THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

James E. Chellis, Master-in-Equity

Case No. 2016-CP-18-01812
Appellate Case No. 2020-001029

David Hannemann,
as President of the Live
Oak Village Homeowner's
Association, Inc., Respondent,

v.

William McFarland, Appellant.

*****Emergency / Time-Sensitive Matter*****

APPELLANT'S PETITION FOR REVIEW OF LOWER COURT RULING REGARDING AUTOMATIC STAY UNDER RULE 241, SCACR

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NOW COMES Defendant/Appellant, William McFarland ("Mr. McFarland"), pursuant to Rule 241(d), SCACR, and hereby petitions this Honorable Court, or any of its individual judges[1] (each of whom is hereinafter included in the reference the/this "Court," unless context makes clear otherwise), for review of the order (the "Subject Lower Court Order") of the Honorable James E. Chellis, Master-in-Equity, Dorchester County (the "Lower Court"), filed December 7, 2020 (App.[2] pp. 125–27).

INTRODUCTION

This petition is urgent and time-sensitive. The Subject Lower Court Order wrongfully requires Mr. McFarland to appear in the Lower Court at 11:30 a.m. on December 16, 2020, to explain why (supposedly) he has failed to comply with an underlying order that is the subject of this pending appeal (the "Underlying Appealed Order").

Mr. McFarland is guilty of no such failure. The Underlying Appealed Order is not operative. It is, and has been, stayed—automatically, pursuant to Rule

[1] *See* Rule 241(d)(2) ("After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order."); *see also* Rule 241(d)(7) ("Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision.").

[2] An Appendix ("App.") of pertinent material from the Lower Court record accompanies this petition.

241(a)—by the instant appeal, which, without question, Mr. McFarland duly noticed.

In issuing the Subject Lower Court Order, the Lower Court has failed to recognize the existence of the automatic stay under Rule 241(a) and erroneously summoned Mr. McFarland before it without a proper legal basis for doing so.[3] Mr. McFarland asks this Court for an order (or, if necessary, orders) confirming[4] that he need not appear in the Lower Court on December 16, 2020, and declaring that the Subject Lower Court Order is erroneous and that the Underlying Appealed Order is subject to the automatic stay under Rule 241(a).

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[3] Indeed, as explained below, Mr. McFarland questions whether the Lower Court even had jurisdiction to do so. Moreover, and as also explained below, even assuming, *arguendo*, both that the Lower Court had jurisdiction and that the Underlying Appealed Order is not subject to the automatic stay, the Lower Court erred in failing to recognize the validity of the mootness issue that Mr. McFarland duly raised.

[4] To be clear, while believing it would benefit all concerned for this Court to confirm that the scheduled hearing should not proceed in the Lower Court on December 16th, Mr. McFarland maintains that, even in the absence of such confirmation from this Court in advance of the scheduled hearing time, he nonetheless has a good faith legal argument that he is not legally required to attend said hearing. Without question, Mr. McFarland has a right to immediate review of the Subject Lower Court Order under Rule 241(d). For this right to be meaningful, review must be conducted *before* he is haled into court by the very order in question. It is only just and logical that the filing/service of the instant petition should itself automatically stay the Subject Lower Court Order. Moreover, as referenced above and, again, will be explained below, Mr. McFarland questions whether the Lower Court even had jurisdiction to enter an order ruling on a dispute about the existence of the automatic stay. Further still, Mr. McFarland believes that the Subject Lower Court Order is likely appealable under S.C. Code Ann. § 14-3-330 and, thus, that his service of a notice of its appeal would also trigger the automatic stay under Rule 241(a).

BACKGROUND

Claiming himself, not Mr. McFarland, to be the rightfully-elected president of the Live Oak Village Homeowner's Association, Inc. (the "HOA"), and that Mr. McFarland was wrongfully denying him said office and, in turn, the corporate records, bank information, and checkbook attendant thereto, Plaintiff/Respondent, David Hannemann ("Mr. Hannemann"), brought this lawsuit against Mr. McFarland seeking, in pertinent part, the following relief:

> [A]n Order declaring that:
>
> *a.* The *Plaintiff is the rightfully-elected President of the [HOA]*;
>
> b. *In his capacity as President*, the *Plaintiff is entitled* to possession of the corporate records, bank information, and checkbook *of the [HOA]*; . . .

(App. p. 8 (emphasis added); *see generally* App. pp. 1–9.)

Mr. McFarland duly answered Mr. Hannemann's complaint, denying its material allegations and counterclaiming for, among other things, a judicial declaration in favor of his HOA presidency. (App. pp. 28–47.)

On cross-motions for summary judgment, the Lower Court entered the Underlying Appealed Order, ruling for Mr. Hannemann—in short, ruling that Mr. Hannemann, not Mr. McFarland, was the HOA president and that Mr. McFarland should therefore deliver/relinquish the corporate records/control of the HOA's

finances to Mr. Hannemann. (App. pp. 48–71.) Following the Lower Court's denial of his motion for reconsideration (App. pp. 72–76), Mr. McFarland duly noticed the instant appeal (App. pp. 84–85).

During the pendency of this appeal, on September 25, 2020, Mr. Hannemann's counsel wrote Mr. McFarland's counsel as follows, asserting that Mr. McFarland was in violation of the Underlying Appealed Order for failure to comply with a number of its "components" (i.e., the parts of the order requiring Mr. McFarland to deliver/relinquish the corporate records/control of the HOA's finances to Mr. Hannemann) and that, if Mr. McFarland did not soon comply, Mr. Hannemann would move for a rule to show cause against him:

> As you know, on August 13, 2020 [the Lower Court] entered an order disposing of both parties' summary judgment motions. In this order, [the Lower Court] ordered your client to turn over all of the books and records of [the HOA] which are in his possession, custody or control within ten (10) days of the entry of the order; to identify any books and records of the [HOA] not in his possession, custody or control, the entity in possession of the same, and to endeavor to have them returned to his possession so that he may turn the same over to Mr. Hannemann; to provide Mr. Hannemann with bank statements for the [HOA] for the preceding 72 months; and to close the bank account of the [HOA] which he has improperly maintained and operated.
>
> To date, Mr. McFarland has not complied with any of these orders. While Mr. McFarland has filed . . . [an] appeal[] in this action, these components of the Court's order are still effective and enforceable under Rule 241

> of the South Carolina Appellate Rules and Mr. McFarland's compliance with the same is required.
>
> If Mr. McFarland does not fully comply with the Court's August 13, 2020 Order by next Wednesday, September 30, 2020, we will file a Rule to Show Cause. Please consider this correspondence our good faith attempt to resolve this issue before seeking recourse from the Court.

(App. p. 87.)

This prompted correspondence between counsel on September 30 and October 1, 2020, with Mr. McFarland's counsel attempting to persuade Mr. Hannemann's counsel that a motion for a rule to show cause against Mr. McFarland was unwarranted because the Underlying Appealed Order is subject to the automatic stay under Rule 241(a) and Mr. Hannemann's counsel remaining unconvinced. (*See* App. pp. 88–98.)

Mr. Hannemann filed the underlying motion for a rule to show cause against Mr. McFarland on October 14, 2020. (*See* App. pp. 77–81.) Mr. McFarland duly responded in opposition to the motion (App. pp. 101–05), maintaining that he was not in violation of the Underlying Appealed Order because it was subject to the automatic stay under Rule 241(a), and in any event, i.e., even assuming, *arguendo*, his good faith legal position about the existence of the automatic stay was somehow incorrect, it was nonetheless a thoughtfully considered *legal* position taken in genuine *good faith* and, thus, clearly, no further explanation (beyond that

already provided by his counsel) was needed from Mr. McFarland himself to know that his conduct in conformity with said good faith legal position was not contemptuous. (*See* App. pp. 102; *see also* App. pp. 88–91, 94–98.)[5]

Mr. McFarland further argued that the components of the Underlying Appealed Order with which Mr. Hannemann accused him of failing to comply had been mooted by the democratic process of HOA governance as a result of a recent special HOA meeting at which a majority of the membership voted to remove all HOA directors and officers and elect new ones, Mr. Hannemann not among them. (*See* App. pp. 102–04.) In support of this argument, Mr. McFarland submitted certifications from four (4) HOA members, i.e., from members who, between them, hold a majority of the HOA votes,[6] attesting that a special meeting of the HOA membership was held on October 30, 2020; that, consistent with the object stated in the meeting notice, by the affirmative votes of HOA members holding a

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[5] *See Ex parte Kent*, 379 S.C. 633, 666 S.E.2d 921 (Ct. App. 2008) ("Contempt is an extreme measure and the power to find an individual in contempt is not to be lightly asserted. Contempt results from the willful disobedience of a court order and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based. A willful act is an act done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.") (internal citations and quotation marks omitted).

[6] There are only seven (7) homes—and, in turn, seven (7) votes—in the HOA. (*See, e.g.*, App. p. 106 ¶ 2–p. 107 ¶7.)

majority of the total votes entitled to be cast, all directors, and thus all officers,[7] including, without limitation, Mr. Hannemann, were removed and new (the current) directors were elected, Mr. Hannemann not among them; and that they (each of the four (4) members) approved of the votes and the results thereof as being consistent with their wishes and with what they understand to be the proper democratic governance of the HOA. (App. pp. 106–24.)

The Lower Court heard Mr. Hannemann's motion for a rule to show cause against Mr. McFarland on December 2, 2020. On December 7, 2020, the Lower Court entered the Subject Lower Court Order, requiring Mr. McFarland to appear before it at 11:30 a.m. on December 16, 2020, to explain why he has (supposedly) failed to comply with the Underlying Appealed Order.

ARGUMENT / GROUNDS OF PETITION

1. The Subject Lower Court Order is erroneous because the Underlying Appealed Order is subject to the automatic stay under Rule 241(a).

In 2000, our Supreme Court modified its prior holding in *Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335 (1985), holding that *this Court* "has the power and the authority to rule upon issues arising under [the South Carolina Appellate Court Rules], including those arising under Rule 225[8]," explaining as follows:

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[7] The HOA bylaws require all HOA officers to be directors; thus, the removal of all directors also removed all officers. (*See, e.g.*, App. p. 108 ¶ 17; *see also* App. p. 16 § 7(A).)

[8] Rule 225 was renumbered Rule 241 effective April 29, 2009.

> In *Kearney . . . , we held that when there is a dispute as to whether an automatic stay exists* under our rule, 'authority to resolve such a dispute is vested in the Supreme Court.' When *Kearney* was decided, our appellate procedural rules provided that appeals were filed and finalized in the Supreme Court, then transferred to the Court of Appeals. Since disagreements over the meaning of the rules almost always arose while jurisdiction over the appeal was vested in the Supreme Court, it was sensible that the Supreme Court resolve the disputes. Under our current procedure, the vast majority of appeals are filed, processed, and decided by the Court of Appeals. We, therefore, modify *Kearney* and hold *the Court of Appeals has the power and the authority to rule upon issues arising under SCACR,* including those arising under Rule 225.

State v. Cooper, 342 S.C. 389, 398, 536 S.E.2d 870, 875–76 (2000) (emphasis added).

The *Cooper* Court seems to have recognized a material distinction between a dispute over the *threshold* question of whether the automatic stay *exists* and disputes where the question is not whether the automatic stay does or does not exist but, where it is undisputed that it does exist, whether it should be lifted or, where it is undisputed that it does not exist, whether supersedeas should be granted. And with its reference to "the power and authority" to resolve disputes about the existence of the stay, the Court appears to link this distinction with jurisdiction. To be clear, it is the *threshold* question of the *existence* of the automatic stay that is at the heart of the Subject Lower Court Order here. (*See* App. p. 125 ("The Plaintiff files this motion requesting the Court to issue a Rule to

Show Cause requiring the Defendant McFarland to appear before the Court to explain why he has failed to comply with the [Underlying Appealed Order]. Specifically, *the Plaintiff contends that the Court's Paragraphs (G), (H), (I) and (J) of the Court's Order are subject to exceptions to the general rule automatically staying matters set forth in Rule 241 of the Appellate Court Rules. . . . The Defendant contends that the relief afforded in Paragraphs (G), (H), (I) and (J) are not covered by the specific exceptions referenced in 241(b)(1) and/or (2).*") (emphasis added).) Accordingly, to the extent that the Lower Court did not have "the power and authority," i.e., the jurisdiction, to resolve a dispute of this nature, the Subject Lower Court Order should be declared a nullity.

In any event, however, i.e., even assuming, *arguendo*, there is no question as to the Lower Court's jurisdiction, the Subject Lower Court Order is nonetheless erroneous for failing to recognize the existence of the automatic stay.

The general rule is that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a). While there are exceptions to the general rule, none applies here.

Addressing exceptions to the general rule (i.e., the rule in Rule 241(a)), Rule 241(b), provides as follows:

(b) Exceptions. The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

(1) Money judgments as provided in S.C. Code Ann. § 18-9-130.

(2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.

(3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.

(4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.

(5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.

(6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.

(7) Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.

(8) An appeal from an order granting an injunction or temporary restraining order.

(9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).

(10) Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.

> **(11)** Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5).

The exceptions that the Subject Lower Court Order relies on are Rule 241(b)(2) ("Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150") and Rule 241(b)(3) ("Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.").

As Rule 241(b) states, "[t]he exceptions to the general rule are found in statutes, court rules, and case law." The exceptions listed at Rule 241(b)(2) and (3) are statutory. Respectively, the statutes are § 18-9-150, titled "Deposit or surety when judgment requires delivery of documents or personalty," and § 18-9-160, titled "Staying judgment to execute conveyance."

Section 18-9-150 reads as follows:

> If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal unless the things required to be assigned or delivered be brought into court or placed in the custody of such officer or receiver as the court shall appoint or unless an undertaking be entered into on the part of the appellant, with at least two sureties and in such amount as the court or a judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Section 18-9-160 reads as follows:

> If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

The Underlying Appealed Order is not a judgment within the scope of §§ 18-9-150 or -160. This is not a dispute about the assignment or delivery of personal property or documents or the execution of any conveyance or other instrument by Mr. McFarland for or in favor of Mr. Hannemann, but rather about the rightful holder of the office of the HOA presidency. The corporate records/bank account involved belong to the HOA, not to Mr. McFarland or Mr. Hannemann personally, and they are entrusted to the HOA president ex officio in conjunction with their *ongoing* role as the HOA's chief executive officer. And as such, they are not the sort of personal property or documents contemplated by § 18-9-150. *See Kearney*, 287 S.C. at 328, 338 S.E.2d at 338 (Rule 41 § 1(B)(2) provides for an exception to the automatic stay from judgments directing the delivery of documents. However, this exception contemplates delivery of the documents into court pursuant to S.C. Code Ann. § 18-9-150 (1976). Holders of ABC permits and licenses must have physical possession of these documents, in order to post them in their places of business as required by law. Accordingly, Rule 41 § 1(B)(2) has no application in appeals from Circuit Court orders reversing an ABC decision to deny a permit or license."). Nor do they implicate or involve the execution of any conveyances or other instruments of the

sort contemplated by § 18-9-160, which, like § 18-9-150, contemplates conveyances or other instruments that can be executed and deposited with the clerk of court to await the outcome of an appeal.

The essential premise underlying all the "components" of the Underlying Appealed Order with which Mr. McFarland is accused of failing to comply (i.e., the parts of the order requiring Mr. McFarland to deliver/relinquish the corporate records/control of the HOA's finances to Mr. Hannemann) is the threshold decision that Mr. McFarland is not the HOA president and Mr. Hannemann is, and *that* decision is automatically stayed by Mr. McFarland's appeal pursuant to Rule 241(a). In other words, the "components" of the Underlying Appealed Order with which Mr. McFarland is accused of failing to comply hinge upon (are secondary to) the Lower Court's primary decision that Mr. McFarland is not the HOA president and Mr. Hannemann is, and the stay of the primary decision in turn stays those secondary "components."

2. The Lower Court also erred in failing to recognize the validity of the mootness issue that Mr. McFarland duly raised.

As reflected in the aforementioned certifications of HOA members holding a majority the HOA votes, a majority of the HOA members desired a special meeting to remove directors, and in turn officers, and elect new ones, and indeed, via the required democratic process, in accordance with the governing documents and the applicable statutory law—namely, § 3(B) of the HOA bylaws (*see* App. p.

11) and S.C. Code Ann. § 33-31-702—such a meeting was properly requested on September 15, 2020 (*see* App. p. 87), noticed on October 18, 2020 (*see* App. p. 110), and held on October 30, 2020 (*see, e.g.*, App. p. 115), and by the affirmative votes of HOA members holding a majority of the total votes entitled to be cast, all directors, and thus all officers, including, without limitation, Mr. Hannemann, were removed and new (the current) directors were elected, Mr. Hannemann not among them. (*See* App. pp. 106–24.)

Thus, even assuming, *arguendo*, that the Lower Court correctly ruled in favor of Mr. Hannemann (which ruling, of course, Mr. McFarland disputes and is challenging in this appeal), the components of the Underlying Appealed Order with which Mr. Hannemann accused Mr. McFarland of failing to comply were mooted by the democratic process of HOA governance as a result of the recent special HOA meeting, at which a majority of the HOA membership voted to remove all HOA directors and officers and elect new ones, Mr. Hannemann not among them.[9]

[9] To be clear, by its own terms, the most that the Underlying Appealed Order determined was that Mr. Hannemann was HOA president at a certain point in time. The Underlying Appealed Order did not rule that Mr. Hannemann would continue to be HOA president in perpetuity, or, for that matter, for any particular period of time. Indeed, prior to issuing the Underlying Appealed Order, the Lower Court had issued a *pendente lite* order, temporarily enjoining the operation of § 3(B) of the HOA bylaws, regarding special HOA meetings. While Mr. McFarland took/takes exception to the Lower Court's *pendente lite order* (indeed, his appeal thereof is part of this consolidated appeal), what is important for present purposes

CONCLUSION

Mr. McFarland asks this Court for an order (or, if necessary, orders) confirming that he need not appear in the Lower Court on December 16, 2020 (or at least that no such hearing should proceed in the Lower Court until review of the Subject Lower Court Order is concluded), and holding that the Subject Lower Court Order is erroneous and that the Underlying Appealed Order is subject to the automatic stay under Rule 241(a).

Respectfully submitted,

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is that the Underlying Appealed Order expressly states the Lower Court's intention that the *pendente lite* order be "dissolved" (App. p. 70) and, thus, that there be no restriction on the HOA's democratic self-governance via special meetings.