THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED
May 29 2020
S.C. SUPREME COURT

Appellate Case No. 2020-000667
Case No. 2012-CP-07-3218

The Callawassie Island Members Club, Inc., ...Respondent,

v.

Gregory L. Martin and Rebecca L. Martin, ...Defendants,

and

The Callawassie Island Members Club, Inc., ...Respondent,

v.

Michael J. Frey and Grace I. Frey, ...Defendants,

Of Whom Gregory L. Martin and Michael J. Frey are the Petitioners.

MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE

Petitioners Gregory Martin and Michael Frey ("Petitioners") hereby oppose the Respondent The Callawassie Island Members Club, Inc.'s Motion to Strike their Petition for Writ of Certiorari and Supporting Memorandum, in which the Club demands that this Court take the unprecedented action of dismissing the Petitioners' entire appeal because they attached a relevant newspaper article to, and referred to an invoice in, their Petition for Certiorari.[1]

Respectfully, the relief that the Club is asking this Court to grant is vastly disproportionate to the infraction that it alleges. The Club would like for this Court to strip the Petitioners of judicial review on the merits of their appeal, because of a claimed technical violation of the Rules of Appellate Procedure. Although it cites no caselaw as grounds for so harsh a penalty, the Club incorrectly points to Rules 209(b) and 210(c), SCACR, as somehow warranting the relief that it seeks. However, as discussed below, (1) the article was attached and the material was referenced for a proper purpose under this Court's Rules, as is permitted by the Rules; and (2) the appropriate relief for a violation (if it **is** one, as further discussed below) of the Rules, such as the Club alleges, is for the *offending material* to be stricken, and not the Petition itself.

I. The Petitioners included the news article for a proper purpose, as permitted under this Court's Rules.

When they drafted and filed their Petition for Writ of Certiorari, the Petitioners believed that they did so in compliance with the South Carolina Rules of Appellate

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[1] The offending material appears within two footnotes of the Petitioners' Petition for Certiorari; one article is attached as an exhibit, which the Petitioners did for the convenience of the Court and in order to save the Court from having to become a subscriber to the newspaper in order to read it, as is often required by online publications.

Procedure, particularly the rules governing motions and petitions. They referred to newspaper articles and a current invoice, *not* as evidence going to the *issues* on appeal, but in support of their petition's position that exceptional circumstances exist in this case that warrant this Court's review of the Court of Appeals' decision.

a. The cited materials are relevant to this Court's "Considerations Governing Review" under Rule 242.

Because a writ of certiorari is not a matter of right, Rule 242, SCACR, sets forth factors that may be considered by the Court as it decides whether to exercise its discretion to grant review. One such consideration is "where there are special and important reasons" involved with a matter. *See* Rule 242(b), SCACR ("Considerations Governing Review"). The significance of Petitioners' case is supported by the footnote reference to press articles, featuring the plight of Callawassie members, and followed avidly by readers of the *Island Packet*, a well-known Lowcountry newspaper. (Petition for a Writ of Certiorari, p. 4, fn. 6). The footnote highlights that the Petitioners are not the only members who have been sued by the Club; in fact, there are a multitude of cases filed by the Club against its members, which are currently pending in state and federal courts.

This Court has historically deemed substantial public interest to be a special and important reason for granting a petition for certiorari:

> [A] writ of certiorari may be issued when exceptional circumstances exist. The instant case presents such exceptional circumstances as it involves a novel question of law **in a matter that has been the subject of numerous claims in state and federal courts**. A decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue **of significant public interest**.

Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154, 160 (2009) (internal citations omitted) (emphasis added); *cf. In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543, 503 S.E.2d 445, 447 (S.C. 1998) ("Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. This matter presents such a case. **Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter**. . . . However, as Judge Floyd very appropriately notes, this is not only an exceptional case **of great public interest**, but is also one presenting novel questions of law, which, to best serve the interests of judicial economy, should be answered at this time.") (emphasis added).

The news articles that the Petitioners referenced were intended to demonstrate that the issues on which the Petitioners seek this Court's certiorari review are timely to South Carolina society, and that the Petitioners' questions pertaining to nonprofit corporation governance are being closely followed by the South Carolina public. That purpose is entirely appropriate to the Court's consideration of "special and important reasons" under Rule 242.

The newspaper articles do not, as the Club improperly characterizes them, introduce new theories or evidence in support of the issues on appeal. In fact, they are referenced as part of a footnote within the Petitioners' Statement of the Case (rather than as part of an argument on any question presented). Summary judgment was granted in 2014, and this appeal has been proceeding for six years. Given the long history and the

highly-publicized issues at stake, it is appropriate that this Court perceive the continuing public interest in the Callawassie matter.

Because the Petitioners included the materials as relevant to this Court's deliberative process pursuant to Rule 242, SCACR, they respectfully request that this Court would deny the Club's Motion to Strike.

b. Rule 240, SCACR, permits a party to attach documents to a petition.

The basis for the Petitioners' inclusion of the offending material is found in Rule 240, SCACR, which governs "MOTIONS AND PETITIONS GENERALLY." That rule specifies (*inter alia*):

> **(c) Form and Content of Motions and Petitions**. . . .
>
> Where the Record on Appeal or Appendix has not been filed, or **where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions**.

Rule 240(c), SCACR (emphasis added). That language recognizes that, in certain instances, facts may be relied on that are outside the Record, and "affidavits and other documents" may be filed to support a position in a motion or petition.[2]

As grounds for its motion to strike, the Club improperly cites this Court's rules pertaining to appellate *briefs*. (Rules 209 and 210, SCACR). But the rules regarding motions and petitions to this Court are different from those pertaining to briefs, which do generally limit citations to matters included in the Record on Appeal. *See, e.g.*, Rule

[2] A well-known treatise notes that "Motions and petitions comprise the means by which a party makes requests of the appellate courts, and are virtually interchangeable under SCACR." Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 363 (3d ed. 2016).

208(b)(4), SCACR ("The *brief* shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." (emphasis added)). An examination of the Table of Contents for the Appellate Court Rules makes it clear that "briefs" are a different category of appellate filing than "motions," and they are governed by different rules and requirements. The Club is incorrect in its contention that a bright-line rule has been violated, and this Court should therefore deny its Motion to Strike.

c. The materials are not intended to be part of the Record on Appeal.

Petitioners agree with the Club that newspaper articles typically are not admissible factual evidence at a trial and should not be considered as factual evidence here. Instead, repeated in-depth articles in the press illustrate the importance of particular issues to society at a given time.[3] So it is here. The Callawassie governance, membership, and other issues are of interest to the public, and that undisputable fact is illustrated by the existence of recent press reports. As stated above, the public interest in Callawassie therefore is relevant to the "special and important reasons" for the Court to consider this Petition.

[3] It is well-established that newspaper and other media reports can indicate that a matter is of public interest or concern. *Cf. Garrard v. Charleston County Sch. Dist.*, 429 S.C. 170, 195, 838 S.E.2d 698, 711 (S.C. App. 2019), *reh'g denied* (Mar. 18, 2020) (discussing newspaper article as reflecting matter of public concern); *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 580, 556 S.E.2d 732, 737, 30 Media L. Rep. 1010 (S.C. App. 2001) (discussing newspaper articles as publishing matters of public concern); *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 507, 506 S.E.2d 497, 500, 26 Media L. Rep. 2537 (S.C. 1998) (discussing matter of public interest published by newspaper); *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 466, 629 S.E.2d 653, 665, 34 Media L. Rep. 1610 (S.C. 2006) (discussing media publishing issues of public controversy or concern).

II. The relief requested by the Club is vastly disproportionate to the infraction alleged.

The Club would have this Court strike the Petitioners' entire Petition for Certiorari because its Statement of the Case references certain newspaper articles to demonstrate public interest. This demand by the Club equates to a request for the death penalty as punishment for running a yellow light. The relief sought is inappropriate under the rules, the law, and the facts here.

Although it couches its motion as a Motion to Strike, what the Club is truly asking from this Court is Involuntary Dismissal.[4] Rule 260(a), SCACR, governs involuntary dismissal of an appeal. The rule makes it clear that such a dismissal is clerical relief,[5] and not a decision on the merits.[6] Typically, a petition for certiorari (which is, among other things, a jurisdictional device) would be dismissed for failure to comply with requirements such as timeliness, service, or in instances where the Court of Appeals has not yet rendered a final decision. No such circumstances exist here.

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[4] *See* Andrew Lindemann's letter to the Honorable Daniel Shearouse, dated May 27, 2020: "I am aware that Rule 240(b), SCACR, provides that a 'motion to dismiss an appeal . . . automatically stay the time limits for perfecting the appeal until the motion is decided.' The motion that I filed last week is akin to a motion to dismiss an appeal . . . ."

[5] Rule 260 reveals that involuntary dismissal is similar to an entry of default pursuant to Rule 55, South Carolina Rules of Civil Procedure. Similarly, after clerical dismissal, an appeal may be reinstated for good cause shown. *Compare* Rule 260(a), SCACR *with* Rule 55(a) and (c), SCRCP.

[6] The Club itself refers to the merits of the case in its Motion to Strike. It refers to the Dennises' inclusion of the exhibit as an "attempt to re-shape their legal theories from those presented in the Circuit Court . . . ," and it claims "the Dennises are now pressing unpled and unpreserved theories of unconscionability and perpetual liability." (Mtn. pp. 4-5). This argument on the merits by the Club properly belongs within the Club's Return to the Dennises' Petition, or within its appellate brief, and not within a Motion to Strike the petition itself.

Critically, the Club cites no precedent for demanding the drastic remedy of dismissal because of the inclusion of an exhibit and a footnote[7] in a petition. Counsel for the Petitioners have been unable to find any instance in which appellate jurisdiction has been denied and an appeal dismissed in such an instance, in South Carolina or elsewhere. In other words, the Club is demanding that this Court take a draconian action that would be unique in the history of South Carolina jurisprudence, and that is strongly disfavored by the principle that appellate courts should make decisions on the merits of a case, and not on alleged technical defects. [8]

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[7] The Club also protests that Petitioners referred in a footnote to (but did not attach) an ongoing Club invoice to Mr. Martin for allegedly accumulating dues, fees, and other charges. That reference is appropriate under Rule 240(c)(3), SCACR, which specifically contemplates that facts may be relied on that "are not contained in the Record on Appeal or Appendix." Also, the information in the referenced invoice can be extrapolated from information in the Record. (*See, e.g.*, Martin R. 21-25, 30-31, 406-412, 416-418 (ongoing Club demands to Mr. Martin for dues, fees, charges, interest, and attorneys' fees and costs)). And that the Club continues to send regular invoices to Mr. Martin is not in dispute and is very much a relevant part of this appeal. As the Club stated in its recent Supplemental Respondent's Brief to the Court of Appeals, filed January 30, 2019, "CIMC claims that, under the governing documents, the Martins agreed to and are required to continue to meet their financial obligations until CIMC reissues their membership to a new member." (Supplemental Respondent's Brief, p. 1). The Club itself argued: "**The Supreme Court's opinion in the *Dennis* case establishes that the contractual requirement that Club members continue to pay dues, fees, and other charges until their membership is reissued is valid and enforceable under the Nonprofit Corporation Act."** (*Id.*, p. 4) (emphasis in original). *See also, e.g.,* Affidavit of Club General Manager Jeff Spencer (Martin R. 406-407, ¶ 2: "That the dues, fees, assessments and other charges are in the nature of continuing contractual obligations . . . [and they] continue to accrue."). However, the Petitioners do not object to footnote 8 of their Petition for a Writ of Certiorari being stricken if this Court agrees with the Club that it is not proper.

[8] *See* C.J.S., *Appeal and Error*, vol. 5, § 752, p. 21 (West 2007) (footnotes omitted) ("The decisions of the appellate courts should turn on substance rather than procedural technicality, and appellate courts hesitate to dismiss a case on purely technical grounds. Unless the ground urged for dismissal is free from doubt, an appeal should not be dismissed. Thus a motion to dismiss an appeal must be made on some legal ground recognized by statute or rules of court, or otherwise present substantial defects of such a nature as to preclude a fair determination of the cause on appeal, or the motion will be denied. . . .").

CONCLUSION

Petitioners ask that this Court would deny the Club's Motion to Strike, because it is without justification under the facts and is without basis in the Rules or the law. In the Petitioners' view, the existence of public interest in the issues involved is a special and important reason for this Court to consider the appeal on its merits. Alternatively, if this Court agrees with the Club that the materials are not permitted under the Rules, the Petitioners respectfully request that this Court would permit them to file a corrected petition for certiorari, deleting the disputed exhibit and footnote, or that the Court would simply strike the exhibit and footnote, rather than the entire petition.[9]

Respectfully submitted,

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[9] The Petitioners are also agreeable to the Club's suggestion that it be permitted to submit materials that the Club believes to be relevant—so long as both sides have equal opportunity to do so. The Petitioners would welcome the opportunity to inform the Court of the Club's ongoing practices and behavior since 2014.