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Feb 16 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Hon. J. Cordell Maddox Jr., Circuit Court Judge

Common Pleas Case No. 2015-CP-04-01518

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Appellate Case No. 2020-001253

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DEUTSCHE BANK NATIONAL  
TRUST COMPANY, as certificate  
Trustee on behalf of Bosco  
Credit II Trust Series 2010-1,

*Respondent,*

v.

DORIS J. DIXON and  
ANMED HEALTH,

*Defendants,*

*Of Whom Doris J. Dixon is*

*Appellant.*

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**Appellant's Petition for Rehearing**

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Howard W. Anderson III (#100329)  
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COMES NOW Appellant Doris Dixon and would respectfully request that this Court vacate the Slip Opinion, numbered 23-UP-044, filed on February 1, 2023.

## **BACKGROUND**

### **I. The Proceedings Below**

The Master-in-Equity summarized many of the relevant proceedings as follows:

1. On May 31, 2013, Steven C. Kirven, then a practicing attorney, commenced an action on behalf of AnMed Health seeking collection of an unpaid hospital bill against [Doris] Dixon and Steve M. Dixon by the filing of a summons and complaint and subsequent service of same on the Defendants in an action entitled AnMed Health v. Doris Dixon and Steve M. Dixon, Civil Action No. 2013-CP-04-01273 [“Hospital Action”];
2. Neither Defendant in the Hospital Action answered or otherwise appeared resulting in an affidavit of default being filed on August 22, 2013, and a default judgment being granted by the Honorable Alexander S. Macaulay, Circuit Judge, which was entered in the records of the Anderson County Clerk of Court on August 27, 2013;
3. Almost two years later, on June 24, 2015, this action [“Foreclosure Action”] was commenced for the foreclosure of a mortgage by the filing of a summons and complaint and subsequent service thereof in an action and titled as captioned above herein;
4. The Plaintiff’s attorney in the Foreclosure Action served the summons and complaint and related documents on Dixon personally on July 3, 2015 according to affidavit of service by Perry Thomas which was filed on July 8, 2015;
5. Steven C. Kirven, while still a practicing attorney, served and filed an answer on July 6, 2015, on behalf of AnMed Health admitting the allegations in the foreclosure complaint regarding AnMed Health’s previously obtained judgment;

6. On October 23, 2015, the Plaintiff's attorney in the Foreclosure Action filed an affidavit of default as to Dixon;
7. By order dated October 23, 2015, the Foreclosure Action was referred to the Anderson County Master-in-Equity who was, at that time, the Honorable Ellis B. Drew, Jr.;
8. On November 23, 2015 a hearing was held in the Foreclosure Action before Judge Drew which was attended by Dixon and which resulted in an Order of Foreclosure and Sale signed by Judge Drew on that date which was entered in the Clerk's office on November 25, 2015;
9. On May 16, 2016, a supplemental hearing was held in the Foreclosure Action before Judge Drew, which was not attended by Dixon despite notice and which resulted in a Supplemental Order of Foreclosure and Sale being issued by Judge Drew dated May 16, 2016 and entered in the Clerk's office on May 17, 2016;
10. By Order dated June 28, 2016, issued by Judge Drew, Steven C. Kirven was relieved as the attorney for AnMed Health in the Foreclosure Action and substituted in his place was Attorney William E. Phillips;
11. On June 30, 2016, Steven C. Kirven [hereinafter "Judge Kirven"] became the Master-in-Equity for Anderson and Oconee Counties, Tenth Circuit, upon the retirement of Judge Drew;
12. On October 12, 2016, a second supplemental hearing in the Foreclosure Action was held before Judge Kirven which was not attended by Dixon despite notice and which resulted in a Second Supplemental Order of Foreclosure and Sale being issued by Judge Kirven on October 12, 2016 and entered in the Clerk's office on October 17, 2016;
13. On June 13, 2017, a third supplemental hearing in the Foreclosure Action was held before Judge Kirven which was not attended by Dixon despite notice and which resulted in a Third Supplemental Order of Foreclosure and Sale being issued by Judge Kirven on June 13,

2017 and entered in the Clerk's office that same day;

14. On February 6, 2018, after publication of the required notice of sale, the initial sale of the subject property in the Foreclosure Action was held at which the Plaintiff submitted its bid in the amount of \$18,765.00 with the bidding held open for thirty (30) days thereafter because the Plaintiff was seeking a deficiency judgment;

15. On March 8, 2018, the bidding was reopened and the final sale held at which time no new bids were received thus making the Plaintiff the high bidder for the subject property;

16. By instrument dated March 22, 2018, the Plaintiff assigned its bid to Bosco Credit II, LLC, which assignment was later filed with the court on May 3, 2018;

17. On March 26, 2018, after full compliance, a Master's Deed was issued to Bosco Credit II, LLC, and subsequently recorded on April 11, 2018, in the Office of the Register of Deeds for Anderson County in Book 13324 at Page 45;

18. On May 7, 2018, a Report on Sale and Disbursements and Order Confirming Sale was issued by Judge Kirven and filed;

19. On May 7, 2018, an Order for Deficiency Judgment against Dixon in favor of Bosco Credit II, LLC, in the amount of \$28,280.18 was issued by Judge Kirven and filed;

20. On May 15, 2018, a Writ of Assistance requested by Bosco Credit II, LLC, was issued by Judge Kirven and subsequently served on Dixon;

21. On December 11, 2018, [a] *Pro Se* motion was filed by Dixon;

22. On December 17, 2018, a notice of hearing on the motion which was scheduled for January 16, 2019, was sent to the parties;

23. On January 10, 2019, [a] Rule 60(b) Motion was filed on behalf of Dixon by her attorney, Howard W. Anderson, III....

[R. 028-32].

Only Ms. Dixon's counseled R. 60(b), SCRCP motion is at issue in this appeal. In that motion, she sought to set aside the judgment and all non-moot interlocutory orders because Judge Kirven served as counsel for AnMed in this action. [R. 091-92].

Judge Kirven recused himself after the hearing on the R. 60(b), SCRCP Motion, [R. 039], and the case was returned to the Circuit Court.

Following a hearing, Judge Maddox denied all relief, on August 31, 2020, rejecting Ms. Dixon's claims that Judge Kirven's failure to have recused himself entitled her to relief under R. 60(b)(1), (4), and/or (5), SCRCP. [R. 048-55].

## **II. This Court's Decision**

In Division 1 of the Slip Opinion, the Court decided as follows:

We hold the circuit court did not abuse its discretion by rejecting Dixon's argument that she was entitled to relief from the judgment pursuant to Rule 60(b)(4), SCRCP. Here, there was no evidence the master's orders were void for lack of personal or subject matter jurisdiction, and Dixon failed to demonstrate any evidence of judicial bias or prejudice.

[Slip Op. at 2 (citations omitted)].

## **ARGUMENT**

Ms. Dixon respectfully requests that the Court modify Division 1 to read that

she is entitled to relief under R. 60(b)(4), SCRC.P.

The orders from Judge Kirven were void as a matter of law because the facts establishing their voidness “appear[] upon the face of the record,” *Hankinson v. Charlotte, Columbia & Augusta R.R. Co.*, 41 S.C. 1, 18 (1894). Specifically, Judge Kirven had previously entered an appearance for a co-defendant in the very case over which he later presided. [R. 29; 084-85]. His prior appearance precluded him of his right to preside. Canon 3(E)(1)(b), CJC, R. 501, SCACR (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where... *the judge served as a lawyer in the matter in controversy...*” (emphasis added).

Given the mandatory recusal language in Canon 3 and given the need to assure the public of the impartiality of the judiciary, *sua sponte* recusal was required. *See, e.g., Ryals v. State*, 914 So. 2d 285, 286 (Miss. App. 2005) (collecting cases allowing appellate review where judge had previously served as prosecutor in the case, even without objection below, “because the duty to avoid the appearance of impropriety overrides any waiver” (citations omitted)); *Adams v. State*, 601 S.W.2d 881, 884 (Ark. 1980) (*sua sponte* recusal required for familial relation to litigant under Code of Judicial Conduct and thus pro-se litigant’s failure to have objected was “immaterial”). *See also Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393

U.S. 145, 150 (1968) (vacating arbitration award where arbitrator did not *sua sponte* disclose small pecuniary interest, even absent any claim that actual impartiality resulted because “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias”).

No showing of prejudice ought to be required. *See Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 392 (2019) (finding recusal required and not engaging in any explicit harmless-error analysis). *See also, e.g., Degarmo v. State*, 922 S.W.2d 256, 267 (Tex. App. 1996) (“The grounds for disqualification are expressly set out in the Texas Constitution. If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void and subject to collateral attack.” (citation omitted)); *Blaisdell v. City of Rochester*, 609 A.2d 388, 391 (N.H. 1992) (declining to implement a harmless-error test because “it would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of partiality, but then to allow a judge’s ruling to stand when those standards have been violated”); *Tatum v. S. Pac. Co.*, 58 Cal. Rptr. 238, 240 (Ct. App. 1967) (“[I]t is no answer to say that the judgment was correct because the statute does not say that the judge is disqualified to decide erroneously but that he shall not decide at all.... [T]he judgment is void....” (citations omitted)).

## CONCLUSION

This Court should grant rehearing, reverse the judgment below pursuant to R. 60(b)(4), SCRCP because Judge Kirven lacked jurisdiction to preside as a matter of law, and remand for further proceedings.

Dated this 16th day of February, 2023.

Respectfully submitted,

DORIS J. DIXON

s/Howard W. Anderson III  
Howard W. Anderson III

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*Of Whom Doris J. Dixon is*

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**Proof of Service**

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I, the undersigned, served a copy this document and Appellant's Petition for Re-hearing, on the following counsel of record by email to the following email addresses of record in the AIS on February 16, 2023:

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*Counsel for Respondent*

Dated this 23<sup>th</sup> day of February, 2023.

DORIS J. DIXON

**s/Howard W. Anderson III**  
Howard W. Anderson III

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