

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

FILED
2005 OCT - 7 AM 10:34
JULIE J. STRONG
FAMILY COURT
NINTH JUDICIAL CIRCUIT COURT
CASE NO. 95-DR-10-4755

CONSTANCE MILLS
(Now Known as Constance Mills Haeseley)
Plaintiff

vs

DALE WAYNE MILLS,
Defendant

**DEFENDANT'S PETITION FOR
A WRIT OF MANDAMUS**

Comes now DALE W. MILLS, *pro se*, to request this Court issue a Writ of Mandamus to the Honorable Jocelyn B. Cate, Judge Ninth Judicial Circuit Court of South Carolina, to quash her ultra vires ex parte proposed order based on ultra vires hearing of September 7, 2005. To also issue a Writ of Mandamus to the Honorable Paul W. Garfinkel, Ninth Judicial Circuit Court of South Carolina for his ultra vires Rule to Show Cause order of August 8, 2005. Both writs shall order both judges to vacate all actions and proceedings entertained and initiated after this case was properly removed to this district court and prior to this district court properly remanding. Further that both judges shall comply fully with 28 U.S.C. § 1446 (d).

In support he offers:

1. This Court has jurisdiction to issues writs pursuant to 28 U.S.C § 1651.
2. The clerk of the federal district court has untimely filed with the state court a magistrate's order remanding this case. Legal proceedings were incomplete as an Objection to the magistrate's report was timely filed with the federal district court

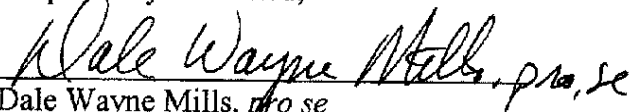
court. The magistrate lacks authority to direct the clerk of this court to send his remand order to the clerk of the state court. Such authority is vested in the district court judge. The Objection to the magistrate order of remand is currently under review by this court. Only a district court judge order of remand triggers the clerk to file the remand order with the state court.

3. After proper removal of In Re Marriage of Constance Mills Haeseley and Dale W. Mills Case Number 95-DR-10 -4755 from the Ninth Judicial Circuit Court of South Carolina to this United States District Court for South Carolina, the Honorable Jocelyn B. Cate and Paul W. Garfinkel entertained an ultra vires ex parte motion, set and held an ultra vires ex parte hearing and are prepared to enter an ultra vires ex parte contempt and commitment order against Dale W. Mills.
 4. On 16 December 2004 Removal of Ninth Judicial Circuit Court of South Carolina Case No. 95-DR-10-4755 was effected with proper Notice of Removal and Notice of Filing Notice of Removal to the Clerk of the Ninth Judicial Circuit South Carolina. (See court file of Notice of Removal and Notice of Notice of Removal)
 5. After proper notice of removal of this action to this court pursuant to 28 U.S.C. §1446 the former wife Constance Mills Haeseley moved and attended an ultra vires ex parte hearing 7 September 2005 before the Honorable Jocelyn B. Cate.
 6. The ex parte ultra vires hearing is about to result in Constance Mills Haeseley and the state court judges together participating in the entry of a contempt and commitment order ultra vires to 28 U.S.C. § 1446 (d) (Proposed Order Attached)
-

7. Such ultra vires conduct by Constance Mills Haeseley, her attorney and the state court judges has resulted in a further loss of 14th Amendment Constitutional and 42 U.S.C. § 1983 civil rights to Dale W. Mills.
8. Dale W. Mills cannot effectively work nor be present in the state of South Carolina without impending risk of incarceration.
9. Dale W. Mills has no other legal resource available to protects his rights and to address the ex parte ultra vires conduct here claimed.
10. Dale W. Mills has been denied his property rights. Reed v Village of Shorewood, 704 F.2d 943, 949 (7th Cir. 1983).
11. Dale W. Mills is further stigmatized by the ultra vires conduct of the parties.

WHEREFORE Dale W. Mills, *pro se*, petitions this court to issue a Writ of Mandamus to the Honorables Jocelyn B. Cate and Paul W. Garfinkel to immediately vacate and quash their orders and invalidate all proceedings since removal 16 December 2004 and to cease all activity in this case until proper remand from this court.

Respectfully submitted,



Dale Wayne Mills, *pro se*
701 Summit Parkway
Borden, IN. 47106
Telephone: 812-246-0651
Fax: 812-246-0652
Email: terratrq@aol.com

DATED this 5th Day of October 2005

MEMORANDUM OF LAW

Introduction

That a court operate solely within its statutory jurisdiction is one of the most fundamental premises of our judicial system. See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (noting that "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction")

If Dale W. Mills cannot petition for mandamus, he "has no other avenue of relief; [he] will be prejudiced in a way not correctable on appeal since [he] will have been forced to endure proceedings in a court that lacks jurisdiction." Seedman v. United States Dist. Court, 837 F.2d 413, 414 (9th Cir. 1988) (per curiam)

South Carolina Law on Writ of Mandamus

Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. Littlefield v. Williams, 343 S.C. 212, 540 S.E.2d 81 (2000). A writ of mandamus is a coercive writ that orders a public official to perform a ministerial duty. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). A trial court judge vacating or quashing her own order is a ministerial task.

Mandamus will issue only to compel a public official to perform a mandatory legal duty. Redmond v. Lexington County School Dist. No. Four, 314 S.C. 431, 445 S.E.2d 441 (1994). As the law is clear relating to removal of cases to federal court and to 28 U.S.C. §1446 (d) this

writ's request is a mandatory legal duty. There is no discretion at issue in this requested action of the writ of mandamus.

See 55 C.J.S. Mandamus § 83 (1998) (while mandamus may be employed to compel an inferior tribunal to exercise its discretion, ordinarily it may not be used to direct or compel the exercise of the discretion in a particular way); see also Godwin v. Carrigan, 227 S.C. 216, 87 S.E.2d 471 (1955) (ministerial duty is one which a person performs in obedience to a mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act to be done).

Dale W. Mills has no adequate remedy at law available to him other than this writ of mandamus to vacate the ex parte ultra vires proceedings and proposed order of this court improvidently entertained and entered after proper removal of this action to federal court and before its remand from there.

Effect of Removal on State Jurisdiction

28 U.S.C. § 1446 governs the procedure for Removal of a state action to a federal court. The facts in the above motion demonstrate full compliance with the federal statute.

The removal of a case from state court to federal court effects a transfer of the entire action, including all the parties and all the claims, to the federal court. City of Gainesville v. Brown-Crummer Investment Co., 277 U.S. 54, 60 (1928); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1376 (5th Cir. 1980); Murphy v. Kodz, 351 F.2d 163, 167 (9th Cir. 1965); Hartlein v. Illinois Power Co., 601 N.E.2d 720, 726 (Ill. 1992). A defendant, upon filing a notice of removal, "shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk" of the state court, which effects the removal. 28 U.S.C. § 1446(d). At that point, "the [] state court shall proceed no further unless and until the case is remanded." *Id.*

“After compliance with the removal statute[,] the jurisdiction of the [] state court is suspended until there has been a remand.” Levine v. Lacy, 204 Va. 297, 300, 130 S.E.2d 443, 445 (1963); accord Yarnevic v. Brink, 102 F.3d 753, 754 (4th Cir. 1996); Maseda v. Honda Motor Co., 861 F.2d 1248, 1254 (11th Cir. 1988); Allman v. Hanley, 302 F.2d 559, 562 (5th Cir. 1962). “Any subsequent proceedings in state court on the case are void ab initio.” Maseda, 861 F.2d at 1254-55 (citing Steamship Co. v. Tugman, 106 U.S. 118, 122 (1882)); accord South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971). A later determination that the removal petition was not proper does not change that outcome. See Maseda, 861 F.2d at 1254 n.11; Moore, 447 F.2d at 1073; United States v. Silberglitt, 441 F.2d 225, 227 (2d Cir. 1971); Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir. 1957).

A proper filing of a notice of removal immediately strips the state court of its jurisdiction. 28 U.S.C. § 1446(d), State of South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971).

The Ultra Vires Conduct

An official act does not become ultra vires if the officer was statutorily empowered to act but may have acted erroneously. Wyoming v. United States, 279 F.3d 1214, 1229-30 (10th Cir. 2002). Here the Plaintiff, her attorney, and the state court judges were not statutorily empowered to act. On the contrary, they were explicitly prohibited from acting pursuant to 28 U. S.C. §1446 (d)

The conduct of the Plaintiff, her attorney, and the state court judges in state court after proper removal 16 December 2004 was ultra vires. 28 U.S.C. § 1446 transferred all jurisdiction to the federal district court if proper notice of removal was performed. It was.

Even more egregious than the ultra vires conduct of the Plaintiff, her attorney and the state court judges was that they all were fully aware and cognizant of 28 U.S.C. § 1446 as

evidenced by the this legal argument raised in state court and noted by them in their proposed order. (See court file Motion and Memorandum of Law to Dismiss).

They further compounded the egregious conduct by engaging in these proceedings ex parte the Defendant.

Writ of Mandamus

Authority

It is well-established that mandamus is appropriate to correct and vacate actions that are not authorized by law. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997); In re Excel Corp., 106 F.3d 1197, 1200-01 (5th Cir.), cert. denied, 118 S. Ct. 159 (1997)

In this case, the Defendants disregarded the plain language of 28 U.S.C. § 1446. Mandamus thus is plainly an appropriate remedy. In re Burlington Northern, 822 F.2d 518 (5th Cir. 1987); In re M.P.W. Stone, 986 F.2d 898 (5th Cir. 1993).

This case presents precisely the sort of exceptional circumstances that warrant the exercise of this Court's mandamus jurisdiction.

Conclusion

“ [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949)

For the above stated reasons a Writ of Mandamus to the Honorable Jocelyn B. Cate and Paul W. Garfinkel to immediately vacate and quash all proceeding after the Notice of Removal of 16 December 2004 must be granted. Further, it is proper for this court to instruct the Plaintiff, her attorney and the state court judges to proceed no further in this case until it is properly remanded from the federal court.

Prayer for Relief

“...probably in the words of Chief Baron Gilbert, that, 'if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., Hab. Corp., B. 10.” Ex Parte Siebold, 100 U.S. 371 (1879)

WHEREFORE the Defendant prays this court issue a Writ of Mandamus to the Defendants the Honorable Jocelyn B. Cate and Paul W. Garfinkel to vacate all its ultra vires orders and invalidate all proceedings before them since removal 16 December 2004 and to proceed no further until this case is properly remanded to state court from federal court.

Respectfully submitted,


Dale Wayne Mills, *pro se*

701 Summit Parkway
Borden, IN, 47106
Telephone: 812-246-0651
Fax: 812-246-0652
Email: terratrq@aol.com

FILED
2005 OCT 7 AM 10:17
JULIE J. STRONG
CLERK OF COURT
BY _____

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been served via U.S. mail this 5th day of October 2005

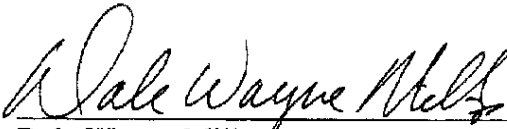
Edward D. Buckley, Jr. (Fed. Id. #1559)
Kevin W. Mims (Fed. Id. # 7883)
28 Broad Street, P. O. Box 993
Charleston, SC 29402
Attorneys for Constance Mills Haeseley

The Honorable Henry McMaster,
S.C. Attorney General's Office
P.O. Box 11549,
Columbia, S.C. 29211

Steven A. James, Esq.
Attorney for Constance Mills Haeseley
92 Folly Road - Suite 9
Charleston, S.C. 29412

The Honorable Jocelyn B. Cate
Judicial Center
100 Broad Street, Suite 256
Charleston, SC 29401

The Honorable Paul W. Garfinkel
Judicial Center
100 Broad Street, Suite 248
Charleston, SC 29401



Dale Wayne Mills, pro se

701 Summit Parkway
Borden, IN. 47106
Telephone: 812-246-0651
Fax: 812-246-0652
Email: terratrq@aol.com