THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2022-000466
Case No. 2018-CP-40-5641

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May 16 2022

S.C. SUPREME COURT

Ronald I. Paul,..... Petitioner,

v.

South Carolina Department of Transportation; Paul D. de Holczer, individually and as a partner of the law firm of Moses, Koon & Brackett, PC; Michael H. Quinn, individually and as senior lawyer of Quinn Law Firm, LLC; J. Charles Ormond, Jr., individually and as a partner of the Law Firm of Holler, Dennis, Corbett, Ormond, Plante & Garner; Oscar K. Rucker, in his individual capacity as Director, Rights of Way South Carolina Department of Transportation; Macie M. Gresham, in her individual capacity as Eastern Region Right of Way Program Manager South Carolina Department of Transportation; Natalie J. Moore, in her individual capacity as Assistant Chief Counsel, South Carolina Department of Transportation,..... Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This litigation arises from a condemnation action that was commenced in 2002 by the Respondent South Carolina Department of Transportation ("SCDOT") and captioned *South Carolina Department of Transportation v. Buckles*, Civil Action Number 2002-CP-40-4800. That condemnation action was tried by former Circuit Court Judge Reginald I. Lloyd in October 2004. In the Order of Judgment filed March 11, 2005, Judge Lloyd directed the Clerk of Court to disburse $2,450.00 to the Petitioner Ronald Paul as the just compensation payable for his leasehold interest. (R. 84-94).[1] That Order was subsequently appealed by the Petitioner, and the Court of Appeals affirmed on October 23, 2006. (R. 95-97). This Court later denied a petition for writ of certiorari on October 18, 2007. (R. 98-99).

On February 20, 2008, the Petitioner filed a civil action bearing Civil Action Number 2008-CP-40-1259 in the Court of Common Pleas against most of the same Defendants as in this case, including SCDOT, de Holczer, Quinn, and Ormond. That Complaint included causes of action for civil conspiracy in several particulars. (R. 100-114). By Order filed March 25, 2009, Special Circuit Court Judge Joseph M. Strickland granted the Defendants' motion to dismiss based on a statute of limitations defense and other defenses. (R. 118-125). The Petitioner appealed to the Court of Appeals which affirmed the dismissal on November 19, 2010. (R. 126-128). On October 9, 2011, this Court denied a petition for writ of certiorari. (R. 129).

[1] The pertinent pleadings and orders filed in the 2002 condemnation action and subsequent litigation commenced by the Petitioner were submitted into the record in support of Motions to Dismiss filed by the Respondents. The Circuit Court properly took judicial notice of those pleadings and orders. (R. 19). *See*, *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records." *See also*, *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011).

The Petitioner thereafter filed several lawsuits in the United States District Court, including the following:

> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:12-1036-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:13-367-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:13-1852-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:15-2178-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation.*,
> Civil Action Number 3:16-1727-CMC-PGJ

In these federal lawsuits, the Petitioner alleged causes of action under 42 U.S.C. § 1983 for civil conspiracy in which he sought both declaratory and monetary relief. In the 2012 action, which was brought against the same Defendants as in the present case, United States District Judge Cameron M. Currie granted the Defendants' motions to dismiss without prejudice. (R. 147-154). The Petitioner thereafter continued to file the identical or nearly identical Complaints in 2013, 2015, and 2016, and each of those lawsuits were dismissed by Judge Currie without prejudice and without issuance of service of process. (R. 166-178). In dismissing the 2016 action, Judge Currie imposed a pre-filing injunction on the Petitioner. (R. 179-185). In those previous lawsuits, the Petitioner alleged conspiracy claims under state and federal law against the current Respondents arising from the prosecution of the 2002 condemnation action, including a settlement reached with the Buckles parties as well as actions taken during the trial of that case in October 2004.

On October 26, 2018, the Petitioner filed the current lawsuit in state court. This action, like the others, includes federal Section 1983 civil conspiracy claims against the same Defendants. (R. 31-59). In lieu of filing Answers, the Respondents SCDOT, de Holczer, Moore,

Quinn, and Ormond filed Motions to Dismiss which were granted by Circuit Court Judge Jocelyn Newman by Order filed November 13, 2019. (R. 18-27). Judge Newman granted a dismissal on several alternative grounds including statute of limitations, res judicata, and collateral estoppel defenses. The Petitioner filed a Rule 59(e) Motion for Reconsideration, which was denied by Judge Newman by Form Order entered on November 26, 2020. (R. 28-30).[2]

On February 9, 2022, the Court of Appeals issued an unpublished *per curiam* decision affirming the Circuit Court's order dismissing this action. *See, Paul v. South Carolina Department of Transportation*, Op. No. 2022-UP-051 (Ct. App. filed February 9, 2022). The Petitioner filed a petition for rehearing which was denied by order filed March 18, 2022.

The Petitioner has now filed a petition for writ of certiorari with this Court.

[2] The Petitioner also named the Respondents Oscar K. Rucker and Macie M. Gresham in the 2018 lawsuit. In response to the Petitioner's attempt to hold them in default, the Respondents Rucker and Gresham filed a Motion to Set Aside Entry of Default and Motion to Dismiss. Those motions were heard by Circuit Court Judge L. Casey Manning who issued an Order entered June 7, 2019, granting their Motion to Set Aside Entry of Default and Motion to Dismiss. (R. 1-10). The Circuit Court's orders were appealed separately. That appeal was assigned Appellate Case Number 2019-001224. On February 9, 2022, the Court of Appeals affirmed the Circuit Court which had dismissed Rucker and Gresham. The Remittitur has been issued, and that appeal is now over. For that reason, the Respondents Rucker and Gresham are technically no longer parties to this case.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Respondents submit that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to or bearing on other cases.

Based upon these considerations, there is no need for this Court to review the decision of the Court of Appeals.

II. The South Carolina Court of Appeals correctly ruled that the Petitioner's current Complaint is barred by the three-year statute of limitations applicable to actions brought pursuant to 42 U.S.C. § 1983.

The Court of Appeals correctly affirmed the Circuit Court's dismissal of the Petitioner's Complaint because it is barred by the applicable three-year statute of limitations. The Petitioner's current Complaint was filed on October 26, 2018, and as a result, all claims that

arose prior to October 26, 2015 are time-barred. As the Circuit Court observed, "[t]he record, which includes orders and pleadings from the prior 2008, 2012, 2013, 2015, and 2016 lawsuits, demonstrates that the Plaintiff's alleged claims accrued and were known to the [Petitioner] prior to October 26, 2015." (R. 21). The Circuit Court also recognized that "the allegations of the current Complaint itself reflect that the causes of action accrued during the course of the 2002 condemnation action which, including appeals, ended in October 2007." (R. 21-22). Moreover, the Circuit Court correctly found that the Petitioner's 2008 litigation, which ended in October 2011, "raised the same facts and conspiracy claims as presently re-asserted in the 2018 action." (R. 22).

To challenge the statute of limitations rulings on appeal, the Petitioner makes four arguments. First, the Petitioner argues that his first cause of action for declaratory relief is equitable in nature, to which the statute of limitations is inapplicable. Second, the Petitioner insists that his claims involve a sealed instrument, and as a result, the proper statute of limitations would be twenty years under S.C. Code Ann. § 15-3-520(b). Third, the Petitioner argues that the last overt act giving rise to his conspiracy claim occurred in April 2016, and as a result, the conspiracy claim was timely brought. Finally, the Petitioner contends that he is entitled to bring a federal takings claim within three years of the United States Supreme Court's decision in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). Each argument lacks merit and does not warrant the issuance of a writ of certiorari to address.

A. Declaratory judgment cause of action is an action at law.

The Petitioner is incorrect in arguing that his first cause of action for declaratory relief is equitable in nature, and thus, a statute of limitations is inapplicable. As the South Carolina Supreme Court has held, "[a] suit for declaratory judgment is neither legal nor equitable, but is

determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781, 782 (1991). "An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." *Id.*

"Count One" in the Complaint includes the sub-caption "Declaratory Judgment 42 U.S.C. § 1983." (R. 55). This indicates that the cause of action is brought under federal law and not state law. The Petitioner further pleads: "This action is brought pursuant to 42 U.S.C. Section[] 1983 for the defendants SCDOT; Oscar K. Rucker; Macie M. Gresham; Natalie J. Moore; Paul D. de Holczer; Michael H. Quinn; and J. Charles Ormond violating the Plaintiff's rights while acting under color of state law." (R. 34). Finally, the Petitioner seeks a declaration that his constitutional rights were violated, specifically his rights under the Takings Clause of the United States Constitution, which is an action at law. (R. 56). In fact, in paragraph 106, which contains the prayer for that first cause of action, the Petitioner specifically seeks the recovery of monetary relief, namely "the resultant financial damages approximating $310,000.00," which is further proof that the declaratory judgment action is one at law. (R. 56). As such, the three-year statute of limitations is a proper time bar on that claim.

B. The twenty-year statute of limitations set forth in S.C. Code Ann. § 15-3-520(b) is not a "tolling" provision that "extends" the three-year statute of limitations for an action brought pursuant to 42 U.S.C. § 1983.

Next, the Petitioner insists that the applicable statute of limitations is twenty years under S.C. Code Ann. § 15-3-520(b) because the original condemnation action in 2002 involved property on which he had a commercial lease, which he claims -- without proof -- was a sealed instrument. Nonetheless, it makes no difference whether the lease was a sealed instrument or not. Both of the Petitioner's causes of action are brought pursuant to 42 U.S.C. § 1983, and as the Circuit Court correctly ruled and the Court of Appeals affirmed, the only appropriate statute

of limitations for a Section 1983 action is three years. In determining the proper statute of limitations in a Section 1983 claim, the United States Supreme Court has found that the federal court should adopt the state law statute of limitations for personal injury. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). In *Owens v. Okure*, 488 U.S. 235 (1989), the Supreme Court further explained that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." 488 U.S. at 249-250. Under South Carolina law, the statute of limitations for a personal injury claim is three years. *See*, S.C. Code Ann. § 15-3-530(5). Consequently, this Court has held that "[i]n South Carolina, § 1983 claims are subject to a three-year statute of limitations." *Estate of Mims v. South Carolina Department of Disabilities and Special Needs*, 422 S.C. 388, 811 S.E.2d 807, 813 (Ct. App. 2018). *See also, Simmons v. South Carolina State Ports Authority*, 694 F.2d 64 (4th Cir. 1982). Thus, the Circuit Court was correct in applying a three-year statute of limitations to the Petitioner's Section 1983 claims.

As a new issue not raised below or in the Court of Appeals and hence not properly preserved for review on certiorari,[3] the Appellant now tries to argue that the twenty-year period set forth in S.C. Code Ann. § 15-3-520(b) is, in actuality, as "tolling provision" which "extends" the original three-year limitations period by an additional twenty years. The Petitioner relies on the *Mims* case in which the Court of Appeals ruled that the mentally impaired plaintiff qualified for five years of tolling based on S.C. Code Ann. § 15-3-40, which is an actual tolling statute and not an alternative statute of limitations provision. Quite simply, S.C. Code Ann. § 15-3-520(b) is

[3] The appellate courts have consistently ruled that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 322 (2001). *See also, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

not a "tolling provision" which enlarges the statute of limitation by twenty years. The Petitioner's new argument based on *Mims* is legally frivolous, and in addition to not being properly preserved, does not support the issuance of a writ of certiorari.

C. Actions taken in defense of the lawsuits brought by the Petitioner are not "overt acts" that trigger the accrual of a new statute of limitations for a federal conspiracy claim.

The Petitioner also argues that his second cause of action for conspiracy under 42 U.S.C. § 1983 was timely brought because the last overt act occurred on April 19, 2016. Specifically, the Petitioner points to paragraph 79 of his Complaint, which reads: "In April of 2016, South Carolina Department of Transportation, Oscar K. Rucker, Macie M. Gresham, Natalie J. Moore, Paul D. de Holczer, Michael Quinn, G.L. Buckles, and J. Charles Ormond filed documents continuing to reject Paul's claims." (R. 49). That is a reference to filings made in the last of the federal lawsuits, specifically Civil Action Number 3:16-1727-CMC-PGJ.

At the motion hearing, the Petitioner explained to the Circuit Court that the "overt acts" that he was claiming to be timely are filings made to the federal or state courts or arguments made by the Respondents in the defense of the lawsuits that he has brought. (R. 441-443). Otherwise, as the Petitioner conceded to the Circuit Court, the overt acts in furtherance of the alleged conspiracy occurred in the 2002 to 2008 time frame (R. 440-441), and certainly long before October 26, 2015. In his brief filed in the Court of Appeals, the Petitioner went so far as to argue that pleadings or motions filed *in this very case* are "overt acts" giving rise to the "continuing conspiracy" that began in 2002. *See*, Petitioner's Court of Appeals Brief, p. 22.

Yet, it is well settled that measures taken to defend litigation brought by a plaintiff alleging a conspiracy, including the filing of pleadings in defense of the action, cannot be treated as the "overt act" giving rise to the conspiracy. If that were the case, as the Petitioner seems to

argue without any supporting authority, practically speaking there would be no statute of limitations for a conspiracy claim. In that case, a plaintiff could, as the Petitioner does here, file a lawsuit long after the alleged conspiracy was completed and then claim that the defendant's denial of the conspiracy in its answer or other actions taken in defense of that lawsuit are the "overt act" giving rise to the "continuing conspiracy." In *Thompson v. California Fair Plan Assn.*, 221 Cal.App.3d 760, 270 Cal.Rptr. 590 (1990), the California Court of Appeals held that "the defense of the suit cannot serve as an overt act sufficient to revive an otherwise time-barred claim on a conspiracy theory." 270 Cal.Rptr. at 594. The court explained that the defense of an earlier lawsuit is not an overt act that can be considered "wrongful because it is absolutely privileged based on considerations of public policy encouraging free access to the courts." *Id*. The United States Supreme Court has similarly held that the defense of litigation, specifically "the filing of the alleged libelous matter as part of the defendants' answer in the mandamus action," cannot be considered the overt act giving rise to an actionable conspiracy claim. *Nalle v. Oyster*, 230 U.S. 165, 183 (1913). *See also, United States v. Craft*, 105 F.3d 1123 (6th Cir. 1997) (court recognized that "filing the Notice of Appeal could not constitute an overt act in furtherance of the conspiracy"); *McLean v. International Harvester Co.*, 817 F.2d 1214, 1220, n.8 (5th Cir. 1987) (stating that privileged statements made in litigation cannot form the overt act required to prove a civil conspiracy).[4] Therefore, in the case at bar, the Circuit Court, as affirmed by the Court of Appeals, was correct in its analysis that the last "overt act" alleged by

[4] The foregoing authorities recognize that arguments made in defense of litigation, including the filing of pleadings that deny the occurrence of a conspiracy, are privileged and thus cannot constitute the "overt act" giving rise to the conspiracy. South Carolina law also recognizes that the filing of court pleadings is absolutely privileged. *See, Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002); *McKesson & Robbins*, 206 S.C. 269, 33 S.E.2d 585 (1945).

the Petitioner occurred long before October 26, 2015, and therefore, the Petitioner's conspiracy claim was time-barred.

D. The Petitioner is not entitled to claim a "new" statute of limitations accrued on June 21, 2019, for previously time-barred federal takings claims based on the retroactive application of the United States Supreme Court's decision in *Knick v. Township of Scott.*

Lastly, the Petitioner argues that the statute of limitations on any federal takings claim should run from June 21, 2019, which is the date that the United States Supreme Court issued its decision in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). *Knick* overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which had previously held that a federal takings claim did not accrue until the plaintiff had exhausted his state law remedies, specifically an attempt to recover "just compensation" under state law condemnation or inverse condemnation laws. The Petitioner appears to argue that the decision in *Knick* should be applied retroactively to resurrect his untimely Section 1983 claims.

A federal district court recently disposed of a similar issue raised in the case of *Thomas v. Tennessee*, 451 F.Supp.3d (W.D. Tenn. 2020). The court explained:

> If Thomas were to assert a new § 1983 Takings Clause claim following *Knick*, he would not be required to exhaust his Tennessee administrative remedies before coming to federal court. *Knick*, however, does not retroactively apply to Thomas's prior takings claim. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review*...." (emphasis added)); *see also Déjà vu v. Metro Gov't of Nashville and Davidson Cty*, 421 F.3d 417, 420-21 (6th Cir. 2005) (explaining that changes in law announced by the Supreme Court do not apply retroactively to collateral attacks on final judgments, to cases in which the parties have exhausted all appellate options, and to cases in which the deadline for filing a timely appeal has lapsed).

451 F.Supp.3d at 866. The same is true in this case. The Petitioner's federal claims, including

any takings claims, have been or could have been litigated years ago. The decision in *Knick* does not resurrect those time-barred claims and grant the Petitioner a new three-year statute of limitations accruing June 21, 2019 (which actually post-dates the filing of this lawsuit).

In his brief, the Petitioner contends that the "taking" occurred on October 21, 2002. *See*, Petition for Writ of Certiorari, pp. 19-20. Moreover, as the record clearly demonstrates, the Petitioner fully exhausted his state law condemnation remedies by October 2007. Specifically, by Order of Judgment filed March 11, 2005, Judge Reginald Lloyd directed the Clerk of Court to disburse $2,450.00 to the Petitioner Ronald Paul as the just compensation payable for his leasehold interest. (R. 84-94). That Order was subsequently appealed by the Petitioner, and the Court of Appeals affirmed on October 23, 2006. (R. 95-97). This Court later denied a petition for writ of certiorari on October 18, 2007. (R. 98-99). Therefore, by October 18, 2007, the Petitioner had been awarded $2,450.00 in just compensation and that was a final judgment. If the Petitioner felt that his federal rights under the federal Takings Clause had been violated by that award, he had exhausted all available state law remedies by October 18, 2007, which satisfied the requirements under the then-existing *Williamson* decision. In other words, the Petitioner was free to pursue his federal takings claim on or after October 18, 2007. Even if the statute of limitations did not begin to run until October 18, 2007, the three years expired in 2010, long before he brought the instant lawsuit.

Contrary to the Petitioner's argument, the retroactive application of the *Knick* decision does not resurrect a takings claim that is already time-barred under then existing law (namely the *Williamson* decision). The Petitioner had his opportunity to litigate his takings claims, which he did so as reflected in multiple state and federal lawsuits brought after October 2007. He does not, however, get another "bite of the apple" simply because the United States Supreme Court issued its decision in *Knick* in 2019. If that were correct, then litigants could re-file takings

claims that were not brought or were deemed unexhausted since 1985, when *Williamson* was first decided. That is not the law. Instead, if a plaintiff was still in the process of exhausting his state law remedies when *Knick* was decided, in that instance, the filing date of the *Knick* decision, which removed the *Williamson* exhaustion requirement, would be the accrual date for the statute of limitations. The Petitioner, however, cannot benefit from that because he completed and satisfied the exhaustion requirement on October 18, 2007, when this Court denied his petition for writ of certiorari. (R. 98-99). Hence, the Petitioner's reliance on *Knick* for providing him a new opportunity and a new statute of limitations for any of his Section 1983 claims is completely misplaced.

In sum, the Circuit Court, as affirmed by the Court of Appeals, correctly ruled that the Petitioner's Section 1983 claims are time-barred by application of a three-year statute of limitations. The orders and pleadings from the prior 2008, 2012, 2013, 2015, and 2016 lawsuits clearly demonstrate that the Petitioner's alleged claims accrued and were known to the Petitioner prior to October 26, 2015. In fact, the very same facts and conspiracy claims were asserted in the 2008 action that was dismissed with prejudice. Thus, there is no question that the Petitioner's current Complaint is time-barred and was properly dismissed with prejudice.

III. The Circuit Court, as affirmed by the South Carolina Court of Appeals, correctly ruled that the Petitioner was not entitled to an opportunity to file an amended complaint where the dismissal was on the merits based on legal defenses and not on pleading deficiencies that could be corrected.

Lastly, the Petitioner argues that the Circuit Court erred in denying him the opportunity to replead or amend his Complaint. However, as the Circuit Court recognized and the Court of Appeals affirmed, with respect to grounds that may be characterized as pleading deficiencies, a dismissal under Rule 12(b)(6), SCRCP, should generally be without prejudice, and "[t]he

plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 881 (2006). However, where the dismissal is premised on legal grounds which cannot be corrected by an opportunity to amend, the dismissal should properly be entered with prejudice and without an opportunity to replead or amend. *Id*. In this case, the Court of Appeals correctly found that "the circuit court properly dismissed Paul's claims with prejudice because Respondents' dismissal was not due to any correctable pleading deficiency." (Slip Op. at 3). The Circuit Court specifically ruled that "the Plaintiff's federal claims are dismissed on the merits and not because of any correctable pleading deficiency." (R. 25). That decision is in accordance with this Court's decision in *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), and should be affirmed. *See also*, *Alterna Tax Asset Group, LLC v. York County*, 434 S.C. 328, 863 S.E.2d 465, 468 (Ct. App. 2021) ("we are mindful that trial courts should not dismiss pleadings with prejudice at the 12(b) stage without allowing the pleader to amend its complaint (unless amendment would be futile").

The Petitioner, in fact, has not even proposed how he could replead or amend his current Complaint to correct the fatal deficiencies found by the Circuit Court and affirmed by the Court of Appeals. He has certainly not shown any amendment would not be legally futile. This issue is without merit.

IV. If the Court grants the Petitioner's petition for writ of certiorari, the Court must also consider the other issues for reversal as raised by the Respondents on appeal but which the Court of Appeals did not find it necessary to reach.

A. The Petitioner's current Complaint is barred by the defense of res judicata or alternatively by the application of collateral estoppel.

The Circuit Court also ruled that the Petitioner's current Complaint is barred by the defense of res judicata or alternatively by the application of collateral estoppel. On appeal to the Court of Appeals, the Petitioner contested that ruling by arguing only that his numerous federal court actions were dismissed by Judge Currie without prejudice and thus cannot be considered a decision on the merits. Nonetheless, the Petitioner overlooked and failed to address the fact that the Circuit Court based its res judicata ruling on the 2008 *state court* action which was dismissed by Judge Strickland with prejudice, and not the various federal court cases. The Circuit Court ruled as follows:

> This Court finds that the Plaintiff's current Complaint is barred by res judicata. The Plaintiff has previously litigated the same claims in the 2008 action, which resulted in a dismissal on the merits as issued by Judge Strickland. The three elements of res judicata are all satisfied. The 2008 action is final, valid, and on the merits. The parties in the 2008 action are identical, with the exception that Natalie Moore was not a party to that case. Lastly, the conspiracy claims asserted in both actions are the same. And certainly, even if not precisely the same, res judicata is a bar to any other claims that could have been brought as part of the 2008 action, which includes a Section 1983 claim for civil conspiracy.

(R. 22-23). In his brief to the Court of Appeals, the Petitioner did not even address this ruling and rather focused only on the preclusive effect of Judge Currie's rulings in the federal lawsuits.[5]

[5] For that reason, the Petitioner's appeal should actually be deemed barred by application of the two-issue rule. In applying the "two-issue" rule, this Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), the Court of Appeals held that "[a]n alternative ruling of a

Nonetheless, even if properly preserved, the Circuit Court's ruling based on res judicata is correct and should be affirmed. "Under the doctrine of res judicata, a final judgment on the merits in a prior action will preclude the parties from relitigating any issues actually litigated or those that might have been litigated in the first action." *Wright v. Marlboro County School District*, 317 S.C. 160, 452 S.E.2d 12, 14 (Ct. App. 1994). "The res judicata defense requires a showing of three essential elements: (1) the prior judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve matters properly included in the first action." *Id*. Here, as the Circuit Court ruled, the prior judgment issued in the 2008 action was final, valid, and on the merits. (R. 118-125). That judgment was affirmed in 2010 by the Court of Appeals. (R. 126-128). Thereafter, this Court denied the Petitioner's petition for writ of certiorari in 2011. (R. 129). Likewise, the 2008 action involved the same parties and includes the same allegations and claims as asserted in this action. Consequently, the defense of res judicata was properly applied by the Circuit Court, and that ruling should be affirmed on that additional basis.

Alternatively, the Circuit Court found that the defense of collateral estoppel bars the relitigation of the same issues adjudicated in the 2008 action. The Petitioner likewise did not address that issue, focusing instead on the federal lawsuits. The Circuit Court's dismissal of the current Complaint should be affirmed on the collateral estoppel defense as well.

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lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

B. The Respondents Quinn, Ormond, and their law firms are not state actors who may be held liable under 42 U.S.C. § 1983.

The Circuit Court also ruled as "an additional basis for dismissal" that "the Defendants Quinn, Ormond, and their law firms argue that they are not 'state actors' and were not acting under 'color of state law' in their representation of the Plaintiff and the Buckles parties in the 2002 condemnation action." (R. 24). The Circuit Court's ruling is correct.

The Circuit Court's decision is supported by numerous federal cases. In *Marcantoni v. Bealefeld*, 734 Fed. Appx. 198 (4th Cir. 2018), the Fourth Circuit explained that "private attorneys do not act under color of state law and a § 1983 suit may not be maintained against an attorney based on his representation." 734 Fed. Appx. at 199. A federal district court recently explained: "Overwhelmingly, courts, including the Supreme Court, have found that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor under color of state law within the meaning of § 1983." *Loved Ones in Home Care, LLC v. Toor*, 2019 WL 2708459, *3 (S.D. W.Va. 2019). *See also*, *Mason v. Department of Justice*, 39 Fed. Appx. 205, 207 (6th Cir. 2002) ("private attorneys do not act under color of law in the representation of their individual clients").

In sum, the Circuit Court correctly ruled that the Respondents Quinn, Ormond, and their law firms are not proper parties and were properly dismissed on this additional basis.

CONCLUSION

Based on the foregoing discussion, the Respondents respectfully request that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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