THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
J. C. Nicholson, Circuit Court Judge

RECEIVED
Nov 12 2020
SC Court of Appeals

2020-UP-238
Case No. 2015-CP-10-03038
Appellate Case No. 2020-001371

Barry Clarke.....Petitioner,

vs.

Fine Housing, Inc. and RRJR, L.L.C.....Respondent,

Of which Fine Housing, Inc. is the .....Appellant/Respondent.

RETURN TO PETITION FOR CERTIORARI

W. Cliff Moore, III (SC Bar No. 4067)
Kirby D. Shealy III (SC Bar No. 11556)
Adams and Reese LLP
P.O. Box 2285
Columbia, SC 29202
(803) 254-4190
Attorneys for Appellant/Respondent

Cases

Statutes

Other Authorities

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case offers facts that are not material to the questions presented by this appeal. As such, Respondent provides this Counterstatement.

On December 2, 2013, Respondent purchased real property identified as 2028 Pittsburg Avenue in Charleston, South Carolina, (the "Property") from RRJR, LLC. (R. pp. 369-372). Respondent engaged William H. Sloan, Jr., an attorney licensed to practice law in South Carolina, to close the transaction for it. (R. pp. 264-265).

At the time of Respondent's purchase, Petitioner claimed that he had an interest in the Property in the form of a Right of First Refusal (the "Right"). (R. pp. 32-36). The Right is a term in a Lease dated January 8, 1999, between Petitioner and Group Investment Company, Inc. (the "Lease"). (R. pp. 355-367). Group Investment Company, Inc. owned the Property at the time the Lease was executed. Petitioner filed the Lease in the Office of the Register of Mesne Conveyance on January 27, 1999. (R. pp. 300, 367).

Mr. Sloan reviewed the title work provided to him by RRJR, LLC's counsel, which did not mention the Lease, prior to the closing. (R. pp. 265, 270). On the date of the closing, Mr. Sloan reviewed a title report that he ordered, which mentioned the Lease, but he failed to take note of the Lease when he reviewed the title report. (R. pp. 275-277, 285). Mr. Sloan did not discover and review the Lease until March 21, 2014 and he immediately advised the Respondent of the Lease. (R. pp. 285-287, 289).

The Lease is for one/half (1/2) of the parking spaces located on the Property. However, Petitioner claims that the Right encumbered all of the Property, including parking spaces that were not leased, improvements, and the unimproved portion of the property not dedicated to parking. (R. p. 316). The Lease requires an annual payment, and Petitioner made those payments to the

Respondent after Respondent purchased the Property from RRJR, LLC. (R. p. 330). The language in the Lease that Petitioner claims to be the Right simply, and in its entirety, states "Section 5.2: Right of First Refusal: Lessor grants Lessee the right of first refusal should it wish to sell." (R. p. 357).

The Petitioner and Respondent stipulated that no one advised Petitioner of the sale of the property from RRJR, LLC to Respondent. (R. p. 10). Petitioner claims that Respondent refused his attempts to enforce the Right. (R. pp. 32-36). On May 28, 2015, Petitioner filed his Summons and Complaint against Respondent and RRJR, LLC, seeking specific performance of the Right. (R. pp. 32-36). RRJR, LLC did not appear in the action and is in default. (R. pp. 60-61). Respondent answered the Complaint with a general denial and raised the affirmative defenses of waiver, laches, estoppel, prior breach, statute of limitations and contract terms too uncertain and indefinite to enforce. (R. pp. 62-66).

On September 28, 2017 the trial court entered its Order of Judgment that, in part, enforced the Right and set out the steps Petitioner needed to take to exercise it. (R. pp. 2-27). The trial court denied Respondent's Motion to Reconsider on October 20, 2017. (R. p. 1). Respondent appealed the Order of Judgment to the Court of Appeals and Petitioner filed a cross appeal concerning the trial court's calculation of the price at which Petitioner could exercise the Right. On August 12, 2020, the Court of Appeals reversed the trial court. In its reversal the Court of Appeals resolved all issues on appeal by determining that the language of the Right creates an unreasonable restraint on alienation and is therefore unenforceable. The Court of Appeals denied Petitioner's Petition for Rehearing on September 1, 2020. On October 15, 2020, Petitioner served his Petition for Certiorari requesting review of the Court of Appeals' decision.

ARGUMENTS

Petitioner offers three reasons for the Supreme Court to issue a Writ of Certiorari to review the decision of the Court of Appeals. None of the offered reasons meets the criteria set out in Rule 242, SCACR or presents an otherwise valid reason for this Court to grant the requested Writ.

1. South Carolina's Recording Statute does not address the underlying validity of real estate transactions; it only determines the priority of validly created and recorded real estate interests as to subsequent purchasers and creditors.

Petitioner complains that the Court of Appeals overlooked South Carolina's Recording Statute (S.C. Code Ann. §30- 7-10 (2007)) (the "Recording Statute") and failed to acknowledge that the Lease was recorded. In Petitioner's view, this oversight and that failure led the Court of Appeals away from the conclusion that Respondent had a duty to review the Lease, and, because it did not review the Lease prior to the purchase of the Property, Respondent cannot complain about the validity of the Right in the Lease. In taking this position, Petitioner misstates the Court of Appeals' decision and misreads the Recording Statute.

Contrary to Petitioner's argument, the Court of Appeals actually addressed the Recording Statute and acknowledged that the Lease was recorded. Its decision specifically recited: Respondent did not contest the Recording Statute's applicability, did not dispute that the Lease contained the contested language, acknowledged that the Lease was recorded in the Office of the Register of Deeds for Charleston County, and agreed that the Lease provided notice of the language argued to be the Right.

Petitioner seeks to have the Court punish Respondent for failing to review the Lease prior to purchasing the property and because Respondent engaged in "sharp" and "overreaching"

business practices. Petitioner never explains how those business practices factor into the application of the Recording Statute.

Petitioner also fails to explain how the legal authority he cites supports his Recording Statute argument, or why that argument should change the result here. The first of the two cases Respondent presents is *Five Star v. Ford Motor Company*, 408 S.C. 362, 759 S.E.2d 139 (2014). *Five Star* was a negligent design products liability case. The portion of the decision to which Respondent directs attention concerns the sufficiency of evidence offered to prove an automobile manufacturer's failure to exercise due care in design. This Court imputed basic scientific knowledge to the manufacturer and stated "[a] manufacturer may not avoid negligence liability by turning a blind-eye to the obvious". *Id*., 408 S.C. at 371, 759 S.E.2d at 144.

The bridge Petitioner offers from *Five Star* to the Recording Statue is the second case – *C&S National Bank v. Landford*, 313 S.C. 540, 443 S.E.2d 549 (1994). In *Landford* this Court recognized a guarantor's duty to read a guaranty before signing it. *Landford* relies upon two earlier decisions *Burwell v. South Carolina National Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986) and *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988). *Burwell* and *PPG Industries* also involved guarantee agreements and, like *Landford*, recognize the duty to read a contract before signing it. None of these cases address the Recording Statute.

Petitioner's argument appears to be that Respondent had a duty to read the Lease before it purchased the Property from RRJR, LLC and, had it read the lease, it would have read the putative language. Respondent agrees, but this uncontroverted point of law does not have any bearing upon the Court of Appeals' decision.

The matter for consideration involves the alleged Right contained in a Lease recorded January 17, 1999. Respondent was not a party to the Lease, but Petitioner seeks to enforce it against the Respondent almost 15 years after it was executed because it was recorded. The rationale that Petitioner pieces together citing *Five Star*, *Landford*, *Burwell* and *PPG Industries* might make sense if Petitioner had signed the Lease. But it did not.

Furthermore, Petitioner's argument makes no sense because Respondent acknowledged the Lease and that it had record notice of the Lease. This acknowledgement concedes to Petitioner whatever rights the Lease contains. Accordingly, if the Right is enforceable, Respondent accepts that it would be subject to the Right, but only if Petitioner had properly and timely invoked it.[1]

However, Respondent's challenge to the Right is that it was not validly created and, as such, notice under the Recording Statute is of no consequence. The Recording Statute specifically references many real estate transactions, including deeds of conveyance of lands, deeds creating a trust in regard to property, mortgages, marriage settlements, leases, statutory liens on buildings and lands, and contracts for purchase and sale of real property. The Recording Statute does not direct or control the creation of those interests in real estate; it just provides for constructive notice once they are filed. By way of illustration, in South Carolina certain formalities are required to create an enforceable deed conveying real property. Those requirements are set out in S.C. Code Ann. § 27-7-10, *et seq*. (2007), not in the Recording Statute. The details for a valid marriage settlement are not found in the Recording Statute, either. They are codified at S.C. Code Ann § 20-5-50 (2014).

[1] Respondent argued that because of his conduct after he discovered the sale of the Property by RRJR, LLC to Respondent, Petitioner's attempt to enforce the Right of First Refusal was barred by the doctrines of waiver, laches, and estoppel. The Court of Appeals did not address these arguments because its determination that the Right of First Refusal was not enforceable was dispositive.

The Court of Appeals determined that the Right was unenforceable because it lacked specificity and, consequentially, was an unreasonable restraint on alienation. Therefore, while the Respondent acknowledged notice of the Lease contacting the purported Right, the notice was of an unenforceable right. To illustrate this point, suppose that the Petitioner recorded a lease that contained the language "On the third anniversary of this lease I deed the Property to Tenant." Under the Recording Statute, everyone would have notice of the language in the lease. However, because the lease did not meet the statutory requirements of a deed conveying real property, it could not be enforceable as a deed.

Application of the Recording Statute does not provide a path to the relief Petitioner requests. The identified closing events, however characterized, do not impact the claimed Right. The Court of Appeals' decision addressed the language of the Lease and determined that its execution and recording 15 years before the sale by RRJR, LLC to Respondent was insufficient to create an enforceable right of first refusal. Nothing in Petitioner's first argument provides a reason to review the decision of the Court of Appeals under the guidance provided in Rule 242, SCACR, or otherwise.

2. The Right lacks essential terms.

Next, Petitioner suggests that the Court of Appeals should have construed the language in the Lease against Respondent to impose Petitioner's time-of-trial interpretation of the Right. Petitioner misses the fact that the Court of Appeals did not determine that the language was ambiguous. Further, even if it had made that determination, Petitioner's jumbled facts do not support his reasoning, and he completely fails to point to any testimony that would support the suggested construction of the Right's terms.

The Court of Appeals did not determine that the Right was ambiguous. Rather, it concluded that the Right lacked the specific terms that are required to make the Right enforceable. For the Petitioner's argument to gain any foothold, there must first be a threshold determination that there was an ambiguity. That determination is a question of law, and only after that question of law has been decided should the court attempt to determine the parties' intent, which is a question of fact. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citing 17A Am. Jur. 2d *Contracts* § 338, at 345 (1991)). Petitioner vaults over the first step of the analysis and moves directly to argue the intended terms of the Right. But the Right is not invalid because it is ambiguous; it is invalid because it lacks essential terms.

The terms of the Right contained in the Lease would be ambiguous if it were susceptible of more than one interpretation. *Id*. Petitioner does not argue for a specific interpretation of the one sentence Right; it demands the creation of new key terms. The Court of Appeals determined that the Right lacked three essential terms – (1) a description of the real property encumbered, (2) the price at which the Right can be exercised, and (3) the time for exercising the Right. The Lease does not provide for direction on any of those three (3) points. Petitioner's request is not for an interpretation of the Right; it is an improper request that the Supreme Court re-write the Lease. Courts may not add or modify terms in a contract to make it enforceable or comport with public policy. *See Poynter v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard, Inc. v. Carolina Flooring Spec., Inc*, 366 S.C. 156, 621 S.E.2d 352 (2005).

In its effort to convince the Supreme Court to add those additional terms to the Lease, Petitioner presupposes several facts that are not consistent with the record. Ultimately, they should have no bearing on Petitioner's argument, but they should be corrected to make the record clear and avoid a decision based on a misstated record. First, Petitioner states that Respondent "chose

to rush its transaction to purchase the property." Petition for Certiorari, p. 9. In fact, the timing on the transaction was not Respondent's choice. In addition to the purchase of the Property, the transaction involved the purchase of the residence of Robin Robinson, a member of RRJR, LLC. (R. p. 373). The transaction closed on December 2, 2013 because the residence was scheduled to be sold at a foreclosure sale on December 3, 2013 (R. pp. 266, 267).

Next, Respondent suggests that Respondent "did not avail itself of an opportunity to examine title before going forward with the transaction." Petition for Certiorari, p. 9. The record clearly reflects that this statement is false. Respondent's closing attorney, Mr. Sloan, made the decision to rely on the title examination provided by the attorney for RRJR, LLC, and to close the transaction for Respondent based on his review of that title examination. (R. pp. 265, 270). Mr. Sloan also ordered an additional title examination that was delivered to him on the day of the closing of the sale from RRJR, LLC to Respondent. (R. pp. 275, 276.). The title examination performed by RRJR's counsel did not report the Lease. (R. p. 270). The title examination delivered to Mr. Sloan on the date of the closing of the sale reported the Lease, but Mr. Sloan, distracted by newly reported federal tax liens, did not see the Lease in the title report. (R. pp. 277, 285). As the Court of Appeals noted, Mr. Sloan "was candid about missing the recorded Lease." Opinion 2020-UP-238, p. 4.

Finally, Petitioner states that the Group Investment Company, Inc., the original lessor under the Lease, "controlled the terms of the Recorded Lease" and the case law offered suggests that any ambiguities in the Lease should be construed against Group Investment Company, Inc., because it drafted the Lease. In fact, Petitioner testified that his attorney, representing the interests of Petitioner and Group Investment Company, Inc. drafted the Lease. (R. pp. 300, 314-315).

There is nothing in Petitioner's argument that directs the Supreme Court to evidence of either Petitioner's intent or the intent of Group Investment Company, Inc. as to: (1) the property encumbered by the Right, (2) the price at which Petitioner could exercise the Right, or (3) the mechanics for the exercise of the Right. On direct examination at the trial before the Lower Court, Petitioner testified as to why he wanted the Right but offered nothing from which the Court could determine intent as to these key components of an enforceable Right. (R. pp. 302-305). On cross-examination, Petitioner offered his belief that the Right should be prospectively enforced given the lack of the essential terms, but absent from his testimony was any evidence that could assist in the construction of the Right as intended by the parties at the time of its creation. (R. pp. 318-327). In fact, if the record suggests anything, it is that the parties never considered any of these necessary terms and that the Lower Court rewrote the Right to add them.

Petitioner attempts to fill the void created by these missing terms demonstrate that the parties to the Lease did not consider anything specific about the extent of the Right and how it would be exercised. As to the price at which Petitioner could exercise the Right, Petitioner initially claimed that he was entitled to exercise the Right by paying Fine Housing one dollar more than Fine Housing paid RRJR for the Property. (R. p. 480). At trial Petitioner suggested that the Right gave him a stake in a "bidding war" that would be launched when the owner of the Property received a purchase offer. (R. pp. 320, 321). The Lower Court determined that Petitioner attempted to exercise his Right when he offered to purchase the Property from Fine Housing on April 10, 2014 for Six Hundred Fifty Thousand Dollars ($650,000.00). (R. p. 25). Finally, in a complicated analysis that involved consideration of the sale price of other real property not controlled by the Lease, the Lower Court found that the price at which Petitioner was entitled to exercise the Right was Three Hundred Fifty Thousand Dollars ($350,000.00). (R. p. 26). Petitioner's claim that there

was an "obvious" method for determine the price at which he could exercise the Right (R. p. 321) is not based on what the parties to the Lease negotiated and is contradicted by this wide range of suggestions of the price at which Petitioner could exercise the Right. The Lower Court's ultimate decision was to rewrite the Lease to determine a price at which Petitioner could exercise the Right. This illustrates the fact that Petitioner is not seeking an interpretation of the Right according to its parties' intent, but the addition of new terms to the Right.

In his Petition for Certiorari, Petitioner concedes that there is no language in the Lease that addresses the timing of the exercise of the Right and retreats to the position that prior court decisions indicate that he has a reasonable time to perform. Petition for Certiorari, p. 10. At trial, Petitioner suggested that he had a "few weeks or a month or something like that" to exercise the Right after notice. (R. p. 325). Regardless, Petitioner testified clearly at trial that instead of exercising his Right of First Refusal to purchase the Property for One Hundred Fifty Thousand Dollars ($150,000.00), he offered to purchase the Property for Six Hundred Fifty Thousand Dollars ($650,000.00). When RRRJR refused to sell the Property to him, Petitioner waited until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formally invoke the Right of First Refusal. There is no evidence as to what the parties intended at the time of the Lease as to how to exercise the Right. Without explanation or evidence of the parties' intent, the Lower Court rewrote the terms of the Right by determining that "[t]he right of first refusal contains an implied condition of timeliness, and sixty (60) days is a reasonable time for performance." (R. p. 26).

Finally, as to the description of the property encumbered by the Right, the only evidence offered was the Lease and Petitioner's understanding of what was obvious to him at the time of trial. (R. p. 316). Petitioner conceded that the Right does not specifically identify the real property

it encumbers (R. pp. 317, 318), and he offers nothing as to the parties' intent at the time the Lease was executed as to what that property would be. The Lease is for one-half (1/2) of the parking spaces on the Property, which is defined by reference to a survey attached to the Lease. The Lease gave the tenant no right to possess the other one-half of the parking spaces, the improvements located on the Property, or the unimproved portions of the Property. Extending the Right to the entire Property is not only unsupported by evidence of the intention of the parties to the Lease, it requires an improper addition of language to the Lease.

The Right is not ambiguous. It merely lacks essential terms that make it unenforceable. The relief Petitioner requests does not merely require interpretation of an ambiguous provision, it requires the Court to rewrite the Lease without any evidence of the intention of the parties to the Lease. The Court of Appeals appropriately reversed the Lower Court's effort to rewrite the Lease, and Petitioner has not identified a special or important reason for its decision to be reviewed.

3. The Court of Appeals appropriately relied on *Webb v. Reames*.

Petitioner's final request for review goes to the heart of the of the Court of Appeals' decision, but misses its mark. Suggesting that the Court of Appeals improperly relied on *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), Petitioner engages a game of semantics in an effort to persuade this Court that the Right is not a restraint on alienation. The challenges to the application of *Webb* are not valid, and there is no legitimate reason offered to change the Court of Appeals' decision.

The volume and variety of possible interests in real property is often compared to a bundle of sticks. *See, e.g., Sea Cabins on the Ocean IV Homeowners Assn., Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 431, 548 S.E.2d 595, 602 (2001). In the comparison, the full bundle is the complete fee simple title to the property that can be separated into distinct interests represented by

the individual sticks in the bundle. Here the bundle is the fee simple title to the Property and the "stick" being examined is the Right. In its effort to name the "stick" that is the Right, the Court of Appeals relied on *Webb* to label the interest as a "pre-emptive right." *Id.*, 326 S.C. at 446, 485 S.E, 2d at 385.

Webb concerned a deed reserving a right of first refusal to the grantor. In its analysis of the right, the South Carolina Supreme Court determined

> [t]his pre-emptive right is a contingent, nonvested interest in that the grantee or the grantee's heirs might never choose to sell the property. It is an interest not conditioned on an event certain to occur. *See* R. Cunningham, W. Stoebuck, & D. Whitman, The Law of Property §3.18, at 132 (2d ed. 1993) ("A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may … buy at a price set out in the pre-emption agreement").

Id. The Court of Appeals' reliance on *Webb* was limited to that single characterization of a contingent, nonvested right of first refusal as a "pre-emptive" interest. Petitioner recites portions of the decision on which the Court of Appeals did not rely in his effort to challenge *Webb*'s applicability. Specifically, it points out that *Webb* involved a right of first refusal deemed unenforceable because it violated the Rule Against Perpetuities and because it provided a fixed price at which the right could be exercised. These factual distinctions have no bearing on the Court of Appeals' characterization of the Right as pre-emptive and are therefore immaterial.

Once identified, the Court of Appeals defined the nature, character and requirements of an enforceable right of first refusal and explained that pre-emptive rights are subject to the rule against unreasonable restraints on alienation. 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 110 (2002). Under common law, restraints on alienation of property were disfavored. *Crosswell Enters., Inc. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992). Unreasonable restraints on

alienation violate public policy and are not enforceable. *McCravey v. Otts*, 90 S.C. 447, 74 S.E. 142 (1912); *Wise v. Poston*, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984).

Again, citing 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* § 110 (2002) the Court of Appeals determined that in some situations a right of first refusal may not be an unreasonable restraint on alienation and suggests that the Right might have been enforceable if it had (1) clearly identified the real property it encumbered, (2) described a method for determining the price at which the Right could be exercised, and (3) provided for the timing of the exercise of the Right. Because it lacked these terms, the Court of Appeals appropriately decided that the Right is an unenforceable restraint on alienation.

Without citing authority, Petitioner argues that the Right does not inhibit or restrict the property owner in any manner and, as such, is not a restraint on alienation. In fact, he suggests that the Right enhances the ability of the owner of the Property to sell it. This is a game of semantics. A validly created right of first refusal that encumbers a parcel of real property is a barrier to free alienability of that parcel – the owner of the parcel cannot sell the parcel without addressing the encumbrance. If the Right were enforceable, RRJR, LLC, could not have transferred the Property to Respondent without addressing Petitioner's encumbrance. RRJR, LLC, would not have enjoyed the right of free alienability of the Property because it would have been restrained by the Right.

The Court of Appeals' limited reliance on *Webb* was appropriate. Petitioner's third argument does not state an argument of the character required for this Court to grant the requested Writ of Certiorari.

CONCLUSION

To succeed in his quest for a Writ of Certiorari, Petitioner must point to "special and important reasons." Rule 242(b), SCACR. Petitioner has not identified any of the reasons listed in Rule 242(b), SCACR, nor has he articulated a reason of similar character. The Petition for a Writ of Certiorari should be denied.

November 11, 2020

s/W. Cliff Moore, III
W. Cliff Moore, III (SC Bar No. 4067)
Kirby D. Shealy III (SC Bar No. 11556)
Adams and Reese LLP
P.O. Box 2285
Columbia, SC 29202
(803) 254-4190
Attorneys for Appellant/Respondent

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Of which Fine Housing, Inc. is the .....Appellant/Respondent.

PROOF OF SERVICE

I certify that I have caused the foregoing Return to Petition for Certiorari to be served on the Petitioner by having a copy deposited in the United States Mail, postage prepaid, on November 11, 2020, addressed to his attorneys of record, as follows:

Thomas R. Goldstein, Esq.
Belk, Cobb, Infinger & Goldstein, PA
Post Office Box 71121
Charleston, SC 29415-1121

Ashley G. Andrews, Esq.
Lafonde Law Office, PA
544 Savannah Hwy.
Charleston, SC 29407

November 11, 2020

s/W. Cliff Moore, III
W. Cliff Moore, III (SC Bar No. 4067)
Adams and Reese LLP
P.O. Box 2285
Columbia, SC 29202
(803) 254-4190
Attorneys for Appellant/Respondent

ADAMS AND REESE LLP

Attorneys at Law
Alabama
Florida
Georgia
Louisiana
Mississippi
South Carolina
Tennessee
Texas
Washington, DC

W. Cliff Moore III
Direct: 803.212.4956
E-Fax: 803.343.1248
cliff.moore@arlaw.com

November 11, 2020

Via OneDrive

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court

RE: Barry Clarke v. Fine Housing, Inc.
Appellate Case No. 2020-001371

Dear Mr. Shearouse:

I have enclosed for filing the Appellant/Respondent's Return to Petition for Certiorari. I am simultaneously serving a copy of the Return on opposing counsel as set forth in the Proof of Service.

Thank you for your consideration of this matter.

Sincerely,

s/ W. Cliff Moore, III

W. Cliff Moore, III

WCMIII/jas

Enclosure

cc: *via U.S. Mail w/ encl.*

Thomas R. Goldstein, Esq.
Belk, Cobb, Infinger & Goldstein, PA
Post Office Box 71121
Charleston, SC 29415-1121

Ashley G. Andrews, Esq.
Lafonde Law Office, PA
544 Savannah Hwy.
Charleston, SC 29407