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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
J. Ernest Kinard, Jr., Circuit Court Judge

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 Petitioners.

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE PETITION FOR WRIT OF CERTIORARI**

On May 22, 2020, the Respondent Callawassie Island Members Club, Inc. (“CIMC”) filed a motion seeking an Order striking the Petition for Writ of Certiorari filed by the Petitioners Gregory L. Martin and Michael J. Frey. CIMC contends that the Petition, as filed, improperly includes references to and reliance on “evidence” and legal theories that are outside of the

appellate record and were not presented to the Circuit Court prior to the entry of the orders on appeal. Specifically, the Petitioners attached to their Petition, as Exhibit 1, a newspaper article from the *Hilton Head Island Packet* titled “The ‘Hotel California’ of the Lowcountry” and further cite to four other newspaper articles from the same newspaper. *See*, Petition for Writ of Certiorari, p. 4. The Petitioners also refer in the Petition to “the Club’s most recent invoice to Greg Martin, dated February 29, 2020,” which is not part of the lower court record that was closed in 2014. *See*, Petition for Writ of Certiorari, p. 6.

The Petitioners have now responded to that motion and insist that the inclusion of such newspaper articles and other evidence such as the invoice is authorized by the South Carolina Appellate Court Rules and serves a “proper purpose.” They are clearly incorrect. The Petitioners confuse the Rules applicable to a petition for writ of certiorari to the Court of Appeals and also conflate the different types of writs of certiorari that this Court may issue.

The Petitioners attempt to rely on Rule 240(c)(3), which states: “Where the Record on Appeal or Appendix has not been filed, or where facts relied upon in the 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)(3), SCACR. That rule, however, has no applicability to a petition for writ of certiorari to the Court of Appeals which is strictly governed by Rule 242, SCACR. Rule 240(a), in fact, states that “[w]here Rules 241 through 246 provide different or additional requirements or procedures, those requirements or procedures shall apply.” Rule 240(a), SCACR. Thus, it is the specific requirements and procedures of Rule 242 that control here. There is no provision in Rule 242 that allows for a party to supplement the lower court record in any respect. Rule 242(e) dictates that an Appendix be filed and states with specificity what “shall” be included in the Appendix. There is no suggestion that the parties may

submit extraneous matter -- such as newspaper articles and “new evidence” -- that is not delineated in Rule 242(e).¹

Moreover, in an attempt to cover for their deliberate violation of the Appellate Court Rules, the Petitioners confuse and conflate the types of writs of certiorari that this Court may issue. Obviously, the Petitioners have filed a petition that is governed by Rule 242. Yet, the Petitioners cite to case law that addresses a very different type of writ of certiorari -- one that is an extraordinary writ sought in the Court’s original jurisdiction per Rule 245(b), SCACR. That is a writ of certiorari directed not to the Court of Appeals, but rather to a circuit court, family court, or other lower tribunal. The case law indicated that such writs of certiorari are issued only in “exceptional circumstances” where issues are raised of “significant public interest.” *See, In re Breast Implant Products Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445, 447 (1998).

In contrast, a writ of certiorari directed to the Court of Appeals occurs fairly routinely -- many such writs are issued each year. Rule 242(b) sets forth the factors that govern the issuance of a writ of certiorari to the Court of Appeals. “Significant public interest” is not such a consideration, as it is for a Rule 245(b) writ of certiorari. This Court recently explained that “it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion.” *South Carolina Dept. of Social Services v. Benjamin*, 2020 WL 2745571 (S.C. 2020). The Court then explained that the “special reasons” are those that are set forth in Rule 242(b):

¹ Nonetheless, even if this Court were to agree with Petitioners that Rule 240 has some application to a Rule 242 petition, Rule 240(c)(3) does not authorize the parties to unilaterally supplement the record with matters outside the record such as newspaper articles and “new evidence” not available to the lower courts. This Court’s decision is based on the record below. *See, Whisonant v. Belue*, 7 S.C. 483, 121 S.E. 360, 362 (1924) (“certiorari is heard on the record below”).

Rule 242(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the court of appeals, stating a writ of certiorari will be granted only when there are special and important reasons, such as when there are novel questions of law; a dissent in the decision of the court of appeals; the decision of the court of appeals is in conflict with a prior decision of this Court; substantial constitutional issues are directly involved; or a federal question is included, and the decision of the court of appeals conflicts with a decision of the United States Supreme Court.

2020 WL 2745571, *1. Notably, this Court did not state that “significant public interest” is a consideration under Rule 242. In fact, if significant public interest is a compelling factor in a case, this appeal would have been previously certified for immediate review by the Supreme Court pursuant to Rule 204(b), SCRCR, which makes “significant public interest” a prime consideration.

Finally, the Petitioners complain that the remedy sought by CIMC is too drastic for the infraction committed. CIMC has requested only that the Court strike the Petition for Writ of Certiorari that was filed. CIMC did not specifically request the dismissal of the appeal. CIMC recognizes that the Court has great discretion to fashion an appropriate remedy, which should include the striking of the offending Petition. The Court certainly has the discretion to allow for a substitute or corrected Petition to be filed in its place, but that is obviously the Court’s decision. CIMC believes that the conduct by the Petitioners was a deliberate and blatant attempt to circumvent the applicable rules in an improper attempt to inject outside information and legal theories not presented in the courts below to impact this Court’s ruling on their Petition. But, CIMC obviously leaves it to the Court’s discretion as to the scope of the appropriate remedy. Nonetheless, the Petitioners should not be permitted to proceed with their current Petition which violates the language and spirit of the Appellate Court Rules.

Respectfully submitted,

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June 5, 2020

CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent The Callawassie Island Members Club, Inc., does hereby certify that service of the **Reply Memorandum in Support of Motion to Strike Petition for Writ of Certiorari** was made upon all counsel of record by email only this the 5th day of June 2020:

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s/ Andrew F. Lindemann
