Respondent HOA’s authority to perform a litany of functions, including collecting assessments, exercising rights of architectural review, and enforcing the Declaration of Covenants and Restrictions for the International Club. The Consolidated Cases were tried in 2012, and a Final Order was entered. The Petitioner appealed the

Final Order, and the appeal was assigned Appellate Case No. 2013-000714. The South Carolina Court of Appeals affirmed the Final Order in Unpublished Opinion No. 2015-UP-111 (hereinafter “**Unpublished Opinion**”). Thereafter, on May 12, 2015, a petition for Writ of Certiorari was filed with this Court to review the Unpublished Opinion. The petition for Writ of Certiorari was denied by this Court by Order dated January 15, 2016.

The Consolidated Cases were remitted to the lower court on January 21, 2016. Because the Respondents were the successful parties on appeal, they filed a motion to tax fees and costs on February 8, 2016 pursuant to Rule 222, SCACR. By order filed on March 4, 2016, the Court of Appeals granted the Respondents’ motion for costs in the amount of \$3,793.40 against Appellant. Petitioner filed a motion for rehearing of the Order awarding costs on March 28, 2016 seeking the same relief as the petition for writs of mandamus and prohibition and the complaint in this matter. Respondents filed a return to the motion for rehearing on April 8, 2016, and the Petitioner filed a reply to the return on April 12, 2016. Contrary to the Petitioner’s assertions in his petition, the motion for rehearing, the return to the motion for rehearing, and the Petitioner’s reply are reflected on the online South Carolina Appellate Case Management System. The Court of Appeals has not ruled on Petitioner’s motion for rehearing to date.

ANALYSIS

I. NO ORIGINAL JURISDICTION

This Court should deny Petitioner’s request for writs of mandamus and prohibition and dismiss his complaint, because no significant public interest or emergency exists justifying this Court’s exercise of its original jurisdiction over the matter.

Pursuant to the South Carolina Constitution, Article V, Section 5, this Court “shall have the power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.” S.C. CONST. Art. V., § 5, see also S.C. Code Ann. § 14-3-310 (1976).

“Although Article V, §5, of the South Carolina Constitution vests this Court with the authority to issue extraordinary writs and entertain actions in its original jurisdiction, this Court’s primary function is to act as an appellate court to review appeals from the trial courts.” Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). Rule 245, SCACR, provides that this Court “will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without prejudice to the rights of the parties.” (emphasis added). “The rule is that, where the court in which the original action is brought has jurisdiction and the usual remedies provided by law are adequate and complete”, writs for prohibition and mandamus will not rise. Woodworth v. Gallman, 195 S.C. 157, 10 S.E.2d 316, 319 (1940).

Rule 245, SCACR, provides guidance for circumstances that warrant an exercise of original jurisdiction over a matter: “[o]nly when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction.” Key, 305 S.C. at 116, 406 S.E.2d at 357. The facts evidencing the public interest or emergency “must be stated in the petition with supporting affidavits.” Rule 245(a), SCACR.

The Relief requested by the Petitioner in his petition and complaint includes:

1. “an Order vacating the March 24, 2016 Order of the Court of Appeals awarding costs to the IHOA Defendant in Appellate Case 2013-000714...”;

2. “an Order awarding” Petitioner “punitive damages in an amount of the Supreme Court’s choosing as a deterrent to any further false claims as to costs on appeal.”

Petitioner’s Petition, p. 2; Petitioner’s Complaint, p. 8.

The petition and unverified complaint are devoid of evidence of a public interest, grounds for an emergency, or other good reason for this Court to exercise its original jurisdiction. The Petitioner requests the Supreme Court to vacate an order properly entered by the South Carolina Court of Appeals awarding costs on appeal. Seeking the reversal of a properly entered order is not grounds for a petition for writs of prohibition and mandamus. Because the Petitioner failed to set forth good reasons for this Court to exercise its original jurisdiction, this Court should deny Petitioner’s writ and dismiss his complaint.

II. THE PETITION LACKS MERIT

In addition to Petitioner’s failure to submit evidence that this matter is subject to the original jurisdiction of this Court, he also failed to provide evidence that he is entitled to writs, and as result, they must be denied and his complaint dismissed.

A. No Evidence Exists to Warrant a Writ of Mandamus

“To obtain a writ of mandamus requiring the performance of an act, the applicant must show 1) a duty of respondent to perform the act, 2) the ministerial nature of the act, 3) the applicant’s specific legal right for which discharge of the duty is necessary, and 4) lack of any other legal remedy.” Redmond v. Lexington Co. Sch. Dist. No. Four, 314 S.C. 431,437, 445 S.E.2d 441, 445 (1994), see also Willimon v. City of Greenville, 243 S.C. 82, 87, 132 S.E.2d 169, 171 (1963).

Based on the long established jurisprudence of this Court:

The writ of mandamus is the highest judicial writ known to the law and according to long approved and well established authorities, only issues in cases where there is a specific legal right to be enforced or where there is a positive duty to be performed, and there is no other specific remedy. When the legal right is doubtful, or when the performance of the duty rests in discretion, or when there is other adequate remedy, a writ of mandamus cannot rightfully issue.

Willimon, 243 S.C. at 87, 132 S.E.2d at 171 (citing Port Royal Mining Company v. Hagood, 30 S.C. 519, 9 S.E. 686, 687-88 (1889)).

First, the South Carolina Court of Appeals does not have a duty to act as alleged in the petition and complaint. Pursuant to Rule 222, SCACR, “[u]nless otherwise ordered by the appellate court or agreed by the parties, costs *shall* be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed.” Rule 222, SCACR. (Emphasis added). “The party is entitled to recover costs under this rule may, to the extent the party actually incurred these costs, recover the following: . . . the costs of the court report transcript . . . the cost of printing the Record on Appeal under Rule 209 . . . the costs of printing or copying the Final Brief . . .” Id. The Respondents were “entitled to recover an attorneys’ fee [of \$1,000]. . .” Id. Under Rule 222, SCACR, the South Carolina Court of Appeals was required to grant costs actually incurred to Respondents as the successful parties on appeal. Therefore, the South Carolina Court of Appeals did not breach a duty by entering the order awarding costs on appeal to Respondents.

Secondly, the relief sought of compelling the Court of Appeals to vacate the order awarding costs is not ministerial in nature. An act is ministerial if “it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts” and “is defined by law with such precision as to leave nothing to the

exercise of discretion.” Redmond, 314 S.C. at 437-38, 445 S.E.2d at 445. Where a Petitioner “seeks the writ to compel a Judge to rule a particular way” (i.e. grant Petitioner’s motion for rehearing the order awarding costs) this Court has held that the act is not ministerial in nature. See City of Rock Hill v. Thompson, 349 S.C. 197, 201, 563 S.E.2d 101, 103 (2002), quoting 55 C.J.S. Mandamus § 83 (1998) (while mandamus may be employed to compel an inferior tribunal to exercise its discretion where the discretion can be legally exercised in only one way, ordinarily it may not be used to direct or compel the exercise of discretion in a particular way). The Petitioner seeks a writ to vacate the order awarding costs that was properly entered pursuant to SCACR, Rule 222. Such an act is not ministerial in nature under South Carolina law.

Because the Petitioner failed to set forth evidence that the South Carolina Court of Appeals has a duty to act and of the ministerial nature of the act, Petitioner’s petition for writ of mandamus must be denied.

B. No Evidence Exists to Warrant a Writ of Prohibition

The principal use of a writ of prohibition “is to prevent the assumption and exercise of jurisdiction by a lower tribunal where wrong, damage and injustice are liable to follow such action.” State Bd. of Bank Control v. Sease, 188 S.C. 133, 137, 198 S.E.2d 602, 603 (1938). “The ancient prerogative writ of prohibition has been recognized and employed in the common-law system of jurisprudence for more than seven centuries, and like all prerogative writs should be used with forbearance and caution, and only in cases of necessity.” New South Life Ins. Co. v. Lindsay, 258 S.C. 198, 199, 187 S.E.2d 794, 796-97 (1972). The law in South Carolina is well settled that a writ of prohibition “will only lie to prevent an encroachment, excess, usurpation, or

improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure.” Id., see also Sease, 188 S.C. at 137, 198 S.E.2d at 603.

Where the lower tribunal has personal and subject-matter jurisdiction over the controversy, a writ of prohibition will not lie to correct errors or irregularities in procedure or to prevent an erroneous decision or an enforcement of an erroneous judgment. Lindsay, 258 S.C. at 200, 187 S.E.2d at 797. Even if the lower tribunal improperly exercises jurisdiction or encroaches, usurps and abuses judicial power, “where an adequate remedy by appeal, writ of error, Certiorari, or other prescribed methods of review are available” a writ of prohibition will not lie. Id.

The petition for writ of prohibition is completely without merit. The South Carolina Court of Appeals properly granted costs to the Respondents on appeal under Rule 222, SCACR. Granting the Respondents’ motion for cost was not erroneous, nor did it amount to abuse of power, because the Court of Appeals had jurisdiction to hear the motion and the award was proper under Rule 222, SCACR. As the successful party on appeal, the Court of Appeals was required to enter an order awarding Respondents’ costs. Although Petitioner argues that the costs were not actually incurred, the costs were incurred by Respondents, and the record reflects evidence to support this fact.

This Court should deny the Petitioner’s petition for writ of prohibition and dismiss his complaint, because the Court of Appeals had jurisdiction over the motion to award costs and it did not abuse its judicial power by entering the order pursuant to Rule 222, SCACR.

III. PETITIONER'S FAILURE TO COMPLY WITH RULE 240, SCACR, IS AN ABANDONMENT OF THE PETITION

“A party seeking the issuance of an extraordinary writ [pursuant to Rule 245, SCACR,] in the original jurisdiction of the Supreme Court shall serve and file a petition” that complies with the requirements of Rule 240, SCACR. Rule 245(b), SCACR. Rule 240(c), SCACR, sets forth that a petition to this Court must include the following:

- (1) A certificate or affidavit of service reflecting the date of service upon all parties...
- (2) A memorandum with citation of authorities in support of the motion.
- (3) ...where the facts relied upon in support of the motion are not contained in the Record of Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions.

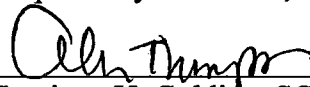
Rule 245, SCACR, echoes the requirements of Rule 240, SCACR, in that it sets forth that “the facts showing the reasons [this Court should exercise its original jurisdiction] must be stated in the petition with supporting affidavits.” See also Rule 65(f)(1) (writs of mandamus “shall be supported by affidavit or verified complaint setting forth clearly the facts entitling the moving party to such writ.”)

Petitioner did not file supporting affidavits or a verified complaint setting forth facts that support his petition for writs of mandamus and prohibition. Failure to file supporting affidavits in support of a petition for an extraordinary writ as required by Rule 240, SCACR, “may be deemed an abandonment of the...petition.” Rule 240, SCACR. Because the Petitioner failed to perform an act required under Rule 240, SCACR, resulting in a lack of evidence in support of his petition, the failure is an abandonment of the petition and complaint.

CONCLUSION

This Court should deny the petition for writs of mandamus and prohibition and dismiss the Petitioner's complaint because the Supreme Court does not have original jurisdiction over the matter, the petition for writs of mandamus and prohibition is without merit, and the Petitioner's failure to present evidence supporting his petition constitutes an abandonment of his petition.

Respectfully submitted,



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May 2, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Thomas E. Huff; Paul E. Short, Jr.; Aphrodite K. Konduros

Case No.: 2009-CP-26-3596
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SC Court of Appeals

Ronald Jarmuth, Petitioner

v.

The International Club Homeowners Association, Inc.,
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and The Court of Common Pleas Fifteenth Judicial Circuit..... Respondents.

PROOF OF SERVICE

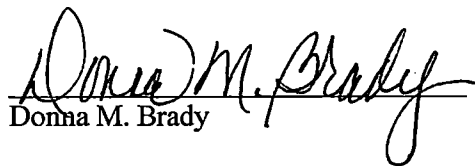
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Associates, Inc.

I, Donna M. Brady, an employee of McNair Law Firm, P.A., attorneys for Respondents International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Inc. in the above-entitled action, certify that I have served the Return to Petition for Writs of Prohibition and Mandamus, and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 2nd day of May, 2016.

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MAY 04 2016

SC Court of Appeals

RE: *Ronald Jarmuth v. International Club HOA, Inc. et al.*
Appellate Case No.: 2013-000714
Civil Action Nos.: 2009-CP-26-3596 and 2010-CP-26-11320
Our File No.: 051490.00001

Dear Ms. Kitchings:

With regard to the above matter, enclosed please find a copy of the following:

- Respondents' Return to Petition for Writs of Prohibition and Mandamus; and
- Proof of Service.

By copy of this letter to parties of record, and as shown on the Proof of Service, I hereby serve a copy of the aforementioned documents to the parties of record.

Sincerely,

McNair Law Firm, P.A.



Alicia Thompson

AT/dmb

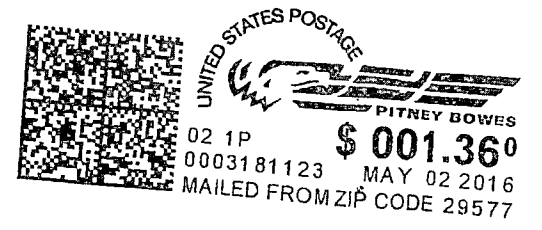
Enclosures

cc: Ronald Jarmuth
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