THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Hon. J.C. Nicholson, Jr., Circuit Court Judge

ROOSEVELT SIMMONS.....Plaintiff,
Petitioner

Vs.

HATTIE BAILUM, RUBY BAILUM
VERDONE BAILUM, JULIE B. JOHNSON,
MONICA MIDDLETON, MARIE SMITH,
MELVIN SINGLETON, FRANKLIN SMITH,
LMC, LLC, JOHN MARTIN, ESQ. as TRUSTEE.....Defendants,
Respondents

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This appeal concerns Petitioner's efforts to vacate a 2007 judgment in an heirs' property case in which he was a defendant. Bailum v. Simmons, 2004-CP-1459. R. p. 423. That case concerned title to four parcels of property: a 20 acre parcel acquired by Samuel Balaam in 1910 and three parcels containing of 24, 5 and 5 acres which were the remainder of

54 acres acquired in 1904 by Samuel Balaam, Mary Balaam, Thomas Balaam, Toney Balaam and Fannie Middleton. They later subdivided the 54 acres amongst themselves in 1905: Samuel received 24 acres; Toney received 10 acres, Thomas received 10 acres; Mary received 5 acres and Fanny Middleton received 5 acres. Petitioner derived his interest from Hester Singleton, his grandmother and the second wife of Sam Balaam.

Long before this litigation was started, Petitioner tried to protect his family's interest. In November 2000, he retained Arthur McFarland, Esq. to quiet title on all the heirs' property. R. p. 28, para.8. While still representing Petitioner, McFarland filed a quiet title action in December 2002 on behalf of Monica Middleton concerning to the 5 acre parcel conveyed to Fannie Middleton in 1905, Middleton v. Doe, 2002 CP-10-4883. R. p.28, para. 9, p. 113. Monica Middleton was awarded title to the 5 acres based upon her testimony that her grandfather was Paul Middleton and that his mother was Fannie Middleton who acquired the 5 acres in 1905. R. pp. 114-116, 121-122. R. pp. 108-112. Attorney McFarland never told petitioner that he filed the Monica Middleton case or that a judgment was entered. R p. 28, para. 9. This five acre parcel was part of the 54 acres Petitioner discussed with McFarland. Petitioner did not find out about this judgment until years later. R p. 167, para. 2.

In early 2004, Petitioner retained Ruth Cupp, Esq. to quiet title on this property. R p. 28, para. 10. Attorney Cupp told him that she felt the case should be handled by a Special Referee and suggested Joseph Mendelsohn, Esq. Simmons strongly objected to anyone deciding the case other than the Master in Equity and in particular objected to Mendelsohn. R p. 28, para. 10.

While attorney Cupp was preparing to file a quiet title action, petitioner was served with a complaint to quiet title on the 24 acres which Samuel Balaam acquired in 1904 and the 20 acres acquired in 1910. Bailum v. Simmons, 2004-CP-10-1459. The plaintiffs were Hattie and Ruby Bailum, Verdone Gray and the estates of Clara Bailum and Thomas Bailum. (the Bailum heirs). R. p. 423. Petitioner and the other heirs of Hester Singleton Balaam were named as defendants. The Bailum heirs later amended their Complaint and admitted that the heirs of Hester Singleton including Petitioner were entitled to a statutory 1/3 interest in all of the heirs property. R p. 456, para. 25-29. The Bailum heirs joined Monica Middleton as a defendant but did not allege that she had any interest as an heir of Sam Balaam. R p. 453.

On January 26, 2005, Mendelsohn held a conference with the Bailum heirs' attorney John Martin, Petitioner and attorney Cupp. R p. 29, para. 14. At that time there was no order appointing Mendelsohn to act as Special Referee. During the conference, petitioner told Mendelsohn that he wanted to purchase the 20 parcel acquired by Sam Balaam in 1910. Mendelsohn then made a disparaging racial remark directed at Petitioner. Id. Petitioner was not aware that Cupp had already asked Mendelsohn to act as Special Referee. Id. Petitioner later discharged attorney Cupp due to her failure to carry out his instructions and proceeded pro se. Id.

On February 14, 2006, attorney Martin filed a motion to refer the case to a Special Referee (Mendelsohn) which included a Consent Order signed by attorney Cupp although she had been discharged the year before. R pp. 357, 461. When the motion was filed, Simmons was pro se, did not consent and was not served with a copy of the motion. R pp. 29, para. 13, 357, 461. The Consent Order does not state the basis for the reference to a Special Referee in lieu of the Master in Equity. R p. 357. Later in February Mendelsohn held a conference to

schedule an evidentiary hearing and to set the procedures of the hearing. There is no stenographic record or order evidencing this proceeding. R p. 30, para. 17. Simmons appeared pro se and objected when attorney Martin asked that the Bailum heirs be allowed to testify on the telephone at the evidentiary hearing. Id.

Petitioner later retained attorney Louis Condon to represent him at an evidentiary hearing held on May 15, 2006. The parties agreed that two additional 5 acre parcels, part of the 54 acres were to be included in the case. R p. 360. The Bailum heirs testified by telephone. Id. Verdone Gray claimed that the Sam Balaam who acquired the 20 acres in 1910 was not the same Sam Balaam who acquired the 54 acres in 1904. She testified that she is the daughter of Samuel Bailum, that her father had a sister named Fannie who was married to Paul Middleton and Fannie had a daughter named Monica. R pp. 148, line 16 to R 150, line 4. She testified that her grandfather Samuel was the son of another Sam Bailum who was married to Hester. R p. 150, line 17-19. Julie Ann Johnson testified that Monica Middleton was the child of her aunt Fannie Bailum Middleton. R p. 31, para. 19. The Death Certificate of Samuel Bailum indicates that he was born in 1902 and would have been two years old in 1904 when he allegedly acquired the 54 acres. R p. 104. Monica Middleton did not appear in person or testify by telephone. The Bailum heirs did not introduce any evidence from the earlier quiet title action brought by Monica Middleton. Id. Petitioner produced his family tree that indicated Samuel Balaam was married to his grandmother, Hester and he had a son named Samuel from his first marriage, R pp. 168, para. 3, 188 and his son also had a son named Samuel. R. p. 188. Petitioner never conceded that different Sam Balaams owned any of the parcels.

The Special Referee awarded the Bailum heirs 2/3 of the sale proceeds of the 20 acre parcel valued at $220,000.00, of which Monica Middleton was given 1/6, and awarded Simmons and the other Hester Singleton Balaam heirs the remaining 1/3. Simmons was given the right to buy this parcel for approximately $163,000 after receiving credit for his heirs' interest and payments he made for taxes and maintenance. R pp. 371-372. Simmons had to present proof of financing within 10 days. R p. 371. The Special Referee awarded the Bailum heirs the entire proceeds from the sale of all other parcels valued at $337,000.00 of which Monica Middleton was awarded 1/4. R pp. 372-373.

Petitioner filed a R 59(e), SCRCP motion to alter or amend the order asserting that he did not consent to appointment of a Special Referee. R p. 464. Marie Smith (another Hester Singleton heir) also filed a motion challenging the appointment of the Special Referee because there was no finding of cause in the order appointing him and asked to be allowed to purchase the 20 acre parcel. R p. 467, 468-469. The Special Referee denied both motions, except he granted Marie Smith the right to purchase the 20 acre parcel and issued an Amended Order Quiet Title partition and Sale reflecting these changes. Both petitioner and Marie Smith were required to provide proof of financing within 10 days. R pp. 379-393, 396,

Petitioner filed a Notice of Appeal pro se. R p. 470. Petitioner retained Charles Houston, Esq. to perfect the appeal. Attorney Houston filed an Amended Notice of Appeal to include all of the orders previously entered. R. p. 471. Because attorney Houston failed to file the Initial Brief or order the transcript , the Court of Appeals dismissed the appeal by Order dated May31, 2007. R. p. 399. Attorney Houston filed a motion to reinstate and the appeal was reinstated by Order filed June 18, 2007. R. p. 400 . Houston was ordered to provide a copy of the letter requesting the transcript within 10 days. Id.

Attorney Houston moved before the Special Referee to stay the sale of the 20 acre parcel pending appeal. R pp. 474-476. The motion was amended to request a new trial based upon newly discovered evidence concerning the Bailum heirs' interest in the other three parcels. R. pp. 660, line 23 to 663, line 5. Petitioner discovered Census Department records showing only one Samuel Balaam lived on Johns Island in 1900 and he had three children, Henry, Ellis and Fannie. R pp. 169 para. 5, 199 -204.

At oral argument on the motion, the Special Referee refused to issue a deed to Petitioner because he said the proof of financial capability was given for third parties and not petitioner. R pp. 165, page 0087, line 20 to 166, page 0089, line 25. However, petitioner contended that he delivered proof of financing on the 20 acres in the form of letters from friends, Frederick Fields and Christian Redell demonstrating that they would finance his purchase. R pp. 168, para. 4 to 169, para. 6, 190-197, 514- 515. The Special Referee however refused to sign a deed to Petitioner for the 20 acre parcel. R p. 169 para. 5 & 6.

The Special Referee denied Simmons' new trial motion but ordered that 1/3 of the proceeds from the sale of the other parcels be held in escrow by the attorney Martin pending the decision of petitioner's appeal. R pp. 405-406.

Petitioner tried to contact Houston while the appeal was pending but was never successful. R p. 95, para. 6. The Court of Appeals subsequently issued another order of dismissal dated March 20, 2008 after attorney Houston failed to timely file the Initial Brief and record. R. p. 414. Attorney Houston moved to reinstate the appeal and the Court of Appeals issued an Order dated May 14, 2008 reinstating the appeal and directing that the Initial Brief and Designation of Matter be filed within 30 days. R. p. 416. When attorney Houston failed to file the Initial Brief and Designation of Matter , the Court of

Appeals dismissed the appeal. R. p. 418. The Court of Appeals denied attorney Houston's motion for rehearing , R. p. 420 and issued a Remititur in December 2008. R p. 422. Following the dismissal of the appeal, in December 2008, the Special Referee conveyed the four parcels and released the proceeds in escrow to the Bailum heirs. Franklin Smith, Marie Smith's son acquired 1/2 of the 20 acre and LMC, LLC a contract purchaser acquired the other 1/2. Petitioner discovered the Monica Middleton judgment after the appeal was dismissed. R p. 167, para. 2.

Petitioner filed a three count Complaint in August 2009 to vacate the Special Referee's Amended Order Quiet Title and Partition and the deeds issued pursuant to that amended order and for damages related thereto. R p. 376 -393. The First Count alleges that the Special Referee was appointed contrary to the South Carolina Code Ann. Section 14-11-60; that the Bailum heirs committed fraud by testifying falsely about an alleged relative Monica Middleton, whose testimony in another case was contrary to theirs; that the Special Referee relied on the false testimony to deny Petitioner an interest in the proceeds from the sale of three parcels ; that the Special Referee exhibited racial bias and arbitrarily refused to accept the financing that petitioner had obtained to acquire the 20 acre parcel; that petitioner's attorney abandoned the appeal causing it to be dismissed; and that Petitioner did not have fair hearing on the merits of his claims. R p. 29, para. 11 to R 37, para. 43; and that it would ne inequitable to prevent petitioner from acquiring the 20 acre parcel. R. p. 37. Para. 43.

The Second Count alleges that there was a fraud on the court because the Bailum heirs acted in concert to submit false testimony, concealed their intent to submit false testimony by having the matter heard by a Special Referee to avoid the Master in Equity;

filed inconsistent pleadings and changed their position at trial; testified by telephone to avoid detection, and that Monica Middleton facilitated this fraud by not appearing at the hearing. R pp. 34, para. 27 to 38, para. 52. As a result Petitioner was deprived of a portion of the proceeds of sale of the other three parcels of heirs' property. R. p. 38. Para. 52. The Third Count alleges fraud by the Bailum heirs in their testimony relating to their kinship to Fannie Middleton and seeks damages. R pp. 39, para. 55 to 40, para. 62.

Defendants moved to dismiss the complaint under Rule 12(b) (8), SCRCP and res judicata. R pp. 45-49. Petitioner asserted among other things, that there were disputes of fact about what had been or could have been addressed in the prior appeal and that his attorney's failure to perfect the appeal should not be held against him. R. pp. 86-93; that Petitioner did not have a full and fair resolution of all of the issues, R pp. 92-9; and that discovery was needed to establish all of the facts pertaining to his claims. R. pp. 91-92. At the motion hearing on March 1, 2010 the court reserved decision on the motion to dismiss. R. p. 300, line 20-25.

The motion was reargued on August 27, 2010. R pp. 306, 307, line 23-25. At the hearing, John Martin, Esq. the Bailum heirs' attorney in the earlier case asserted that there was no factual basis for Petitioner's claim of a fraud on the court because the Monica Middleton who testified in Middleton v. Doe was not the same Monica Middleton identified as a Bailum heir in the case being challenged. R p. 338, line 9-14. The court expressed concern about the alleged fraud, R p. 340, line 8-14, and converted the motion to dismiss to a motion for summary judgment and requested that the parties submit further affidavits. R pp. 342, line 15 to 343 line 10.

Respondents submitted a Supplemental Memorandum in Support of their Motion to Dismiss asserting that the testimony of Monica Middleton was irrelevant since different property was involved. R p. 101, second paragraph, line 10-13. In support of their position, they submitted the trial record and judgment in Middleton v. Doe. R pp. 113-127. Respondents contended that Simmons had already raised this issue in his appeal that was dismissed. R p. 97, first paragraph. There were no affidavits from or concerning Monica Middleton. In a letter to the Court, attorney Martin withdrew his assertion that there were two separate Monica Middletons involved in the two cases. R p. 353. By short form order dated October 6, 2010, the court denied the defendants' motion to dismiss. R p. 222.

In further opposition, petitioner asserted that his first attorney, McFarland has failed to disclose his representation in the Monica Middleton case which was related to the heirs' property on which McFarland was to file a quiet title action for Petitioner. R. p. 167. Para. 2. Petitioner did not learn about the Monica Middleton judgment until after the Bailum appeal was dismissed. Id. Petitioner realized that Mendelsohn's refusal to issue a deed to the 20 acre parcel was racially motivated and also because Petitioner objected to his appointment. R p. 169 para. 6. Petitioner later filed a Judicial Grievance against Mendelsohn as a result of his racial comment and behavior. R pp. 169, para. 6, 206-207. Petitioner asserted that he timely produced the evidence of financial capability from two friends who promised to lend him the money to acquire the 20 acres. R. p. 168, para.

Petitioner asserted that the testimony of Monica Middleton was evidence of a fraud on the court because it contradicted the testimony of Verdone Grey Bailum and that

the Bailum heirs conspired to deprive him of his heirs interest in the three parcels acquired in1905 by using a Special Referee and not calling Monica Middleton to testify. R. p. 133-134; that the appointment of the Special Referee was contrary to statute and that petitioner had specifically objected. R. p. 134. Petitioner asserted that he had been denied a fair hearing because his appeal was dismissed due to the because of attorney Houston's abandonment of the appeal. R. p. 139. There were disputed issues of fact relating to the First Count claim of extraordinary circumstances requiring discovery to be conducted. R. p. 137-142.

By Order filed January 11, 2011, the court granted summary judgment dismissing the complaint. R pp. 1-21.The Circuit Court found that Monica Middleton's testimony was not relevant to petitioner's claim of an heirs interest in the three parcels since that case involved a different parcel, R. p. 17, and she did not testify as to any relationship to Sam Balaam, R. p. 18, and that the petitioner had not established extrinsic fraud. R. p. 18. The Circuit Court found that petitioner had abandoned his appeal and that all of the issues raised in this case could have been addressed in that case and appeal. R. p. 18. The Court concluded that res judicata barred the Petitioner from relitigating the issue. R. p. 19. Simmons filed a Rule 59 (e), SCRCP motion to alter and amend the judgment. R pp. 212-241. The motion was denied by Order filed March 2, 2011. R p. 25. A Notice of Appeal was served on March 29, 2011.

The Court of Appeals heard the appeal on January 15, 2013 and in a Per Curiam Order dated February 20, 2013, affirmed the Circuit Court. App. 3. The Court of Appeals adopted by reference the Circuit Court's decision for granting summary judgment. App. 4. Petitioner sought rehearing on the basis that the Circuit Court failed to address the due

process and jurisdictional issues as part of the unusual circumstances present and failed to allow Petitioner to develop the record. App. 6-17.

ARGUMENT IN SUPPORT OF THE PETITION

SUMMARY OF ARGUMENT

This case presents novel questions of law: Is a litigant denied due process if his appeal is dismissed due to his attorney's inaction and there are issues as to the Special Referee's bias and lack of jurisdiction? Does a Consent Order appointing a Special Referee without notice to a pro se litigant and contrary to his instructions and not containing any finding of cause violate S.C. Code Ann. Section 14-11-60? Was there sufficient evidence of unusual circumstances and fraud in the prior case to require denial of summary judgment? Does extrinsic fraud occur when the opposing party submits false testimony about an absent party that contradicts their pleadings? These questions are more fully discussed below.

A. Petitioner was denied due process by the application of res judicata

This Court should grant a Writ of Certiorari in order to consider the proper balance of competing interests: the availability of a remedy under SCRCP 60(b) for relief from a demonstrably unjust result; and the application of res judicata to insure finality to litigation.

When addressing collateral attacks on a final judgment, the court must balance the need for finality (underlying the principle of res judicata) against the need for a fair and just resolution of the dispute. "[T]he application of res judicata 'may be precluded

where unfairness or injustice results, or public policy requires it.'". T v. T, 378 S.C. 127, 138, 662 S.E.2d 413, 419 (Ct. App. 2008) (citation omitted). See Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001).Thus res judicata does not bar a rehearing of facts which were previously decided unless there was a fair and adequate opportunity for the injured party to be heard. "In order for the doctrine of res judicata to apply, the following elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975). Petitioner asserts that he was denied due process because the issues of racial bias and lack of jurisdiction of the Special Referee to conduct the proceedings were never decided because his appeal was dismissed. Under those circumstances, petitioner should not have been denied an opportunity to collaterally attack the Special Referee's Amended Order in a separate action under R 60(b) by application of res judicata.

Petitioner raised the due process argument before the Court of Appeals and in his Petition for Rehearing. Appellant's Brief at 40; App. at 12. It has never been addressed. Allegations of racial bias are contained in Petitioner's affidavit and a Judicial Ethics Complaint Petitioner filed against Mendelsohn. R. pp. 94-95, 169, 206-207. That Complaint was never decided due to the pendency of the prior appeal. R. p. 169, para. 6. Further evidence of arbitrary conduct occurred at a June 6, 2007 hearing at which the Special Referee rejected petitioner's proof of financing without conducting a hearing as to the bona fides of the financing or allowing petitioner the opportunity to close title to the 20 acres. R. pp. 653, line 8 to 654, line 6. It was at this point that Petitioner realized

that there was bias, which was related to petitioner's objection to his appointment. R. p. 169.

Petitioner raised the jurisdictional issue before the Court of Appeals, Appellant's Brief at 41 and in his Petition for Rehearing. Appendix at 6. The Special Referee's jurisdiction to conduct the hearings was never decided. South Carolina Code Ann. Section 14-11-60 states that a Special Referee can only be appointed where the Master in Equity is unavailable or there is just cause shown. Since the Order appointing the Special Referee does not contain a finding of just cause, R. p. 357, his appointment is void ab initio.

The Consent Order cannot waive the jurisdictional defect. In Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758 (Ct. App. 1996), the plaintiff commenced an action pursuant to R60 (b) to vacate an earlier judgment by the Master in Equity. The Court of Appeals said: "issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion."

Even if the Consent Order did not violate Section 14-11-60, petitioner did not consent to it. The motion to appoint Mendelsohn as Special Referee was filed while Petitioner was pro se and he was not served with it. R. p. 28-29, 461-462. The motion contained a consent by petitioner's former counsel which was invalid since she no longer represented the Petitioner. R. p. 357.

Petitioner asserts that due process and the appearance of justice should always prevail over considerations of finality. Petitioner believes that the Circuit Court and Court of Appeals erred in placing too much emphasis on the need for finality and did not

consider how the unusual circumstances present here combined to produce an unjust result. Petitioner respectfully requests this Court to grant his petition so that the lack of fairness can be addressed and balanced against the need for finality.

B. The prior attorney's repeated failure to perfect the appeal should not be held against Petitioner

Petitioner contends that this Court should grant a Writ of Certiorari because the facts of the case present a novel issue of what constitutes "attorney abandonment". The Petitioner presented this issue to the Court of Appeals and in his Petition for Rehearing. Appellant's Brief at 35-41; App. at 11-13. The Circuit Court held that petitioner "failed to perfect the appeal" and thus "abandoned" his right to challenge the earlier case under R 60(b), SCRCP. R. p 18. The Circuit Court thus held Petitioner responsible for attorney Houston's failure to perfect the appeal. The neglect of an attorney is not always to be imputed to the client. "[T]his is not a hard and fast rule. Rather, it is one that is to be applied rationally, with a fair recognition that justice to the litigants is always the polestar." Brown v. Butler, 347 S.C. 259, 265-266, 554 S.E. 2d 431, 435 (Ct. App. 2001) (citation omitted). It is not applicable when the attorney's neglect rises to the level of willful abandonment. "An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice." Graham v. Town of Loris, 272 S.C. 442, 452-453 (1978); see also 7A C.J.S. Attorney & Client § 181, at 285 (1980) (where the conduct of counsel is outrageously in violation of his implicit duty to devote reasonable efforts in representing his client, his acts will not always be imputed to his client).

The Record establishes that Petitioner was unable to contact his attorney during the appeal. R. pp. 95-96. During this time, the Court of Appeals initially dismissed the appeal when Attorney Houston failed to order the transcript and/or file the Initial Brief, R. p. 399, then nine months later dismissed the appeal again for failure to file the Initial Brief, R.p.414, and then again five months later for failure to comply with the earlier Order of Reinstatement. R. p. 416, 418. Petitioner did not learn of the dismissal until after the issuance of the remitter. R. p. 96, 422. The repeated failure to file a brief after being ordered to do so three times is not mere neglect but an abandonment,

The Circuit Court relied on Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993) and Tench v. South Carolina Dept. of Educ., 347 S.C. 117, 553 S.E.2d 451 (2001).Smith Companies of Greenville, Inc. v. Hayes, supra involved a post trial motion under Rule 60(b) (4) and (5) requiring that the motion be filed in a reasonable time after judgment. The court found that there was no justifiable reason to excuse the 1 ½ year delay in seeking to set aside the judgment. In dicta the court noted that a Rule 60 post trial motion should not be considered a substitute for appeal when the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion. Similarly, Tench v. South Carolina Dept. of Educ., supra, was a post trial motion under Rule 60(b) (1) and Rule 60(b) (5). Again the court held that the motion was untimely since it was filed well more than a year after the judgment. Further, the court denied relief under Rule 60(b) (5) where the relief could have pursued the issue on appeal. The Smith Companies and Tench cases are factually different because Petitioner did file an appeal. The issue here is what is the significance of attorney Houston's failure to perfect that appeal after being ordered to do so several times.

Cases cited by respondents do not address this issue. Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010) involved a R 60(b),SCRCP motion made after default was entered against defendant. This Court found that Rice had been denied due process because of her attorney was suspended when he failed to act on notices regarding the case. Id. at page 311. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) was another R 60(b),SCRCP motion made after default was entered against defendant. The issue was whether an attorney's failure to answer was " excusable neglect". Id at 341-343. Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391 (1957) involved a motion to vacate a default due to the attorney's failure to obtain an extension of time to answer. Id at 550-551. As the cited cases demonstrate, the general rule that attorney neglect will be imputed to the client is applied when there has been a single failure to protect the client's interest.

This Court should address whether repeated attorney inaction in the face of three Court Orders can be charged against the client. Petitioner contends that it would be unfair to do so, particularly when this repeated inaction resulted in dismissal of an appeal which could have vindicated Petitioner's right to purchase the 20 acres that he wanted.

C. There was a demonstrated lack of discovery as well as sufficient evidence to require denial of summary judgment

This Court should grant a Writ of Certiorari to review whether there was a lack of discovery which should have required denial of summary judgment; and the secondary issue whether there already was sufficient evidence of extrinsic fraud or unusual circumstances in the record to require that summary judgment be denied. Petitioner presented these issues to the Court of Appeals and in his Petition for Rehearing.

Appellant's Brief at 33-35, 37-40 43-46; App. at 15-16. R 60(b), SCRCP provides that equitable relief may be granted based upon unusual circumstances. "In essence, the rule merely reflects many of the considerations attendant to an equitable analysis." T v. T, 378 S.C.127, 135, 662 S.E.2d 413 (Ct. App. 2008). The Court of Appeals noted: "What we do suggest is that equity only intervenes when the circumstances so require, but to do so, **a court must be aware of all of the circumstances before it acts**. Thus, the parties must be allowed to develop the record accordingly." (emphasis added). Id.

"[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baird v. Charleston County, 333 S.C. 519,529, 511 S.E. 2d 69 (1999). During oral argument on the initial motion to dismiss, the Circuit Court acknowledged that there had not been any discovery in response to petitioner's counsel assertion about the need to develop the record.

> "MR. BERTELE : We need to find out some of the things that happened here and why they happened. The complaint is not complete with respect to all of the events that went on because obviously we've had—
> THE COURT: Well, I understand that .
> MR. BERTELE: --- no discovery.

R. p. 289, lines 11 -16.

When the motion to dismiss was reargued, attorney Martin asserted that there are two Monica Middletons."R. p. 338, line 9-12. Whereupon the Circuit Court stated:

> " THE COURT: So instead of me—and you'all taking depositions and you'all continue to litigate this thing, let's convert it to summary judgment motion. I give you so much time to substantiate what Mr. Martin is saying, if that is true or not."

R p. 342, line 15-20. The Circuit Court acknowledged that it was at fault for prolonging decision on the motion to dismiss. R p. 343, line 20-24. Since the motion was based upon

res judicata, the only concern was what was on the record below. The court granted respondents 45 days to submit the appropriate affidavits, R p. 346, line 14-15 and Simmons 30 days. R p. 346, line 2-3. Therefore, it is clear that the Circuit Court preempted discovery in order to address the contention that there were two Monica Middletons. Simmons attorney agreed to this limitation of what was to be submitted, not to forego any discovery on the other allegations in the complaint. R p. 342, line 5, 25. However, the Circuit Court found that all of the issues raised in this case could have been dealt with in the prior case or appeal but were now barred by res judicata. R. p. 18.

When the Circuit Court granted summary judgment dismissing the entire complaint, Petitioner reiterated that his counsel did not have any discovery about Monica Middleton from attorney Martin and prior attorney files in his R 59(e) motion. R. p. 240. Para. 374. There was nothing in the Record of what discovery occurred in the original action. Appellant's Brief at p. 33.

However, Petitioner should have been permitted to fully develop the facts including : why did the Bailum heirs file pleadings saying Simmons was entitled to a share in all the subject property and then change their position at trial; what discovery was provided to petitioner's attorney Condon; why did the Bailum heirs name Monica Middleton as a defendant in their case but then at trial use her alleged kinship to Fannie Middleton as support for their claims that she was a heir of a different Sam Balaam ? Discovery would enable petitioner to provide further support for his claims that the fraud on the court involved other circumstances.

Notwithstanding the limited record before the Circuit Court, it should not have granted summary judgment as to the entire complaint. The allegations of unusual

circumstances in the First Count included the petitioner's assertion of racial bias by the Special referee and lack of statutory jurisdiction, prior dismissal of the appeal due to attorney abandonment, all discussed above, and the apparent fraud involving Monica Middleton. The Petitioner asserted that the Bailum heirs' testimony and the Monica Middleton testimony was evidence of extrinsic fraud supporting the Second Count (see below). Even if the contradictory testimony involving Monica Middleton was considered as intrinsic, that can be the basis for a finding of unusual circumstances. In T v T, 378 S.C.127, 136, 662 S.E.2d 413 (Ct. App. 2008) the Court of Appeals held: "Even if we were to assume based on precedent that any fraud is intrinsic, the judgment is nonetheless vulnerable to attack outside the fraud context . . . and through an independent action if the appropriate circumstances are present."

The Circuit Court never addressed whether petitioner had shown a prima facie case of unusual circumstances because the Court dismissed the entire complaint based upon res judicata.

As to the issue of fraud on the court, the Circuit Court found it was intrinsic not extrinsic. In Ray v. Ray, 374 S.C. 79, 647 S.E. 2d 237 (2007), this Court held that "an act or perjury or concealment . . . coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to R 60(b) due to extrinsic fraud." Id. at 85-86. These facts are not subject to dispute: the Second Amended Complaint acknowledged that Hester Singleton's heirs had a 1/3 statutory interest in all of the heirs' property, R. p. 456, para. 26 7 27, but did not allege that Monica Middleton had any interest as an heir of Sam Bailum . Then the Bailum heirs changed their position at trial.

Monica Middleton did not appear at the hearing but nonetheless received a substantial portion of the sale proceeds.

Petitioner further contended that Verdone Bailum's testimony was extrinsic fraud because Monica Middleton's testimony occurred in a prior proceeding of which petitioner had no actual or constructive notice and that the Special Referee relied upon it. Appellant's Brief at 27-29; and that there was a dispute of fact as to whether he could have relied upon the Bailum heirs Second Amended Complaint to establish his interest in the three parcels and whether he could have found the Monica Middleton judgment beforehand. Appellant's Brief at 31-33

Petitioner also alleged that attorney McFarland intentionally concealed his representation of Monica Middleton and delayed filing his quiet title action . Attorney misconduct constitutes extrinsic fraud if proven by clear and convincing evidence and would constitute fraud on the court. In Chewning v. Ford Motor Co., 354 S.C. 72, 86, 579 S.E. 2d 605 (2003) this Court affirmed the denial of a motion to dismiss an action to vacate a judgment based upon generalized allegations as to procuring false testimony and intentional concealment. Petitioner contends that there was prima facie evidence of fraud and sufficient disputed issues of fact that Bailum heirs committed an act of perjury and concealment with the intent to defraud.

In summary, this Petition presents novel issues about the application of res judicata, lack of due process and attorney abandonment. Because the Circuit Court dismissed the complaint based upon res judicata and its finding that Petitioner abandoned the prior appeal, it never decided the substantive issues concerning the basis for dismissing the First Count, namely the existence of unusual circumstances.

CONCLUSION

Petitioner respectfully request that this Court grant a Writ of Certiorari and consider the merits of the appeal. Petitioner contends that he was denied due process in the application of res judicata to an independent actions to vacate a final judgment based upon unusual circumstances. Petitioner contends that the facts herein establish attorney abandonment which should not have been held against him. Finally, petitioner

Respectfully submitted

_____
Edward A. Bertele

CERTIFICATION OF COUNSEL

I hereby certify that the petitioner has filed a petition for rehearing and the Court of Appeals has denied rehearing by order dated April 18, 2013.

_____
Edward A. Bertele

May 18, 2013

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May 20, 2013

Ms. V. Claire Allen, Deputy Clerk
Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

Re: Roosevelt Simmons v. Hattie Bailum et al.
Case No. 2011189009

Dear Ms. Allen:

I am enclosing for filing the following: copy of appellant Roosevelt Simmons' Petition for Writ of Certiorari and Certification of Service. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Very truly yours

Edward A. Bertele

Encl:
CC: John Massalon, Esq.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Case No. 2009 - CP -10 - 5343
Hon. J.C. Nicholson, Jr., Circuit Court Judge

ROOSEVELT SIMMONS)
Plaintiff, Appellant)
Vs.)
)
HATTIE BAILUM, RUBY BAILUM,)
VERDONE BAILUM,)
JULIE B. JOHNSON,)
MONICA MIDDLETON,)
MARIE SMITH, MELVIN SINGLETON,)
FRANKLIN SMITH, LMC, LLC,)
JOHN MARTIN, ESQ. as TRUSTEE)
Defendants, Respondents)

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Petition for Writ of Certiorari was served upon the respondents' attorneys, Wills Massalon & Allen, LLC by regular mail postage prepaid at their last known mailing address; and that a copy was filed with the Court of Appeals.

Edward A. Bertele, Esq.
Attorney for Petitioner

May 20, 2013
Charleston, SC