

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 18 2017

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2016-002540

Unpublished Opinion No.: 2016-UP-421 (S.C. Ct. App. filed October 5, 2016)

Mark D. Ostendorff.....

Petitioner,
~~Appellant,~~

v.

School District of Pickens County Board of Trustees, School District
of Pickens County, Alex Saitta, Judy Edwards, Jimmy Gillespie,
Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew, Henry Hunt,
and Robert Folkman..... Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

CHILDS & HALLIGAN, P.A.

Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

Mary Allison Caudell, S.C. Bar No. 101187
macaudell@childs-halligan.net

1301 Gervais Street, Suite 900
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Respondents

Other Parties of Record:

Mark Ostendorff
135 Cedar Creek Circle
Central, SC 29630

~~Appellant,~~ *Pro Se*

TABLE OF CONTENTS

	<u>PAGES</u>
Table of Authorities	ii
I. Questions Presented	1
II. Questions Presented	1
III. Argument	2
A. Petitioner Has Not Identified Any Special and Important Reasons for this Court to Grant a Writ of Certiorari.....	2
B. The Court of Appeals Properly Held that Petitioner Abandoned His Argument that the Circuit Court Gave Defendants “Total Immunity”	3
C. The Court of Appeals Properly Held that Petitioner Either Failed to Preserve or Conceded the Remaining Issues Upon Which He Seeks Certiorari to the Court of Appeals	4
IV. Conclusion	4

TABLE OF AUTHORITIES

PAGES

Case Law:

Fields v. Melrose Ltd. P'ship., 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).....3

First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994).....3

Jinks v. Richland Cnty., 355 S.C. 341, 585 S.E.2d 281 (2003)3

Wilder Corp. v. Wilkie, 330 S.C. 71, 497 S.E.2d 731 (1998)4

South Carolina Code:

S.C. Code Ann. § 15-78-70(b).....3

Other Authorities:

SCACR 208(b)(1)(d)3

SCACR 242(b), Considerations Governing Review2

Respondents, School District of Pickens County Board of Trustees, Alex Saitta, Judy Edwards, Jimmy Gillespie, Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew, Henry Hunt, and Robert Folkman hereby submit their return to Mark Ostendorff's Petition for Certiorari to the Court of Appeals of its October 5, 2016 decision affirming the Circuit Court's decision to grant the Respondents' motion to dismiss Petitioner's claims against them in their individual capacities.

I. QUESTIONS PRESENTED

1. Do the factors set forth in SCACR 242(b) support a writ of certiorari?
2. Did the Court of Appeals properly hold that Petitioner abandoned his argument that the Circuit Court improperly gave the individual defendants total immunity?
3. Did the Court of Appeals properly hold that Petitioner failed to preserve issues two through six of his appeal?
4. Did the Court of Appeals properly hold that Petitioner conceded the issue of whether the Pickens County School District Board of Trustees was a legal entity capable of being sued?
5. Did Petitioner fail to preserve the constitutional arguments he seeks to raise in his petition for certiorari?

II. STATEMENT OF THE CASE

Petitioner, Mark Ostendorff, is a former employee of the Pickens County School District who worked as a project manager in the building program. He filed this lawsuit *pro se* on March 4, 2014, essentially alleging wrongful termination of his employment and various tort claims against his immediate supervisor, Robert Folkman; the assistant superintendent for human resources at that time, Kelly Pew; the superintendent of the

school district, Henry Hunt; and individual members of the school district's Board of Trustees: Alex Saitta, Judy Edwards, Jimmy Gillespie, Herbert Cooper, Jim Shelton, and Ben Trotter; the School District of Pickens County; and against the School District of Pickens County board of trustees as a putative legal entity. On July 2, 2014, the Honorable Letitia H. Verdin granted a Rule 12(b)(6) motion to dismiss any and all claims against the individual defendants in their individual capacities and against the board of trustees for the reasons set forth in the defendants' motion and supporting memorandum of law. Petitioner timely appealed the decision while the underlying action continued against the School District. By order filed May 29, 2015, the Honorable Lee S. Alford granted the School District's motion for summary judgment on Petitioner's remaining claims in their entirety. Petitioner has also appealed that ruling to the Court of Appeals and it is currently pending as appellate case number 2015-001361.

III. ARGUMENT

A. Petitioner Has Not Identified Any Special and Important Reasons for this Court To Grant a Writ of Certiorari.

SCACR 242(b), **Considerations Governing Review**, provides as follows:

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Petitioner makes no argument that any of these factors are implicated in this appeal, and none of them warrant certiorari to the Court of Appeals in this case. Accordingly, certiorari should be denied.

**B. The Court of Appeals Properly Held that Petitioner
Abandoned His Argument that the Circuit Court Gave
Defendants “Total Immunity.”**

Petitioner raised to the Court of Appeals the obvious legal principle that the Tort Claims Act does not grant “total immunity” to governmental employees acting outside the scope of their official duties or who have acted with actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b). However, he did not argue to the Circuit Court or to the Court of Appeals that any of the individual defendants acted with actual fraud, actual malice, intent to harm, or committed a crime of moral turpitude or that the Complaint alleged facts that would have allowed a jury to conclude that any individual defendant acted outside the scope of his or her official duties at any time regarding the termination of Petitioner’s employment. Accordingly, by failing to make any argument as to why the trial judge erred in her ruling or failed to appreciate the law, Petitioner clearly abandoned that issue. *See Fields v. Melrose Ltd. P’ship.*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993) (“[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”); Rule 208 (b)(1)(D), SCACR; *Jinks v. Richland Cnty.*, 355 S.C. 341, 585 S.E.2d 281, 282 n. 3 (2003) (“for issue preservation, assuming the ‘statement of the issue’ is sufficient, the issue must also be argued fully in the initial brief of appellant to be preserved for the Court’s consideration”); *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

C. The Court of Appeals Properly Held that Petitioner Either Failed to Preserve or Conceded the Remaining Issues Upon Which He Seeks Certiorari to the Court of Appeals.

Following the Circuit Court's order granting the Respondents' motion to dismiss, Petitioner did not file any post-hearing motions prior to filing a notice of appeal. Petitioner's memorandum of law filed with the Circuit Court did not contain any argument regarding application of the Tort Claims Act to Respondents' motion or any argument that any facts in the complaint could be construed to constitute acts outside the scope of any individual defendant's duties. He did not make any argument that his dismissal from employment or the Circuit Court's ruling deprived him of any rights under the South Carolina or United States Constitutions. For those reasons, the Court of Appeals properly held that he had failed to preserve those issues on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.")


Likewise, the Court of Appeals properly concluded that Petitioner had conceded the issue of whether the Board of Trustees was a legal entity capable of being sued independently from the School District in the case. (R. p. 67). Further assignments of error contained in the Petition for Certiorari alleging violation of Petitioner's rights under the United States or South Carolina Constitutions were not raised to either the Circuit Court or the Court of Appeals and cannot be raised by way of the instant Petition.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 
Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

Mary Allison Caudell, S.C. Bar No. 101187
macaudell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Respondents

January 18, 2017

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2016-002540

Unpublished Opinion No.: 2016-UP-421 (S.C. Ct. App. filed October 5, 2016)

Mark D. Ostendorff.....

Petitioner,
Appellant,

v.

School District of Pickens County Board of Trustees, School District
of Pickens County, Alex Saitta, Judy Edwards, Jimmy Gillespie,
Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew, Henry Hunt,
and Robert Folkman..... Respondents.

PROOF OF SERVICE

I certify that I have served **RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI** on the *Pro Se* Appellant, by depositing a copy of it in the U.S. Mail, postage prepaid, on January 18, 2017, addressed to Mark Ostendorff, 135 Cedar Creek Circle, Central, SC 29630.



CHILDS & HALLIGAN, P.A.

Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

Mary Allison Caudell, S.C. Bar No. 101187
macaudell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Respondents