

# **Exhibit 1**

Order dated December 13, 2019  
in Kincannon v. Griffith,  
Civil Case No. 2019-CP-32-2268



desired to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000). South Carolina follows the scintilla of evidence standard.

Dismissal on the pleadings is an especially drastic remedy. It is generally limited to the four corners of the pleadings themselves. Here, the court agrees to look at matters beyond the pleadings, as seemingly requested by both parties.

### BACKGROUND

On February 13, 2017, a Family Court judge signed an order of divorce which incorporated a settlement and property division reached by the parties.<sup>1</sup> The parties were married in February 2013, and separated on or about August 26, 2015. Both sides point to the following language in the order:

C. Husband agrees the residence where Wife resides at 306 Springwalk [Spring Walk] Lane, West Columbia, South Carolina 29169 is Wife's separate non-marital property. Husband agrees that Wife has legal title to this residence.

This case may present the most convoluted status of any this court has ever considered, and the Complaint is a hodgepodge of references to various potential legal theories of recovery. The ones specifically mentioned are contract, rescission of contract, and declaratory judgment, though there also vague references to unnamed equitable remedies. In his Complaint, the plaintiff asserts that he is unable to specify all the causes of action that he might be using to seek recovery because he needs to know what the

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<sup>1</sup> The wife was represented by counsel. The defendant appeared pro se, but is trained in the law, currently on inactive status with the South Carolina Bar.

defendant's responses will be. In addition, the Complaint has a significant section where the plaintiff poses a series of questions rather than pleading proper assertions. This is not proper pleading. Normally, the court would allow amendment, but this lawsuit is part of a pattern of repeated legal actions filed by the plaintiff against his former wife. In at least one of those actions, a judge has determined that the plaintiff is engaging in misuse of legal process. The court is determining these motions based on matters that are facially apparent.

The Complaint filed May 30, 2019, states:

1. This is an action principally for breach or, alternatively, for rescission of a contract or otherwise enforceable agreement between Plaintiff and Defendant, who were at the time married but separated at the instance of Defendant, entered into an apparently enforceable contract calling for Plaintiff to purchase approximately \$300,000 of property out of his separate non-marital assets and transfer that property to Defendant's possession whereupon the property would become Defendant's separate non-marital property upon Defendant's performance of a marital reconciliation sought by Plaintiff provided the reconciliation occurred within one year of the agreement. Defendant took possession of the property but failed to perform the marital reconciliation within one year of the agreement (or thereafter) and subsequently divorced Plaintiff. Accordingly, Plaintiff maintains this action for breach of contract and related claims such as rescission.<sup>2</sup> [sic]

In other places in the Complaint, the plaintiff refers to equitable recovery. Initially, the court will address the claim involving real estate.

#### CLAIMS RELATED TO REAL PROPERTY

The Complaint references that the property was conveyed to the defendant by McGuinn Homes, LLC through deed dated August 29, 2015, recorded September 9,

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<sup>2</sup> The Complaint also makes a claim related to a BMW automobile that was discussed in the divorce decree and considered by this court later in this order.

2015. As indicated above, this would fall immediately around the August 26, 2015 (on or about) date that the Family Court found that the parties separated.<sup>3</sup>

So, the plaintiff is claiming that there is an enforceable agreement, entered during the separation, while the parties were still married, whereby he agreed to use his non-marital assets of approximately \$300,000 to purchase "property," and that this property, including this residence, would be placed in the defendant's name, subject to the agreement.<sup>4</sup> He claims that he agreed to give her possession of this residence and that it would become her separate marital property, if she reconciled with him within one year of that alleged agreement. No date has been provided as to when the agreement was entered, but, logically, it had to have been on or before the date of the execution of the deed or, at the very latest, the date the deed was filed on September 9, 2015. Therefore, based on the plaintiff's allegations and the documents in this file, any such agreement had to have been entered within a two-week period in late August or early September of 2015.

According to the Complaint, the plaintiff did more than allow the defendant to have possession during the separation. The property was transferred directly from McGuinn Homes, Inc. to the defendant.

The parties did not reconcile. They were separated for more than a year, and when these parties appeared for their divorce hearing on January 24, 2017, the division of property was still in dispute. At that time, the plaintiff knew that an essential term of this purported contract had not been met: there was no reconciliation within a year. He knew that part of the representation to the Family Court as a settlement enabled the plaintiff to

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<sup>3</sup> The public record shows that this is a general warranty deed conveying fee simple title, and that it was made in consideration of \$190,153.00 paid to McGuinn Homes.

<sup>4</sup> The reference to \$300,000 apparently relates to a large number of unspecified expenditures.

obtain a divorce without further delay. Nothing in the divorce decree indicates that the plaintiff specifically reserved any right to seek either this real estate itself or the right to maintain a claim for it. The plaintiff's argument is that such rights were protected by the declaration that the residence is the defendant's non-marital property. As discussed below, this argument ignores his inconsistent act of changing the non-marital status from his own to that of his wife.

South Carolina Code §20-3-630 deals with marital and non-marital property. It reads, in part:

(A) The term "marital property" as used in this article means all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation as provided in Section 20-3-620 regardless of how legal title is held, except the following, which constitute nonmarital property:

(1) property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse;

(2) property acquired by either party before the marriage and property acquired after the happening of the earliest of:

(a) entry of a pendente lite order in a divorce or separate maintenance action [the court has not been advised of any temporary order];

(b) formal signing of a written property or marital settlement agreement; or

(c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;

(3) property acquired by either party in exchange for property described in items (1) and (2) of this section;

(4) property excluded by written contract of the parties. "Written contract" includes any antenuptial agreement of the parties which must be considered presumptively fair and equitable so long as it was voluntarily executed with both parties separately represented by counsel and pursuant to the full financial disclosure to each other that is mandated by the rules of the family court as to income, debts, and assets;

(5) any increase in value in nonmarital property, except to the extent that the increase resulted directly or indirectly from efforts of the other spouse during marriage.

Interspousal gifts of property, including gifts of property from one spouse to the other made indirectly by way of a third party, are marital property which is subject to division.

(B) The court does not have jurisdiction or authority to apportion nonmarital property.

Viewing the evidence in the light most favorable to the plaintiff, there could have been an issue as to whether the house was acquired using non-marital assets that the plaintiff had before the marriage. [See §20-3-630(A)(3) property is non-marital if acquired "by either party in exchange for [non-marital] property described in items (1) and (2) of this section."] The plaintiff anchors his Complaint on §20-3-630(B) and cases that have interpreted jurisdictional requirements establishing that the Family Court lacks jurisdiction to apportion non-marital property. Apportioning or dividing a particular asset is different than considering all the assets of the parties, marital and non-marital, as the Family Court is required to do in evaluating the propriety of the property settlement.

Concerning marital property, §20-3-620 provides, in subsection (B), that "In making apportionment through equitable division, the court must give weight in such proportion as it finds appropriate to all of the following factors: . . . (13) "liens and any other encumbrances upon . . . the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage . . .[.]" [Emphasis added]. So, the Code appears to require that an encumbrance of any type upon the separate property of either of the parties or any debt incurred during the marriage should be called to the attention of the Family Court in evaluating the propriety of the division of property contained in the decree. There is no indication that the Family Court was apprised of the purported agreement that the plaintiff is advancing in this lawsuit.

The only reasonable construction that the court can determine regarding the plaintiff's position is as follows: 1) he agreed with his wife that he would convert his non-martial assets into a residence, which would become her non-martial property, if she reconciled with him within one year of their separation; 2) she breached the contract by not reconciling; 3) after one year, the parties divorced and entered into a settlement related to their property, which was incorporated into a binding Family Court order; 4) pursuant to the Family Court settlement, the subject residence is established to be the defendant's non-martial property, which is the status that she would have occupied had she reconciled; and, 5) this declaration that the residence is the defendant's non-marital property allows him to bring this action in circuit court to obtain relief based on the original, unfulfilled contract.

The agreement was not in writing. The Statute of Frauds, §32-3-10, provides, in part:

No action shall be brought whereby: . . .

(3) To charge any person upon any agreement made upon consideration of marriage;

(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or

(5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

To the extent that the deed might be considered a writing or memorandum, deeds are not signed by the grantee, so there is nothing supplied to the court indicating a writing signed by the defendant. This action concerns an interest in real estate. In addition, it is

an agreement made upon condition of marriage in that it is based entirely on a condition that the defendant reconcile and remain married to the plaintiff, though no term has been advanced as to how long she would be required to remain married to him after the initial reconciliation. Viewing all evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff, the purported agreement cannot be enforced through Common Pleas court because it does not comply with the Statute of Frauds. There is no evidence of a valid cause of action based on breach of contract.<sup>5</sup>

### RESCISSION

As for any claim for rescission of contract, the remedy for rescission is to return the parties to the same position they occupied before the contract was entered (the *status quo ante*). The relief in this instance would presumably be some form of restitution, including a cause of action for unjust enrichment, though no such cause of action is specifically pleaded here.

Am Jur 2d – Contracts §513 reads, in part:

V. Modification, Extinguishment, and Renewal, C. Rescission, Termination, or Discharge, 1. Nature of Contractual Rescission, Termination, or Discharge, § 513 - Methods of discharge or termination of contracts

Generally, a contract may be canceled only under its own terms or through mutual agreement. Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. A contract may be discharged by performance in accordance with its terms, or by the expiration of the time during which it

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<sup>5</sup> To the extent that this claim can be considered by further post-divorce action related to property over which the Family Court lacked jurisdiction, §20-3-620(A) provides:

In a proceeding for . . . disposition of property following a prior decree of dissolution of a marriage by a court which . . . lacked jurisdiction to dispose of the property, and in other marital litigation between the parties, the court shall make a final equitable apportionment between the parties of the parties' marital property upon request by either party in the pleadings.

is to remain operative. In addition, there are several other methods of discharging contracts, including rescission by agreement or by virtue of a contractual provision, rescission for original invalidity, and rescission for failure of consideration or a material breach or default. Parties to a valid contract may rescind or abandon it, or substitute another in its place, or by conduct inconsistent with the continued existence of the original contract estop themselves from asserting any right thereunder.

Definition:

To "rescind" a contract is to abrogate or cancel the contract, unilaterally or by agreement, or to make void; to repeal or annul.

Rescission is an equitable remedy that invalidates an agreement, not a cause of action, which rests on the equitable principle that a person shall not be allowed to enrich him- or herself unjustly at the expense of another.

[Emphasis added]. The effect of the remedy of rescission is generally to extinguish a rescinded contract so effectively that in contemplation of law it has never had existence, and to put or restore the parties to status quo.

The remedy of rescission and restitution is an alternative to damages in an action for breach of contract.

It is difficult to understand how rescinding this alleged contract could result in any benefit in this lawsuit for the plaintiff. In the light most favorable to the plaintiff, if the purported contract were considered never to have existed, the *status quo ante* would be to place the parties in a situation where the defendant would not have the residence and the plaintiff would have the assets that he alleges to have been non-marital. However, that status is one where there would have been no determination by the Family Court that the assets were non-marital. The wife would be able to claim that various assets were marital property, subject to equitable division, and/or that they were separate property of the plaintiff that the Family Court was required to consider under the equitable division standards, which may affect the division of the marital property. As discussed below, what the plaintiff did in Family Court is inconsistent with the granting of relief in this court on the equitable grounds presumably alleged here.

#### OTHER EQUITABLE RELIEF

If the plaintiff wants to assert some quasi-contract or equitable relief in circuit court, he is precluded because he engaged in an intervening action, inconsistent with preservation of his rights. If he wanted to maintain his right to bring this lawsuit, he was required to have maintained the position in Family Court that the residence is his non-martial property, not convert it to be the wife's non-martial property through the Family Court case. As mentioned previously, §20-3-630(A)(3) declares that property is non-marital if acquired "by either party in exchange for [non-marital] property described in items (1) and (2) of this section." His argument now is that he used his non-martial assets to acquire this residence. He may have prevailed on that issue had he pursued it, but he abandoned that position in the Family Court by converting his purportedly non-martial property into becoming his wife's non-martial property. The mere reference to the property being non-martial, thus outside the jurisdiction of the Family Court to apportion, ignores the distinction between whose non-marital property it is.<sup>6</sup>

Promissory Estoppel:

To the extent that the plaintiff seeks recovery under promissory estoppel, that also fails. In *Satcher v. Satcher*, 351 S.E.2d 477, 570 S.C. 535 (Ct. App. 2002), the court stated:

I. Promissory Estoppel

A contract and promissory estoppel are two separate and distinct legal theories. They "are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other." *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985). Our courts recognize a remedy in equity if the claimant can prove:

- (1) the presence of a promise unambiguous in its terms;
- (2) reasonable reliance upon the promise by the party to whom the promise is made;
- (3)

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<sup>6</sup> The mere designation of property as non-martial also does not prevent the Family Court from considering that fact and any claim of liens or encumbrances upon the couple's separate property, as cited in the statutes above.

the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct.App.1993).

The applicability of the doctrine depends on whether the refusal to apply it “would be virtually to sanction the perpetration of a fraud or would result in other injustice.” Citizens Bank v. Gregory's Warehouse, Inc., 297 S.C. 151, 154, 375 S.E.2d 316, 318 (Ct.App.1988). Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property.

The Complaint alleges no promise on the part of the defendant. To the degree that one might extrapolate from the argument a promise by the defendant to convey the residence to the plaintiff, if the parties did not reconcile within one year, the parties went through a divorce and property division months after the year had expired, and the plaintiff agreed to have the residence determined to be the non-marital property of the defendant, titled in her name.

#### Equitable Trusts:

- A. Resulting Trust: Equity can enforce through a resulting trust the rights of a person who pays for property that is titled in the name of another person.
- B. Constructive Trusts: Equity can impose a trust upon and enforce rights related to property based on an agreement, understanding, promise, or similar arrangement between parties related to that property.

If the plaintiff desired to proceed by claiming equitable trust, those claims must also fail. Resulting and constructive trusts allow a court in equity to determine whether someone has an interest in property titled in another person's name. But, there are at least a couple of equitable maxims that preclude the plaintiff's relief in circuit court in this instance: 1) Equity aids the vigilant, not those who sleep on their rights; and, 2) Equity

considers as done what ought to have been done. The plaintiff had the ability to maintain his position related to this property when he was in Family Court and, if the court determined the issue in his favor and declared this residence to be his non-marital property, any dispute as to its division would be appropriate in circuit court. If the Family Court determined the residence to be marital property, he could have appealed. Instead, he converted the non-marital property status from himself to his wife, and he now seeks to undo that through this action.

To the extent that case law or §20-3-620(A) may be read to allow the Court of Common Pleas to resolve this dispute, the court finds that it is patently inequitable for the plaintiff to circumvent the Family Court process through this lawsuit.

#### PERSONAL PROPERTY

The Complaint also seeks relief concerning personal property. The following paragraphs outline those allegations.

6. Plaintiff and Defendant each claim equitable title to an automobile purchased with Plaintiff's funds presently in Defendant's possession.
7. Plaintiff and Defendant each claim equitable title to various other items of tangible personal property purchased with Plaintiff's funds presently in Defendant's possession
8. Plaintiff and Defendant dispute whether Defendant has a contractual, legal, or equitable obligation to reimburse Plaintiff for various payments Plaintiff made for Defendant's benefit for personal property that is either intangible or unreturnable, such as utilities payments, college tuition payments, etc.

These assertions are in direct contravention of the Family Court decree. With the exception of specific provisions concerning a pet and a BMW automobile, the decree makes it clear that the parties agreed that each party would keep the personal property in his or her possession, including any financial accounts, and be responsible for any debts

in their respective names. As for the pet dog, there is an agreement about possession of the pet and what happens in the event that one party is unable to care for the dog. As for the BMW, the decree indicates that the parties knew that the BMW was no longer in the possession of the wife, who had acquired a different vehicle, and each party was given sole ownership of the vehicles in their respective possession. For reasons similar to those discussed above concerning legal and equitable remedies related to the real estate, and based on res judicata and principles of collateral estoppel, the court finds that these portions of the lawsuit concerning personal property, on their face, are things that have been decided by the Family Court and cannot be litigated or re-litigated here.

#### MENTAL HEALTH

The plaintiff alleges that the agreements that he entered were made at a time when he lacked mental capacity. If he wishes to set aside the Family Court's order, Rule 2 of the SCRFC adopts Rule 60, SCRCP, and the plaintiff must make any application to set aside the Family Court order in that court. This court has no authority to deal with that issue.

#### PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIM

The plaintiff moves to dismiss the defendant's counterclaim which seeks to have the court enjoin the plaintiff from filing lawsuits against the defendant, unless they are pre-cleared for filing by a circuit judge. The plaintiff believes that there is no precedent for such and that it would require the court to adopt a new set of special rules.

Respectfully, he is mistaken. Though it is a drastic remedy, numerous courts, including circuit courts in South Carolina and the South Carolina Supreme Court have taken this

action. [See for example the Supreme Court's rulings related to Dr. Marie-Therese Assa'ad-Faltas.]

Section 15-36-10, et seq., Code of Laws of South Carolina, which is known as the South Carolina Frivolous Civil Proceedings Act, includes in subsection (G)(3) a provision for injunctive relief. There is both precedent and statutory authority for issuing an injunction related to abusive filing. However, before any such injunction can be entered, a hearing would need to be held, preferably before the Chief Judge for Administrative Purposes, to determine the appropriate relief, if any. The motion to dismiss the counterclaim is denied.

THEREFORE, IT IS ORDERED that this Complaint is dismissed and the motion to dismiss the Counterclaim is denied.

[Electronic signature follows on separate page.]



Lexington Common Pleas

**Case Caption:** James John Todd Kincannon VS Ashely Suzanne Griffith

**Case Number:** 2019CP3202268

**Type:** Order/Summary Judgment

Circuit Judge (Code #2050)

s/ William P. Keesley