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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Opinion No. 2022-UP-089 (S.C. Ct. App. filed March 2, 2022)

Elizabeth Lofton,...Respondent,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.. Petitioners.

JOHN LUCAS TREE EXPERT, CO.'S
PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner John Lucas Tree Expert, Co. certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 24, 2022.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in remanding this case to the Circuit Court for a determination of whether Lofton's late-filed Motion to Amend her Complaint should have been granted?
2. Whether the Court of Appeals should have affirmed the grant of summary judgment in favor of Petitioners based on Lofton's lack of standing?

Pursuant to Rule 242, SCACR, Petitioner John Lucas Tree Expert, Co. ("John Lucas Tree") hereby moves this Court to issue a writ of certiorari to review the Court of Appeals' Unpublished Opinion, No. 2022-UP-089, filed March 2, 2022. This Petition raises a novel and important question of law, *i.e.*, whether a plaintiff, who has been on notice for over two years that she lacks standing to bring her complaint, can do absolutely nothing and, in a last-ditch effort to avoid summary judgment, file a motion to amend in an attempt to cure her standing issue. The *South Carolina Rules of Civil Procedure* either provide a roadmap for the orderly disposition of disputes, including the provision that claims must be brought by the real party in interest and that corrections to the named party in interest must be made within "a reasonable time … after objection," Rule 17, SCRCP, or those *Rules* are merely a "suggestion" that parties can ignore with impunity. The Court of Appeals' Opinion No. 2022-UP-089 also is in conflict with this Court's ruling in *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018) that "the circuit court is not responsible for doing the plaintiff's work, and the burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff."

STATEMENT OF THE CASE

Respondent Elizabeth Lofton ("Lofton"), filed a First Amended Complaint on January

19, 2016 in Charleston County Court of Common Pleas against Petitioners John Lucas Tree and Berkeley Electric Cooperative, Inc. ("Berkeley Electric"), alleging damages to a piece of property located in Charleston County, South Carolina. Lofton asserted that she owned the subject property and/or that the property was titled in her name. (R. pp. 16-27) ("Complaint"). Lofton's Amended Complaint alleged causes of action against John Lucas Tree sounding in trespass, conversion, negligence/gross negligence, and a violation of S.C. Code Ann. § 16-11-580.

John Lucas Tree filed a timely Answer on March 14, 2016, raising, among other assertions and defenses, that Lofton had not demonstrated she owned the property that is the subject of her Complaint. (R. pp. 33-49). Berkeley Electric also filed a timely Answer on February 3, 2016. (R. pp. 29-31).

Lofton was deposed on July 7, 2016. Thereafter, on October 3, 2016, John Lucas Tree moved for summary judgment arguing, among other things, that Lofton lacked standing in her individual capacity to bring this claim because she does not own the subject property which, instead, is owned by the Irene N. Lofton Revocable Living Trust (the "Trust"), of which she is the Trustee. (R. pp. 53-77). Berkeley Electric filed its own Motion for Summary Judgment, adopting the arguments made by John Lucas Tree. (R. p. 78).

Lofton did not file any opposition to the summary judgment motions; instead, the case was removed from the General Docket under Rule 40(j), SCRCP, pursuant to a Consent Order filed on October 28, 2016. (R. pp. 79-83). Eleven months later, Lofton moved to restore the case to the active docket on September 28, 2017, making no effort to resolve her standing issue but, instead, again listing herself as the Plaintiff in her individual capacity. (R. pp. 85-87). The matter was restored on January 24, 2018. (R. pp. 89-90).

On August 31, 2018, John Lucas Tree again moved for summary judgment, once more arguing that summary judgment was proper because Lofton lacked standing to bring this lawsuit because she does not own the property at issue. (R. pp. 91-92; R. Supp. pp. 1-20). On September 19, 2018, Berkeley Electric also moved for summary judgment, again arguing that Lofton lacked standing to file suit because the Trust, not Lofton, owned the property at issue. (R. pp. 107-120).

The parties were heard by the Honorable Jennifer B. McCoy on November 26, 2018. Lofton failed to file any response or opposition to either Motion for Summary Judgment until the afternoon of the scheduled hearing. In her opposition to summary judgment, Lofton argued that she should be allowed to amend her Complaint in order to correct that error. (R. pp. 123-136). On the afternoon of the hearing, Lofton also filed a Motion to Amend her Complaint "to change the named Lofton in the lawsuit to the Trust …" (R. pp. 121-122).[1]

At the hearing, Lofton's counsel acknowledged that it had been error to bring this lawsuit in Lofton's name. (R. p. 157:6-9; *see also* R. p. 164:10-12 (Lofton's counsel conceding defense counsel "is correct in terms of the fact that she simply lacks standing"); R. p. 166:18-20 (same)). Instead, Lofton's counsel argued that she should be allowed to amend her Complaint to allow her to bring her case as the Trustee, while at the same time acknowledging that the Motion to Amend was not properly before the Court at that time:

> THE COURT: Well, I really don't think that a motion to amend is properly before this Court at this time. Certainly --
>
> MR. WHITSITT: It's not at this time, no.

[1] Lofton represented in her Motion to Amend that "pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, consultation with opposing counsel will take place prior to hearing of this matter." (R. p. 121). That is not what Rule 11 requires, however. Instead, Rule 11 requires "an affirmation that the movant's counsel *prior to filing* the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion …" Rule 11, SCRCP (emphasis added). Lofton's counsel failed to consult opposing counsel prior to filing the Motion to Amend.

THE COURT: Certainly the other parties would need to receive notice and an opportunity to prepare for such a hearing.

MR. WHITSITT: Absolutely, and I will --

THE COURT: So, I'm not prepared today to really move forward and make any kind of ruling on that.

MR. WHITSITT: And I would state to the Court that I only just today filed that motion. (R. p. 165:8-19).

On February 22, 2019, the Circuit Court issued an Order granting both John Lucas Tree and Berkeley Electric's motions for summary judgment on the basis that Lofton lacked standing to bring her claims. (R. Supp. pp. 21-24). On March 4, 2019, Lofton moved to reconsider the Order pursuant to Rules 59 and 60, SCRCP, arguing, among other things, that her Motion to Amend, "filed 27 Nov 2018 is properly before the court." Lofton maintained that she should be allowed to amend her Complaint to bring the suit in the name of the Trust. At the same time, however, Lofton argued that amending her Complaint was unnecessary because she could simply "clarify in the pleadings" that, as "the successor trustee of her mother's revocable living trust … she has the power to prosecute any claim on behalf of the trust in accordance with §62-7-816(24)." (R. pp. 139-142). After the Circuit Court denied Lofton's Motion to Reconsider in a Form 4 Order filed March 6, 2019, (R. p. 143), Lofton timely appealed to the Court of Appeals.

The Court of Appeals did not address the substance of the standing issue but,[2] instead, ruled that the Circuit Court abused its discretion by failing to decide Lofton's Motion to Amend, and remanded to the Circuit Court for it to consider her Motion to Amend. Petitioners both moved for Rehearing, which was denied on March 24, 2022.

[2] The Court of Appeals correctly determined, however, that Lofton's argument that she had statutory standing to bring the claims in her own name was not preserved because she raised it for the first time in her motion to reconsider. In addition, the Court of Appeals correctly held that her argument that she possessed constitutional standing was not properly before the Court because she raised it for the first time in her Reply Brief.

ARGUMENTS

I. The Court of Appeals erred in remanding to the Circuit Court for a determination of whether Lofton's Motion to Amend should have been granted.

Relying on *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), the Court of Appeals determined that Lofton's Motion to Amend—which she failed to file for over two years and only filed as a last-ditch effort to avoid summary judgment on the afternoon of the hearing—was ripe for decision at the point the Circuit Court was considering her Motion to Reconsider, and that the Circuit Court improperly failed to rule on it. The Court of Appeals erred both in holding that the Circuit Court failed to rule on Lofton's Motion to Amend, and in failing to determine that, waiting for over two years after objection has been made to correct the named plaintiff to be the real party in interest is, as a matter of law, an unreasonable amount of time under Rule 17, SCRCP.

Despite the fact that Petitioners raised the issue that Lofton lacked standing to bring this suit in her own name in October 2016 and again in August 2018, Lofton subsequently made no effort whatsoever to address the standing problem until the afternoon of the November 26, 2018 hearing. Moreover, after conceding at that hearing that that her Motion to Amend was not properly before the Court, (R. p. 165:8-11), Lofton made no request for a hearing on her Motion to Amend. Instead, she simply waited until after the Circuit Court ruled against her on summary judgment and then asserted her Motion to Amend was "properly before the court." (R. p. 141). Because the only motions set for hearing or decision in this case were Petitioners' motions for summary judgment, Petitioners have never responded to the late-filed Motion to Amend which, logically, became moot once summary judgment was granted.

On appeal, Lofton argued that the failure to rule on her Motion to Amend constitutes reversible error, while at the same time she continued to assert that no amendment is necessary

because she possesses statutory standing. (*Compare* R. p. 157:6-9 (Lofton's counsel conceding that it was error to have brought this lawsuit in Plaintiff's name) *and* R. p. 123 ("Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity"), *with* App. Br. p. 4 ("it is appellants position that amendment is not necessary because of the statutory power granted to Trustees") *and* (R. p. 141 ("Plaintiff would also show that Amendment is not necessary…")). Thus, the Court of Appeals' conclusion that the Circuit Court erred by failing to rule on Lofton's Motion to Amend and requires a remand conflicts with Lofton's repeated statements that such an amendment is not necessary. As has been observed, an appellant bears the burden of demonstrating that an error was prejudicial, and "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Either Lofton was prejudiced by the failure to allow her to amend her complaint, or there is no prejudicial error in the Circuit Court's denial of her late-filed Motion to Amend. Lofton cannot have it both ways.

In any event, the Circuit Court denied Lofton's request to amend her Complaint in order to name the real party in interest—the Trust—as the Plaintiff. Critically, while Lofton's counsel readily conceded at the November 2, 2018 hearing that her Motion to Amend, filed the afternoon of the hearing with no notice to Petitioners, was not properly before the Court at that time, Lofton also argued in opposition to summary judgment that she should be allowed to amend her Complaint. (R. pp. 123-124). The Circuit Court granted summary judgment to Petitioners based on Lofton's lack of standing, (Supp. R. pp. 21-24), thereby implicitly denying the request to amend.

Lofton also argued in her Motion to Reconsider that she should be allowed to amend her Complaint to correct the named Plaintiff. The Circuit Court's denial of Lofton's Motion to

Reconsider includes a denial of her request to amend. Thus, setting aside the issue of whether and when Lofton's Motion to Amend was properly before Judge McCoy, by granting Petitioners' motions over Lofton's opposition to summary judgment, and by denying her Motion to Reconsider, Judge McCoy, in her discretion, denied Lofton's unreasonably late request for leave to amend her complaint. Lofton's request to amend issue has been decided and there is no need or basis for a remand.

The ruling in *Skydive*, on which the Court of Appeals relied, is inapplicable to the instant case. In *Skydive*, the defendants moved to dismiss the plaintiff's complaint under Rule 12(b)(6), for failure to state a claim. Such motions necessarily are filed early in a case. Rule 12(b)(6), SCRCP ("[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted"). In contrast, here, Lofton's claim has been pending against John Lucas Tree since January 2016, discovery has been conducted, two separate rounds of motions for summary judgment based on Lofton's lack of standing to bring suit in her individual capacity have been filed, one before the case was removed from the docket pursuant to Rule 40(j), SCRCP, and one after it was restored. Unlike the plaintiff in *Skydive*, here, Lofton had clear notice of the standing issue and had ample opportunity to attempt to cure it. Instead, she did nothing, allowing over two years to pass, memories to fade and witnesses to become unavailable.

And, while it may be true that, when "a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal," *Skydive*, 426 S.C. at 179, 826 S.E.2d at 587, it is equally true, and more applicable to the procedural posture of this case, that "[e]very action shall be prosecuted in the name of the real party in interest," and shall be dismissed if, after "a reasonable time has been allowed, after

objection," the plaintiff fails to attempt to cure the defect by ratification, joinder or substitution of the real party in interest. Rule 17, SCRCP. Here, unlike in *Skydive*, Lofton failed to even attempt to substitute herself in her capacity as Trustee within a reasonable time after Petitioners raised the standing issue. *Skydive* addresses the issue of whether allowing an amended complaint would be futile, but does not address Rule 17 or the requirement that an amendment to correct the real party in interest must be filed within a reasonable time after "objection." Thus, the Court of Appeals erred by relying on *Skydive* as a basis for remand.

Lofton completely failed to take any steps, within a reasonable time after Petitioners objected, to correct her standing problem. In the more than two years since Petitioners first objected to Lofton bringing this suit in her own name, and more than seven months after the case was restored to the active docket, Lofton did nothing to address her standing problem. Not until the very afternoon of the hearing to consider Petitioners' renewed summary judgment motions did Lofton take any step to correct her lack of standing. Such a lengthy delay in addressing the standing problem is not even arguably reasonable under Rule 17, SCRCP, particularly where, as is the case here, Lofton has never offered any explanation or excuse for her unreasonable delay.

Moreover, *Skydive* addressed the unique problem faced by a plaintiff whose complaint has been dismissed pursuant to Rule 12(b)(6) with prejudice, leaving it no opportunity to attempt to amend—the only options available to Skydive were to appeal the dismissal or move to alter or amend the judgment which, as this Court noted, would be impracticable if the plaintiff acknowledged a need to amend the complaint in order to state a claim. 426 S.C. at 181, 826 S.E.2d at 588. Here, Lofton was faced with no such quandary or appeal deadline. Instead, as noted above, Lofton had over two years from John Lucas Tree's first motion for summary judgment in August 2016 to the date of the motions hearing in November 2018 to do

something—anything—to correct the standing issue in her Complaint. She did nothing. As a result, *Skydive* is both legally and factually distinguishable from the instant case and does not require or justify a remand to the Circuit Court for consideration of Lofton's Motion to Amend.

Patton v. Miller, 420 S.C. 471, 804 S.E.2d 252 (2017), also relied on by the Court of Appeals in support of its remand, actually supports Petitioners' position. There, the mother sued certain medical providers "as Next Friend of Alexia Lumpkin," her daughter. In April and May of 2013, the defendants moved for partial summary judgment. They filed their memoranda in support in July 2013, arguing that the mother, suing as the daughter's representative, could not recover the daughter's medical expenses incurred while she was a minor because the parents were legally responsible to pay those expenses. In August 2013—a month later—the plaintiff not only opposed summary judgment but also filed a timely motion to amend her complaint. (Exh. A to John Lucas Tree's Petition for Rehearing includes relevant pleadings from the Record on Appeal in *Patton*). Here, in contrast, Lofton waited over two years to respond in any way to Petitioners' assertion that she lacked standing to bring this case in her individual capacity, waiting until the afternoon of the summary judgment hearing. Thus, *Patton* does not support the Court of Appeals' remand. Either a reasonable time means a reasonable time, *i.e.*, a month or a few months after objection has been raised, or it is meaningless surplusage. Given that the standing issue was raised first in August 2016, there is no question that Lofton waited an unreasonable amount of time to address it. The burden to correctly name the plaintiff as the real party in interest, or to correct that error within a reasonable amount of time after notice, falls on Lofton in this case, not the circuit court. *Fisher*, 422 S.C. at 241, 811 S.E.2d at 742. Lofton failed to meet her burden of correcting the real party in interest within a reasonable time after objection was raised.

There is no excuse for Lofton's prolonged delay in attempting to correct a fundamental error that was raised to her early in this litigation. Lofton's counsel did nothing for over two years after the issue of standing was first raised and has never even attempted to provide any explanation for that failure.[3] In *Crowley v. Spivey*, this Court admonished that, while motions to amend pleadings "are favored and liberally allowed, circumstances *such as inexcusable delay*, surprise to the adverse party, or the like, may justify refusal to amend." 285 S.C. 397, 414, 329 S.E.2d 774, 784 (1985). Lofton has provided no explanation for her undue delay in addressing the standing issue. Lofton's Motion to Amend was not filed within a reasonable time after Petitioners objected to her standing to bring this case in her individual capacity. As a result, her Motion to Amend was inexcusably late under Rule 17, SCRCP, and no remand is necessary.

II. The Court of Appeals should have affirmed the grant of summary judgment in favor of Petitioners based on Lofton's lack of standing.

This Court should grant John Lucas Tree's Petition and hold that the Circuit Court properly granted summary judgment based on Lofton's lack of standing to bring this suit in her individual capacity. Standing to bring and maintain a suit "may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception."[4] *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Plaintiff cannot establish standing under any of the avenues enumerated in *ATC South* and, therefore, the Circuit Court properly granted Respondents' motions for summary judgment. Moreover, as the Court of Appeals corrected noted, Lofton's argument concerning constitutional standing was not properly before the Court, as she raised it for the first time in her Reply Brief, and her argument

[3] While Lofton's counsel suggested that she had been in the hospital, (R. p. 174), unsupported statements made by counsel do not constitute evidence. *Bowers v. Bowers,* 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("[a]rguments of counsel are also not evidence")

[4] Lofton has never argued the public importance exception.

regarding statutory standing is not preserved for appellate review because she first raised it in her Motion to Reconsider. (*See also* Brief of Resp. at p. 7). Nonetheless, John Lucas Tree addresses each argument briefly below.

In order for a plaintiff to establish constitutional standing, three elements must be satisfied. The plaintiff must have suffered an injury-in-fact, or a particularized harm; a causal connection must exist between the injury and the challenged conduct; and, it must be likely that a favorable decision will redress the injury. A party seeking to establish standing bears the burden of demonstrating each of the three elements. *Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). In other words, "[t]o have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest." *Charleston County Sch. Dist. v. Charleston County Elec. Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999). The real party in interest "has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Anchor Points v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992).

Here, Lofton filed suit in her individual capacity and not on behalf of the Trust. She readily admitted, however, that the Trust owns the property in question. She does not and has not ever owned or paid taxes on the subject property. (R. p. 150:3 – p. 151:8; *see also* Deed of Distribution, R. Supp. pp. 8-10). At the November 26, 2018 hearing, Plaintiff's counsel conceded that it was error to have brought this lawsuit in Plaintiff's name. (R. p. 157:6-9; *see also* R. p. 164:10-12 (Plaintiff's counsel conceding defense counsel "is correct in terms of the fact that [Plaintiff] simply lacks standing …"); Plaintiff's Response to Motions for Summary Judgment, R. p. 123 ("Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal

capacity")). As a result, Lofton lacks standing under the first element of the test articulated in *Sea Pines*. Plaintiff herself has not suffered an injury-in-fact. Rather, it is the Trust's property that allegedly has been harmed. Lofton cannot establish constitutional standing because she cannot prove any particularized injury or harm that she has suffered as a result of Petitioners' alleged actions. She has conceded as much on multiple occasions.

Lofton cannot establish statutory standing. As the Court of Appeals found, the first time Lofton raised any argument concerning the application of S.C. Code Ann. § 62-7-816 was in her Motion to Reconsider and, as a result it is not preserved for appellate review. *See*, *e.g.*, *Kiawah Prop. Owners Group v. PSC*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (issue first raised in motion for reconsideration is not preserved for appellate review). This rule is particularly applicable in this case where John Lucas Tree raised the defense that Lofton lacked standing in its first Motion for Summary Judgment, filed October 3, 2016, (R. pp. 56, 59), which was joined by Berkeley Electric. (R. p. 78). After the case was restored to the active docket after having been removed for nearly a year, John Lucas Tree and Berkeley Electric again moved for summary judgment, once more raising the argument that Plaintiff lacked standing. (R. Supp. pp. 1-2, 4) (R. pp. 111-113). Not only did Lofton fail to raise the issue of statutory standing or attempt to amend or correct her Complaint, she failed to file any response at all to the motions for summary judgment prior to the motions hearing.

Lofton points to seemingly broad language in S.C. Code Ann. § 62-7-816(24) that allows a trustee to "prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties." Notably, the statute does not authorize a trustee to bring suit in the trustee's individual capacity as opposed to on behalf of or in the name of the trust. Coupled with a trustee's duty of loyalty enshrined in S.C.

Code Ann. § 62-7-802(a), ("[a] trustee shall administer the trust solely in the interests of the beneficiaries"), allowing a trustee to sue in her own personal capacity risks violating that core duty. For example, should Lofton prevail in her lawsuit, any recovery would go to her directly and not to the Trust itself.[5] Such an absurd result cannot have been what the Legislature intended. Instead, S.C. Code Ann. § 62-7-816(24) clearly allows a trustee to bring suit on behalf of the Trust, but does not allow a trustee to pursue personal, individual claims based on trust property. While there are no South Carolina cases discussing whether Section 62-7-816(24) grants statutory standing for claims brought in the trustee's individual capacity and not in the name of the trust or on behalf of the trust, in other cases where the plaintiff was found to have statutory standing, the statutory provisions unambiguously granted that right to an individual suing in his or her own capacity. (*see* John Lucas Tree Resp. Br. pp. 11-12).

Because Lofton's arguments that she possesses constitutional and/or statutory standing to bring this lawsuit in her individual capacity are not preserved for appellate review and, furthermore, lack merit, this Court should grant certiorari and affirm the Circuit Court's grant of summary judgment.

Finally, John Lucas Tree hereby adopts and incorporates by reference the arguments in Petitioner Berkeley Electric's Petition to the extent they are not inconsistent with the arguments set forth herein.

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[5] To the extent it is argued that, if Lofton failed to apply any recovery she obtained from the lawsuit to the Trust and/or Trust property itself, the other beneficiaries could sue her to force her to comply with her statutory duties, such a result would conflict with the basic tenants of trusteeship and would require the other beneficiaries to engage in further litigation that otherwise would have been unnecessary. Patently, if the lawsuit had been brought in the name of the Trust, as it properly should have been, there would be no question as to the disposition of any recovery.

CONCLUSION

For the reasons stated, Petitioner John Lucas Tree respectfully asks the Court to grant its Petition for a writ of certiorari.

Respectfully submitted,

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