

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Newberry County

SC Court of Appeals

Honorable David B. Hocker, Circuit Court Judge

Opinion No. 2020-UP-307 (S.C. Ct. App. filed May 2, 2019)

The State of South Carolina,

Respondent,

v.

Craig C. Busse,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petition hereby certifies a Petition for Rehearing was filed in the South Carolina Court of Appeals and denied by Order filed August 23, 2021.

STATEMENT OF QUESTIONS PRESENTED

1. Did the South Carolina Court of Appeals err in holding that the circuit court did not abuse its discretion in the valuation and characterization of the Marital Estate, resulting in the Petitioner being responsible for the mortgage payments and the Respondent's 2015 tax debt, which violated the Prenuptial agreement?
2. Did the South Carolina Court of Appeals err in holding that Petitioner did not preserve his argument in his request for Attorney's Fees although this request was already preserved with the prenuptial agreement and the circuit court abused its discretion on this matter?
3. Did the South Carolina Court of Appeals err in stating that the Petitioner abandoned statement that the family court abused its discretion on ordering him to pay the Guardian *ad litem* travel costs?

STATEMENT OF THE CASE

The parties were married August 25, 2007 in Pennsylvania. Prior to the marriage, both parties entered into a Prenuptial Agreement on August 20, 2007 that addressed alimony, attorney's fees, marital and non-marital property. R. p. 237.

The matter on appeal to the South Carolina Court of Appeals began following a dispute between parties on January 10, 2016 that resulted in the Appellant's arrest for Domestic Violence. The parties lived separately from that point on and the Appellant pled not guilty to the charge and hired an attorney in the criminal case. R. p. 610 lines 17-20, R. p. 1562. As a result of this charge an Order of Protection was put in place for six months (Docket No.: 2016-DR-40-127). At that time the Appellant had a bond condition of no-contact in place. The Temporary Order by Honorable Gwendlyne Jones on April 22, 2016 allowed for the parties to have electronic or written communication. R. p. 91. Guardian *ad litem* Grady G. Hard, Esq. was then appointed in this case. R. p. 86. The Temporary Order also granted for the Responded to have temporary use of the marital residence and for the Appellant to pay child support and the mortgage payments for the marital residence although he was not allowed to live at the residence. R. p. 93-95. The Appellant then filed a Notice of Motion and Motion for Reconsideration and/or Relief from Judgement or Order from the Temporary Order on April 29, 2021 Pursuant to SCRCF 52(b), 60(a), and § 63-3-560(25) to request reconsideration of the mortgage payments and other issues. R. p. 162. A hearing was held on the Appellant's motion by the Honorable Gwendlyne Y. Jones on May 25, 2016 where court then ordered on June 16, 2016 denying the Appellant's motion. R. p. 105.

Due to several text messages from the Appellant to the Respondent, the Prosecutor moved for bond revocation on September 22, 2016 in front of the Honorable Frank Addy, who then revoked the Appellant's bond. Appellant, understanding that there is an uncertainty with trial and

the already financial hardships from the Temporary Order on April 22, 2016, the Appellant pled guilty pursuant to North Carolina v. Alford¹. This plea was made in exchange for a time served sentence whereas the Appellant was released that day from bond and all bond conditions.

Prior to the Appellant's Alford plea, the Respondent filed a Motion for Temporary Relief on August 31, 2016 for the Guardian *ad litem* to travel to West Virginia where the Respondent was seeking to relocate along with the minor children of the Appellant and the Respondent. R. p. 171. The Respondent's motion also requested that the Appellant be responsible for the fees associated with this request including the travel fees. *Id.* The Appellant objected to the relocation led to the text messages that at were called into question for the bond revocation, due to the request prior to the Motion filed by the Respondent.

A Consent Order Relieving Counsel was filed on January 4, 2017 relieving the Appellant's former attorneys. After the order finding the Appellant in contempt of the Temporary Order was filed on February 6, 2017, the Appellant hired new counsel Attorney Ashby Jones. R. p. 113. Appellant then supplemented the original Complaint to seek a divorce on the grounds for continuous separation for a minimum of a year. R. p. 134.

A final trial was held on March 20, 2017 through March 28, 2017 before the Honorable Monét S. Pincus. The Final Order was then filed on November 28, 2017. R. p. 1. The Appellant then filed a Motion for Reconsideration of the Final Order on December 11, 2017. Supp. R. p. 1. On January 28, 2017 the Order on Rule 59 Motion was denied and this appeal followed.

In the opinion filed on June 23, 2021, the South Carolina Court of Appeals affirmed the decision of the circuit court stating that the Petitioner abandoned his issues regarding the mortgage

¹ North Carolina v. Alford, 400 U.S. 25, 37 (1970)

payments, the Respondents tax debt, and the Guardian *ad litem* fees. The court also stated that the Petitioner did not preserve the argument for the Attorney's fees at trial. (App. p. 13-18). Pursuant to Rule 221 of the South Carolina Appellate Court Rules, the Petitioner petitioned for a rehearing, which the court denied by Order filed August 23, 2021. (App. p. 1). Pursuant to Rule 242 of the South Carolina Appellate Court Rules, the Petitioner hereby petitions for a writ of certiorari for this Court to review the Court of Appeals decision.

ARGUMENT

- I. THE SOUTH CAROLINA COURT OF APPEALS SHOULD HAVE DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE PETITIONER'S MOTION TO RECONSIDER THE TEMPORARY ORDER ORDERING THE MORTGAGE PAYMENTS TO BE THE PEITIONER'S RESPONSIBILITY WHEN THE PETITIONER SUBMITTED EVIDENCE OF THE EXPENSES SINCE THE SEPERATION AND THE MORTGAGE PAYMENTS WERE A FORM OF ALIMONY AND THEREFORE CONTROLLED BY THE PRENUPTIAL AGREEMENT ALONG WITH THE RESPONDENTS TAX DEBT.

Upon the criminal arrest for domestic violence of the Petitioner, the Respondent requested an Order of Protection from the court, which subsequently included a Temporary Order. (App. p. 1475). The Temporary Order addressed the no contact provisions of the Petitioner and the Respondent and allowed for electronic and written communication while also granting for the Respondent to remain in the marital residence. The Temporary Order also required for the Petitioner to pay the mortgage payments of the marital residence and the child support although he could not remain in the marital residence. (App. p. 144, 146-148). The Petitioner also testified at trial that he has paid a total of \$27,915.53 in mortgage payments for the marital home. (App. p. 663, lines 23-35, p. 664, lines 1-4, p. 1596, p. 1615). The Petitioner further only asked for half of the payments be reimbursed since the respondent was the occupant of the marital residence and not the Petitioner. (App. p. 664, lines 5-7). The Petitioner then filed a Notice of Motion and Motion of Reconsideration of this Temporary Order on April 29, 2016 in order to address the issues with the mortgage payments and the respondents tax debt. (App. p. 215). This motion was however denied by order of the court on June 10 2016 (App. p. 158).

When the matter was addressed at trial, the court only gave Appellant credit for the down payment he paid for the marital residence (App. p. 115, paragraph 59). However, the Petitioners request for at least half of the mortgage payments of the marital residence to be reimburse or even in full is not without support of the Prenuptial agreement. The Prenuptial agreement regarding Real Estate states: "...any down payments or other funds, or payments made by the future husband or wife regarding any real estate transaction, shall be the husband's or wife's sole and separate property...and such property shall be excluded from the marital estate of the parties for inheritance, divorce or any other purpose." (App. p. 296). Therefore, it is reasonable for the Petitioner to make the request of the court to allow for even a portion of the mortgage payments to be reimbursed. The Prenuptial agreement further stated under Separate Property, Subsection 3, regarding the marital estate during divorce, "The parties acknowledge that but for this agreement, each party would have had the statutory right of equitable distribution of marital property..." (App. p. 293). Therefore, the Petitioner is entitled to an even split of the marital estate expenses with the Respondent. The Court further erred in its discretion regarding this matter due to the fact that it allowed the Respondent to incur less debt and less responsibility regarding the matters addressed during the trial and the Motion to Reconsider filed by the Petitioner.

The Petitioner further believes that the temporary order was in violation of the prenuptial agreement because it requires the Respondent to make half of the mortgage payments. By the Respondents failure to litigate this matter, this added additional debt to the Appellant resulting in the Appellant having paid more in mortgage payments than that was testified to during trial by the time the marital residence was ultimately sold.

Furthermore, the court erred in allowing the Petitioners 2015 tax refund to be considered marital property (App. p. 114, paragraph 57). Due to the Respondents inability to claim tax liability on her 2015 Federal Income Withholdings, this should not have been factored in with the Petitioner's own separate tax refund. The Prenuptial Agreement further controlled this matter that: "The parties agree that each party's premarital and marital debt shall remain that party's separate debt." (App. p. 296).

It is immediately apparent that in regards to the matters involving the mortgage payments and the Respondent's tax debt, the trial court erred in allowing the Respondent to have no financial responsibility and for the weight of responsibility to be solely carried by the Petitioner. Both of these decisions by the trial court allowed for a complete disregard for the prenuptial agreement in which both parties had already previously agreed to. This allowed for the Respondent to gain all the advantage of these procedures while the Petitioner incurred more financial debt for matters that should have been litigated through the prenuptials and upheld by the trial court.

II. THE SOUTH CAROLINA COURT OF APPEALS SHOULD HAVE DETERMINED THAT THE PETITIONER BEING ORDER TO PAY ATTORNEYS FEES WAS AN ABUSE OF THE COURTS DISCRETION DUE TO THE PETITIONER HAVING ARGUED THESE FACTS THROUGH THE E.D.M. V. T.A.M. AND THIS MATTER WAS ALREADY CONTROLLED BY THE PRENUPTIAL AGREEMENT.

The trial court ordered for the Petitioner to pay the attorneys for the Respondent in the amount of \$77,787.13. (App. p. 124, p. 1478). However, the prenuptial agreement already controlled this matter as well stating that they both agreed to be responsible for their own attorneys' fees. The Petitioner demonstrated to the trial court that he had a history of

unemployment and difficulty obtaining a job since the move to South Carolina. (App. p. 490, lines 21-25). This made paying attorney's fees difficult on top of the mortgage payments he had already been making on the marital residence and the child support ordered in the amount of \$1,163.00 a month. (App. p. 106, paragraph 48). The financial strain the Petitioner had already been ordered to fulfill made it difficult to satisfy the order for the Appellant to pay \$1,500.00 per month in attorneys fee until it was paid in full. (App. p. 129, paragraph 35).

It is the trial court's responsibility to determine the party's ability to pay as an essential factor in determining the awarding of attorney's fees. The trial court erred in respect to this matter and in respect to the factors presented through E.D.M v. T.A.M² even though the Petitioner presented evidence to support his financial hardships. First the parties are to be responsible for their attorneys' fees per the prenuptial agreement and the Respondent had already demonstrated her ability to pay \$34,000.00 in attorney's fees. (App. p. 1117, lines 24-25, p. 1118, lines 1-6). The Respondent was also going to be able to be able to cut her expenses with the relocation to West Virginia as stated through the testimony of the Respondent's father. (App. p. 973, lines 17-25, p. 974, lines 1-55, p. 975, lines 1-13). This alone provided evidence that the Respondent would be able to further afford her attorney's fees with less expenses even though she had been able to before with the expenses already as a factor.

With respect to the trial court being in control of the awarding of attorney's fees, it erred in understanding that the Petitioner had the ability to the pay the fees. Due to the orders of both the Temporary Order and the trial court, the petitioner was left with insufficient means of paying the attorney's fees after satisfying the already ordered payments of child support,

² E.D.M. v. T.A.M. 307 S.C. 471, 415 S.E.2d 812 (1992)

mortgage payments, and the Guardian *ad litem* fees. The Petitioner submits that the trial court erred in determining these fees and that the Court of Appeals erred in its discretion to overturn this decision even with the knowledge presented in both the trial and the appeal that the Petitioner had no means to afford the attorney's fees on top of the other fees. Even though this matter was already addressed and controlled by the prenuptial agreement but ignored by the trial court. The Prenuptial agreement further controlled this and the court erred in disregarding this agreement. The agreement further stated, "If either party refuses, upon request to effectuate the terms of this Agreement, the other party shall be entitled from the defaulting party to counsel fees, court costs and necessary travel and litigation expenses required to enforce this Agreement in a court of law". (App. p. 294).

III. THE SOUTH CAROLINA COURT OF APPEALS SHOULD HAVE DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THE PETITIONER BE SOLEY RESPONSIBLE FOR THE TRAVEL COSTS OF THE GAL SINCE THE PETITIONER WAS NOT THE PARTY SEEKING RELOCATION NOR BEARING THE BURDEN OF PROOF.

The Respondent was seeking to relocate to West Virginia despite the objection of the Petitioner and the already contested custody. Therefore, the Guardian ad litem was requested to travel to West Virginia and the Petitioner was ordered to pay for the travel fees. (App. p. 122-123, paragraph 70). Because it was the Respondent's desire to relocate the Petitioner requested that these fees be equitably distributed to both parties. The Petitioner's objection was his belief in the best interest of the children however, the court ruled it was "out of spite" despite the testimony offered by the Petitioner. (App. p. 93-94). The court then ordered the

Petitioner solely responsible for the fees to the Guardian *ad litem*, which then increased by the final order.

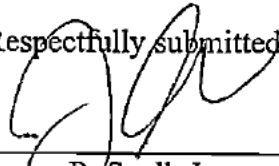
There the trial court erred in requiring these costs be the responsibility of the Petitioner since the Guardian *ad litem* is the advocate for children to determine their best interests. As stated in Arnal v. Arnal³, the Guardian *ad litem* assists in determining if the relocation is in the best interest of the children. Since that is the Guardian *ad litem*'s decision, but the relocation is at the request of the Respondent, the fees for the Guardian *ad litem*'s expenses and travel should have at the least been split between parties. Therefore, the Court of appeals erred in upholding this decision of the court since the Guardian *ad litem* is appointed by the court for matters involving the children's best interests and the relocation request of the Respondent provides support that the fees should have been equally divided between the parties.

³ Arnal v. Arnal, 363 S.C. 268, 290, 609 S.E.2d 821 (S.C. App. 205)

CONCLUSION

Based on the foregoing, the Petitioner believed that certiorari should be granted in this case; Petitioner should have these matter reconsidered and reversed making the Respondent financially responsible for her portion of the mortgage payments, her 2015 tax debt, attorneys fees, and the guardian fees; the Petitioner awarded the return of the monetary amounts he has paid for these matters, and for all other relief which is just and proper.

Respectfully submitted,



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September 23, 2021
Lexington, South Carolina

Attorney for Petitioner

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC Court of Appeals

Certiorari to Richland County
Monét S. Pincus, Circuit Court Judge

Opinion No. 2021-UP-230 (S.C. Ct. App. filed February 28, 2018)
Court of Appeals Appellate Case No.: 2018-000391

Angel R. Tomsic, Respondent,

v.

John Tomsic, Petitioner.

PROOF OF SERVICE

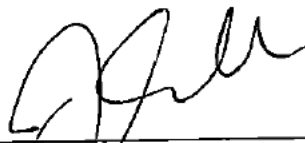
I hereby certify that I have served a copy of the *Petition for Writ of Certiorari* in this case, dated September 23, 2021 as well as disc copy of the *Appendix* (which is delayed in printing by e-filed with the court), on the following parties via email and via US-Mail, postage pre-Paid, addressed to the following:

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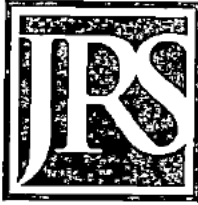
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September 23, 2021
Lexington, South Carolina



LAW OFFICE OF
JAMES R. SNELL, JR.
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September 23, 2021

The Honorable Patricia A. Howard (*via hand delivery & e-filing*)
Clerk, South Carolina Supreme Court
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The Honorable Jenny Abbott Kitchings (*via hand delivery*)
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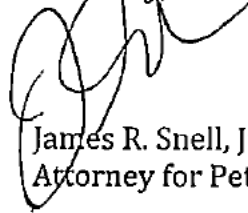
Re: Angel Tomsic, Respondent vs. John Tomsic, Petitioner
Appellate Case No.: 2018-000391
UP No.: 2021-UP-230

SC Court of Appeals

Dear Ms. Howard and Ms. Kitchings,

Enclosed for filing is an original and six (6) copies of the Petitioner's *Petition of Writ of Certiorari* as well as a *Proof Service* to all parties filed with South Carolina Supreme Court. A copy has also been filed with the South Carolina Court of Appeals. The Appendix is delayed in printing and so a copy has been e-filed and will be delivered upon completion. Counsel for the Petitioner has provided all parties a disc copy of the appendix and upon completion will serve all parties with a printed copy and will in return file a new Proof of Service of the Appendix. Thank you for your assistance with this matter.

Sincerely,



James R. Snell, Jr.
Attorney for Petitioner

Enclosures

cc: Katherine C. Goode, Esq. (via email & US-Mail)
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