

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Judge

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Appellate Case No.: 2019-000764

William Rice Cook, III ..... Petitioner

v.

Benny Richard Phillips, Jr., and the real estate property located at 207  
North Avenue, Anderson, SC 29625 TMS # 123-26-08-02 . Respondent

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**RESPONDENT'S RETURN TO PETITIONER'S  
PETITION FOR WRIT OF CERTIORARI**

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The Petitioner should not be granted a Writ of Certiorari as he cannot comply with Rule 242 of the South Carolina Appellate Court Rules, nor can he show any viable cause why this Court should grant review in this case. The Petition falls beyond the scope of Rule 242(b) SCACR and should, therefore be denied. None of the reasons listed for petitioning the Supreme Court apply to this Appeal before the Court. Noting that a “Writ of Certiorari is not a right, but of sound judicial discretion, and will be granted only where there are special and important reasons,” *id.* it is clear that the Petitioner fails to present any viable basis for its suggestion that this Court should ignore the rulings of the trial judge and the Court of Appeals, and go above and beyond the enumerated grounds for granting Supreme Court review.

The premise of Cook’s Petition is flawed. He attempts to state that he has established a right in property by contracts which were executed by the decedent, Claudia Harden, February 28, 2006, amended by document dated August 11, 2006. (Appx. pp. 148-150). These contracts were in existence and certain work is alleged to have been done by Cook pursuant to the contracts. All of Cook’s baseless conclusions have been denied by pleadings and briefs (Appx. p. 70) filed in this case.

The decedent Claudia Harden died December 3, 2013, and Cook never took any action either before or after her death to establish that he was due any monies whatsoever, or that he was entitled to any benefit whatsoever. He is now bringing an action against Phillips, Jr. but has no basis for the action. The only

basis for Cook's claim that he has an interest in property, or that he is entitled to an interest in property, relates back to the 2006 contracts which Cook failed to take any action on and he is now foreclosed from establishing any rights under those contracts by virtue of the Non Claim Statute.

### **CERTIFICATE OF COUNSEL**

Counsel for the Respondent certifies that the Petition for Rehearing was made and fully ruled on by the Court of Appeals on April 9, 2019 (Appx. p. 2).

### **QUESTIONS PRESENTED**

1. The Court of Appeals did not err in affirming the Circuit Court as to its grant of summary judgement against Cook on his constructive trust cause of action.

2. The Court of Appeals did not err in upholding the Circuit Court's decision to grant summary judgement against Cook on his partition/equitable title cause of action.

3. The Court of Appeals did not err in upholding the Circuit Court's decision to cancel Cook's lis pendens.

### **COUNTER-STATEMENT OF THE CASE**

Cook initially filed his claim in the Probate Court (Appx. p. 238-244) which action was later stipulated to be dismissed, and then filed this action in Circuit Court against Phillips, Jr. alleging that he was due money based upon an alleged contract or sales agreement dated February 28 and August 11, 2006 which was allegedly signed by Claudia Harden's Attorney in Fact [ not Phillips, Jr.], and

Cook. The alleged sales agreements concerned the renovation and repair of a certain home situate at 207 North Avenue, Anderson, South Carolina, which was owned by Claudia P. Harden who was the grandmother of Phillips, Jr.

The agreements were allegedly signed by Julia H. Phillips, on February 28, 2006, who had been appointed as attorney in fact for Claudia P. Harden by instrument recorded in Deed Book 1840 at page 190, in the Register of Deeds Office for Anderson County, South Carolina (Appx. pp. 148-150). This alleged agreement was amended by an additional written agreement dated August 11, 2006, again signed by the attorney in fact for Claudia P. Harden, Julia Harden Phillips, the mother of the present Defendant. Both sales agreements contain various obligations of the Petitioner. Julia Harden Phillips (the Attorney In Fact) died October 26, 2011, and her Estate was administered in the Probate Court for Anderson County, Probate File 2011-ES-04-01168 and Cook filed no claims of any kind against the Estate. Ben R. Phillips, Jr. was appointed Conservator for Claudia P. Harden, in 2011 by Certificate of Appointment dated October 14, 2011. No claims against Claudia P. Harden, were filed with the Conservator, as noted by the Trial Judge.

Claudia P. Harden died testate December 3, 2013 with her Estate being probated in Anderson County Probate Court File 2014-ES-04-00047. The Estate was closed by Order of the Probate Court on June 1, 2015 and no claims were filed by Cook for the alleged debt due to him at any time. If any had been filed, the same would have been contested, *inter alia*, as being barred by the Statute of Limitations, S.C. Code Ann. §32-3-10, and §62-3-803.

The property at 207 North Avenue, Anderson, South Carolina, was devised by Claudia P. Harden to her daughter, Julia H. Phillips, who had pre-deceased her and in that event, to Phillips, Jr., pursuant to the Will (Appx. p. 236); and deeds of distribution conveying the subject property to Phillips, Jr. were recorded in the Register of Deeds Office for Anderson County on October 20, 2014, and a corrective deed on February 24, 2015, in Deed Book 11576 at page 245, and Deed Book 11717 at page 168 (Appx. pp. 159-163).

Cook filed his claim, first, in the Probate Court in the Estate of Bennie Richard Phillips, Sr. , the father of the current Defendant based upon substantial similar allegations as are contained in the current Petitioner's Complaint (Appx. pp. 238-244), at which time the claim was summarily denied. (Appx. p. 242). The Probate Court claim was removed to Circuit Court and was resolved by Stipulation of Dismissal (Appx. p. 246). The action now before the Court was then filed December 31, 2015.

The Phillips, Jr. Motion for Summary Judgement and 12(b)(6) Motion was scheduled to be heard by the Court, and Briefs and Memoranda and Argument was presented to the Court on June 13, 2016. The Court issued its Order of Summary Judgement on June 24, 2016, and this appeal followed (Appx. p. 118). The Court of Appeals issued its opinion December 19, 2018.(Appx. p. 1). A petition for rehearing was filed and denied by the Court of Appeals by order filed April 9, 2019. (Appx. p. 29) . The petition for a writ of certiorari was served on respondent by mail on May 9, 2019 and received on May 13, 2019.

Petitioners Failed to Meet the Standard for Granting a Writ of Certiorari  
Under Rule 242 SCAR

Rule 242 SCACR sets forth the "Considerations Governing Review" this Court uses in determining whether to grant a writ of certiorari to review a decision of the Court of Appeals. As set forth in that rule, "[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." This Court by rule then lists reasons indicative of instances when the Court would grant certiorari, viz.:

- (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.

The petition for writ of certiorari fails to address these reasons and fails to satisfy this Court's pronounced standard for granting certiorari. Therefore, the petition should be denied. Petitioners do not even make an attempt to argue that reasons 1, 2, 3, 4 or 5 should lead this Court to grant a writ of certiorari. The Court of Appeals, in extensively reviewing the record in this matter, the evidence, briefs and other materials, rendered a finding in favor of the Respondents. The Petitioners desire that this Court review all the documents and record and make a contrary finding in their favor. This is not the purpose for which a writ of

certiorari is granted. There is no threat to the settled law in South Carolina by the Court of Appeals' opinion. That Court painstakingly waded through the documents and testimony regarding this matter dating back to 2006. This Court need not do the same. Certiorari should thus be denied.

### ARGUMENT

**1. The Court of Appeals did not err in affirming the circuit court as to its grant of summary judgment against Cook on his constructive trust cause of action.**

Cook continues to attempt to assert a cause of action against Phillips, Jr., based upon contracts that Phillips, Jr. had no part of, did not participate in, and have not been established to bestow any benefits whatsoever upon Cook at any time. The holding of the case cited by Cook, Halbersberg v. Berry 302 S.C. 97, 106; 394 S.E. 2<sup>nd</sup> 7, 13 (Ct. App. 1990) specifically states as follows:

“A constructive trust arises against one who by fraud, actual or constructive, by commission of a wrong, or by any form of unconscionable conduct, artifice... or questionable means and against good conscience, either as obtained or currently holds the right to property (emphasis added) which he ought not in equity and good conscience hold and enjoy.”

Phillips, Jr. acquired this property by operation of law. He did nothing wrong or in violation of anyone's right to acquire the property, nor does he now hold the property wrongfully.

Cook's argument is simply wrong. Cook attempts to distinguish between “has obtained or holds the right to property” but that distinction is without merit and not true. In his efforts to assert a “constructive trust”, Cook cites the case of SSI Medical Services, Inc. v. Cox 301 S.C. 493, 500 392 S.E. 2<sup>nd</sup> 789, 793-94, 1990 as the basis for his claiming that the ownership of the property is wrongful by Phillips, Jr. However, he misstates the law as set forth in the SSI Medical

Services case, *supra*. That case was based upon the finding of a constructive trust where the Defendant had obtained money by conversion and had no right to it in the first place. The wrongful act of a defendant in SSI Medical Services was conversion, which then entitled the Court to hold that the monies that he had obtained and held onto was were wrongful and subject, therefore, to a constructive trust. A wrongful act was present. Cook ignores this fact. The cases cited by Cook are not precedent for his premise and do not establish that he has any rights whatsoever. All of the cases contained wrongful acts. Whitmire, Dominick, Smith, SSI Medical, Halbersberg, and Briggs do not establish any precedent for the position set forth by Cook. In fact, the cases when read are precedent to require that before there can be a constructive trust, there must be the actual act. Dominick v. Rhodes 202 S.C. 139, 24 S.E. 2<sup>nd</sup> 168 (1943) stated as follows:

“ .... A constructive trust will arise whenever the circumstances under which property was acquired (emphasis added) make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two (emphasis added) and provided the raising of a trust is necessary to prevent a failure of justice....”

In the Halbersberg v. Berry case, 302 S.C. 97, 394 S.E. 2<sup>nd</sup> 7 (1990), the matter involved the fraudulent acts of one of the partners; in the case of Smith v. S.C. Ret. Sys., 336 S.C. 529, 520 S.E. 2<sup>nd</sup> 352 (Ct. App. 1999) the matter dealt with an act by the decedent husband, contrary to and in violation of a Court Order and Qualified Domestic Relations Order that had previously been entered into and therefore, constituted a “bad act”.

The case of Dominick v. Rhodes 202 S.C. 149, 24 S.E. 2<sup>nd</sup> 168 (1943) dealt with the wrongful assumption of control of property by a father over the property belonging to a son who was incompetent.

In the case of Whitmire v. Adams 273 S.C. 458, 257 S.E. 2<sup>nd</sup> 163 (1979) the actions under consideration were found not to be fraudulent acts or wrongful acts, and no “constructive trust” was present.

**2. The Court of Appeals did not err in upholding the Circuit Court’s decision to grant summary judgement against Cook on his partition/equitable title cause of action.**

Cook’s assertion is simply wrong. Cook had no interest in the property. His claimed interest would have had to relate back to the 2006 contracts which he failed to establish and was barred by law from establishing by the non-claim statute (see Respondent’s Brief, Appx. p. 70-97). He does not have an equitable lien as he fails to meet the criteria to constitute an equitable lien. As set forth in the case of Chase Home Finance, LLC v. Risher 405 S.C. 202, 746 S.E. 2<sup>nd</sup> 471 (Ct. App. 2013) where the Court stated:

“For an equitable lien to arise, there must be a debt, specific property to which the debt attaches and an expressed or implied intent that the property serve as security for payment of the debt ... If a party seeking an equitable lien cannot satisfy any of these requirements, the debt is not available.”

Cook now alleges in his brief that his “claimed interest in property” relates back to the 2006 Harden contract in contravention of his previous arguments.

The Non-Claim statute (SC Code § 62-3-803) describes remedies which arose during the lifetime of a decedent but are not pursued until the Decedent’s death.

His alleged claim was against a living person, i.e., Claudia Harden, but he never

pursued that claim legally against Harden or her estate.

Phillips, Jr. had no contractual obligation, nor duty to Cook in this matter in the context of anything. Evidently Cook attempts to conjure up an equitable interest out of thin air, again with no facts and with no basis; and just because he seems to call what he has an “equitable lien” does not mean that it is so. His pleading of equitable interest is a conclusion based on nothing. He has no facts upon which to base his “right” except the contracts which expired in 2009. His attempt to bootstrap this on to 62-3-803(d)(1) is simply wrong again.

The Court of Appeals did not overlook, nor did the Court misapprehend the fact that Phillips’ acquisition of the property was perfectly legal and was without any overt action on his part. The holding of the Court of Appeals did not overlook or misapprehend the fact that Phillips legally, openly, and equitably held title to the property of the Will of the decedent, by operation of law.

**3. The Court of Appeals did not err in upholding the Circuit Court’s decision to cancel Cook’s lis pendens.**

The Lis Pendens filed in this matter was properly dismissed by the Court as it was filed in violation of S.C. Code Ann. §15-11-10. A Lis Pendens may be filed:

“[in] an action affecting the title to real property... not more than 20 days before filing the Complaint or at any time afterward... With the Clerk of each county in which the property is situated, a notice of the pendency of the action containing the names of the parties, the object of the action and the description of the property in that county affected thereby”. S.C. Code Ann. §15-11-10.

The filing of a Lis Pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. Pond Place Partners

v. Poole 351 S.C. 1, 567 S.E. 2d 881 (Ct. App. 2002). As set forth in Pond Place Partners *supra* an action affecting the title to real property clearly allows the filing of a Lis Pendens by an interested party in order to protect their ownership interest in the property subject to the litigation. The Petitioner has no ownership interest in this property by any stretch of the imagination.

See also Carolina Park Assocs. LLC v. Marino 400 S.C. 1, 732 SE 2d 876 (2012) where the Court reiterated that a Lis Pendens is only allowed “in an action affecting the title to real property”.... The Carolina Park Assocs. Court further stated:

“However, if the Court finds that the Lis Pendens does not ‘affect’ the title to real property as required under S.C. Code Ann. §15-11-10, the Lis Pendens is not authorized by the Statute and the Statute does not limit the Court’s power to cancel it. The Trial Court thus found that the Lis Pendens did not meet the requirements of the Statute and was therefore subject to being cancelled as was held by the Court.”

The Petitioner in this case does not even have a viable claim that can be made in the Courts of this state, as set forth by the numerous statutory prohibitions set forth above.

### **CONCLUSION**


1. The Petitioner should not be granted a Writ of Certiorari as he cannot comply with Rule 242 of the South Carolina Appellate Court Rules, nor can he show any viable cause why this Court should grant review in this case. The Petitioner's request for a Writ of Certiorari should be denied due to his failure to comply, with Rule 242(b) SCACR. The Petition falls beyond the scope of Rule 242(b) SCACR and should, therefore be denied. None of the reasons listed for

petitioning the Supreme Court apply to this Appeal before the Court.

Here, there are no novel questions of law, no dissent in the Court of Appeals, no conflict in the decision of the Court of Appeals with prior decisions of this Court, no substantial constitutional issues involved, and no federal questions. There is ample evidence supporting the opinion rendered by the Court of Appeals. Noting that a "Writ of Certiorari is not a right, but of sound judicial discretion, and will be granted only where there are special and important reasons," *id.*, it is clear that the Petitioner fails to present any viable basis for his suggestion that this Court should ignore the rulings of the trial judge and the Court of Appeals, and go above the enumerated grounds for granting Supreme Court review.

Based on the foregoing, including the record evidence in this case, the Briefs previously submitted, as well as this Brief, and Rule 242 of the South Carolina Appellate Court Rules, the Respondent respectfully submits that there was ample evidence to support the Court of Appeals decision and that the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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May 31, 2019

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PROOF OF SERVICE

I certify that I have served the foregoing Return to Petition for Writ of  
Certiorari by depositing a copy of it on the date shown below in the United States  
Mail, postage prepaid, addressed as follows:

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