THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-5343

Roosevelt Simmons,.....Petitioner,

v.

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC, John Martin, Esquire, as Trustee

of which,

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Melvin Singleton, LMC, LLC, and John Martin, Esquire, as Trustee, are.....Respondents.

RESPONDENTS' RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen LLC
Post Office Box 859
Charleston, South Carolina 29401
(843) 727-1144

ATTORNEYS FOR RESPONDENTS

Other Counsel of Record:
Edward A. Bertele, Esquire
1812 Pierce Street
Charleston, South Carolina 29492
ATTORNEY FOR PETITIONER

INDEX

QUESTIONS PRESENTED

1. Must Petitioner's Petition be denied because it does not comport with the requirements of Rule 242, SCACR?
2. Did the Court of Appeals err in holding that summary judgment? was properly granted to Respondents and properly affirmed?
3. Are Petitioner's claims are recycled versions of his claims previously raised, and insufficient for relief?
4. Did the Court of Appeals err in holding that summary judgment was not granted prematurely?

STATEMENT OF THE CASE

On August 24, 2009, Petitioner filed a Lis Pendens, Summons and Complaint against Respondents related to the following parcels: (1) TMS# 311-00-00-310, and (2) TMS# 311-00-00-024. (R. p. 43-p. 44), and others. (R. p. 26-p. 42). The underlying suit is an action in equity pursuant to Rule 60(b), SCRCP, to set aside the judgments in two prior lawsuits involving the properties which were the subject of the Lis Pendens. (R. p. 26-p. 41). The first action was captioned Bailum v. Simmons, et al., Case No. 04-CP-10-1459 (the "Bailum '04 Case")(these deeds and properties hereafter referred to as "Parcels

1, 2, 3 and/or 4")[1]. (R. p. 26-p. 41). The second action was entitled Middleton v. Doe, et al., 02-CP-10-4883 (the "Middleton '02 Case") (this deed and property hereafter referred to as the "Middleton Parcel"). (R. p. 26-p. 41).

In response to the Complaint Respondents filed a Motion to Dismiss on September 16, 2009. On March 1, 2010, the Honorable J.C. Nicholson, Jr. heard several motions including Respondents' Motion to Dismiss. (R. p. 245, l. 12-15). Judge Nicholson took that motion under advisement. (R. p. 300, l. 20-25). Judge Nicholson held a second hearing on the Motion to Dismiss on August 27, 2010. (R. p. 307, l. 20-25). Following oral arguments, Judge Nicholson and the parties agreed to convert the defendant's motion to dismiss to one for summary judgment. (R. p. 342-p. 343, l. 9). The judge allowed the parties additional time to submit further evidence, and indicated that he would either rule or hear additional oral arguments if he deemed it necessary. (R. p. 342-p. 344, l. 18). While the underlying suit was pending in the trial court, the parties filed several memorandum; numerous exhibits, attachments and affidavits, and correspondence with the court, as well as a number of other motions.

Judge Nicholson granted summary judgment to Respondents on January 11, 2011. (R. p. 1-p. 21). On February 1, 2011, Petitioner filed a Motion for Reconsideration and to Alter or Amend the Order Granting Summary Judgment to the Defendants with a supporting affidavit by Petitioner's attorney, Edward A. Bertele. That motion was denied on March 2, 2011. (R. p. 25, and 212-p. 241).

[1] The Bailum '04 Case ultimately quieted title to four properties: TMS# 311-00-00-024 (Parcel 1); TMS# 312-00-00-65 (Parcel 2); TMS#. 312-00-00-32 (Parcel 3), and TMS# 312-00-00-67 (Parcel 4). Parcel 1 was ultimately partitioned and now includes a second TMS#: 311-00-00-310.

Petitioner then filed his Notice of Intent to Appeal with the Court of Appeals on March 30, 2011. On February 20, 2013, the Court of Appeals affirmed Judge Nicholson's Order granting summary judgment. Petitioner's Petition for Rehearing to the Court of Appeals was denied on April 18, 2013. Petitioner then filed this Petition for Certiorari on May 20, 2013.

Facts

In 2004, Respondent John F. Martin, Esq. ("Respondent Martin") filed the Bailum '04 Case to quiet title to two properties, TMS Nos. 312-00-00-065, and 311-00-00-024, as to those persons who might claim an interest in the properties, including Petitioner. (R. p. 423-p. 433). Thereafter, on July 29, 2004, Respondent Martin filed an amended the pleadings to add additional plaintiffs and defendants. (R. p. 434-p. 445).

On January 20, 2005, Ruth L. Cupp, Esquire, ("Attorney Cupp") filed an Answer and Counterclaim on of behalf of Petitioner denying the material allegations of the Complaint and counterclaiming for the property taxes he paid for both parcels, ownership as to both parcels through adverse possession, and an heirs interest in Parcel 1. (R. p. 446-p. 450). Petitioner's attorney and Respondent Martin agreed on January 25, 2005, to refer the Bailum "04 Case to Joseph S. Mendelsohn, Esq. to serve as Special Referee. (R. p. 357). Respondent Martin answered Petitioner's counterclaims by general denial filed March 3, 2005. (R. p. 451).

On September 13, 2005, Petitioner's attorney and Respondent Martin signed a consent order to again amend the complaint to include the names of additional heirs provided by Petitioner and to realign the parties, and on that same date, a Second

Amended Complaint was filed. (R. p. 354 and p. 452-p. 458).

On November 10, 2005, Attorney Cupp moved to be relieved as counsel for Petitioner. (R. p. 356 and p. 459-p. 460). In pertinent part Attorney Cupp's affidavit stated that "she was unable to explain to Roosevelt Simmons the prevailing law underlying this case nor am I able to explain to him what I believe I can and not do for him in this case." (R. p. 356 and p. 459). Attorney Cupp was relieved by order on November 10, 2005, and Petitioner was given thirty days to obtain new counsel, or proceed *pro se*. (R. p.356). On December 15, 2005, Petitioner notified the Ninth Circuit Administrative Judge of his intention to proceed *pro se*. (R. p. 664).

The trial before the Special Referee trial was held on May 15, 2006. Prior to trial, Petitioner retained Louis E. Condon, Esq., the former Charleston County Master-in-Equity, ("Attorney Condon") to represent him. (R. p. 359, p. 637 and 377). At trial, counsel for the parties, including Petitioner, agreed to and entered into the record several stipulations including that:

1. the Bailum '04 Case involved the quieting of the title, partition and sale of Parcels 1, 2, 3 and 4;

2. "Hester" Bailum was sometimes referred to as "Esther" Bailum, and the caption should reflect "Hester Bailum a/k/a Esther Bailum";

3. the parties would be realigned so that the living heirs of Samuel Bailum appeared as Plaintiffs, and the living heirs of Hester Bailum, including Petitioner, remained as Defendants;

4. Hattie Bailum, James Bailum, Verdone Gray, Julie B. Johnson, Leon

Singleton and Melvin Singleton would be allowed to testify by telephone;

5. the previously marked exhibits which were submitted and reviewed by counsel and the Guardian ad Litem prior to trial would be admitted into evidence; and

6. plaintiffs' prayer for relief was amended to have title to Parcels 1, 2, 3 and 4 quieted, and once title was established, that the Parcels be portioned and/or sold, and the respective shares be distributed to the heirs of Samuel Bailum, Sam Bailum, Thomas Bailum, Tony Bailum, Mary Bailum and Fanny Bailum, or the heirs of Hester Bailum, as determined appropriate by the Special Referee.

(R. p. 360-p. 361, and p. 378-p. 379).

Ultimately, the parties in the Bailum '04 Case, after amendment and realignment by consent, included all persons who might claim an interest in the property. For purposes of the present appeal, Hattie Bailum a/k/a Balaam, Ruby Bailum a/k/a Balaam, Verdone Gray, Julie B. Johnson and Monica Middleton, as plaintiffs, and Roosevelt Simmons, Melvin Singleton and Marie Smith, as defendants, were included in the amended caption. (R. p. 358-p. 359, p. 361-p. 364, p. 376-p. 377, p. 379-p. 382).

Pursuant to the parties' consent and stipulation, on September 5, 2006, the Special Referee took supplemental testimony from Leon Singleton and Melvin Singleton, and further supplemental testimony was taken from Melvin Singleton on September 22, 2006. (R. p. 359 and p. 377). Petitioner, on several occasions, was advised that he may be able to purchase Parcel 1. (R. p. 371 and p. 389).

On January 11, 2007, the Special Referee issued his Order to Quiet Title, Partition and Sale. (R. p. 358-p. 375 and p. 376-p. 393). The order found that the Samuel Bailum

living heirs were Hattie Bailum, Ruby Bailum, Monica Middleton and Julie Bailum Johnson, and the Hester Singleton Bailum living heirs were Petitioner, Marie Smith and Melvin Singleton. (R. p. 363-p. 364, and p. 381-p. 382). Walter Burns, Alonzetta Burns, Sheila Owens, Louise Canty and Mabell Hicks were also Hester Singleton Bailum living heirs; however, they had already deeded their interest in Parcel 1 to Petitioner and therefore no longer had an interest in the property. (R. p. 364 and p. 382).

As to Parcel 1, the Special Referee found that the Samuel Bailum heirs, as his blood descendants, shared a 2/3 interest, and the Hester Bailum heirs shared the 1/3 interest Hester Bailum received as Samuel Bailum's third wife. (R. p. 362-p. 363, p. 366, p. 370, p. 373, p. 380-p. 381, p. 384, p. 388 and p. 392). As to Parcels 2, 3 and 4, the Special Referee found the heirs of Hester Bailum had no claim or interest in these parcels as her husband, Samuel Bailum, had no interest in those parcels. (R. p. 363, p. 366, p. 381 and p. 384). The Special Referee also denied Petitioner's adverse possession counterclaim because Petitioner's own testimony proved that he did not meet the required elements for adverse possession generally, or the additional element of ouster required for an heir claiming title by adverse possession. (R. p. 366-p. 370, p. 373, p. 375, p. 384-p. 388 and p. 391).

The Special Referee held that Hattie Bailum entered into a contract for sale for Parcel 1 in 2003, which contract necessitated the instigation of this action, and that the court-ordered appraisal set the value of Parcel 1 at $220,000. (R. p. 371, p. 374, p. 389, and p. 392). Consequently, the Special Referee ordered the sale of Parcel 1. (Id.).

In response to the requests by Petitioner and Marie Smith, the Special Referee

granted them the opportunity to purchase Parcel 1 with the following conditions: that the opportunity was only assignable to individuals related by blood or marriage to a party; that they had to provide the Clerk of Court, for filing and date stamp within ten days from the date of service of the order, a loan approval letter for $220,000 or proof of funds available by a licensed lender; and had to consummate the sale within thirty days of the Order. (Id.). Failure to produce the required proof of ability to pay or close in time allotted would result in Parcel 1 being conveyed by the Special Referee in accordance with the contract. (Id.). Further, the Special Referee noted in the Order that on several occasions he had offered the Petitioner the opportunity to buy out the remaining heirs interests in Parcel 1. (R. p. 371 and p. 389). The Special Referee also recognized Petitioner's efforts to preserve Parcels 1, 2, 3 and 4 for the benefit of all heirs, and concluded that he was entitled to $10,000 from the proceeds of the sale of all four parcels, over and above his interest as an heir to Parcel 1. (R. p. 371-p. 372, p. 374, p. 390 and p. 392). The parties agreed that this sum was fair and equitable compensation for Petitioner. (Id.).

Further, the Special Referee found Hattie Bailum also entered into a contract in 2003 for the sale of Parcels 2, 3 and 4. (R. p. 372-p. 373, p. 375, p. 390-p. 391 and p. 393). The parties to that contract amended to sell the parcels for the court-ordered appraisal amount of $337,000. (Id.).

Next, the Special Referee determined that the sale of all the parcels was in the best interests of the heirs and concluded that the net proceeds from the sale of the parcels were to be distributed as follows:

Parcel 1

2/3 interest to Samuel Bailum Heirs:

Hattie Bailum, Julie B. Johnson and Monica Middleton	1/6 each
Ruby Bailum and Verdone Gray	1/12 each

1/3 to Hester Bailum Heirs:

Petitioner	2/9
Marie Smith and Melvin Singleton	1/18 each

Parcels 2, 3 and 4

Entire interest to Samuel Bailum Heirs only:

Hattie Bailum, Julie B. Johnson and Monica Middleton	1/4 each
Ruby Bailum and Verdone Gray	1/8 each

(R. p. 371-p. 375, and p. 389-p. 393).

Attorney Condon prepared a Motion to Reconsider Order of Special Referee with affidavit by Petitioner, purportedly signed and notarized.[2] (R. p. 464-p. 466). Therein, Petitioner requested the judgment be amended or a new trial granted based upon the following alleged errors: Petitioner did agree to the appointment of a Special Referee; he was not given the customary thirty days to purchase the property; Petitioner did not receive adequate advance notice of the purchase price that he would have to pay; that the sum calculated for his contributions and protection of the Parcels was inadequate, unreasonable and inequitable; and that the denial of his adverse possession claim as to all four parcels should be reversed. (Id.). On February 7, 2007, Attorney Berlinksy, filed a Motion of Defendant to Alter or Amend the January 11, 2007, Order to correct Defendant

[2] It is assumed that the motion and affidavit were delivered directly to the Special Referee. The Charleston County Clerk of Court does not have a record of this motion or affidavit, and the copy produced by Petitioner does not have a file stamp. However, the motion and affidavit were referred to in the Special Referee's March 6, 2007 Order dealing with Petitioner's motion.

Marie D. Smith's inadvertently omission from the Order. (R. p. 467).

On February 16, 2007, the Special Referee heard both motions. Both Petitioner and Marie Smith were represented by counsel at the hearing. (R. p. 395). The Special Referee granted Marie Smith's motion to amend, and executed an Amended Special Referee's Order Quiet Title Partition and Sale with the requested change included. (R. p. 396). The Special Referee denied the Petitioner's motion. (Id.). Specifically, the Special Referee found that the evidentiary hearing, testimony and documentary evidence were preserved by a court reporter and were available to any party who wished to order and pay for them; there was no error or law or procedure with regard to his findings and conclusions of Petitioner's adverse possession claim; that the court-ordered appraisal for Parcel 1 was made available to counsel nearly two years before the January 11, 2007, Final Order confirmed the sales price and Petitioner's right to purchase Parcel 1 which provided Petitioner ample time to secure loan commitment or other acceptable financing as ordered; and any party making a claim for taxes paid during the pendency of the action was entitled to pro-rata reimbursement upon proof of payment produced to the Special Referee not less than 48 hours before disbursement of the proceeds. (R. p. 396-p. 397).

Thereafter, Petitioner filed a *pro se* Notice of Appeal from the Special Referee's Order filed on March 6, 2007[3]. (R. p. 470). On April 24, 2007, Charles E. Houston, Jr., Esquire, ("Attorney Houston") appeared for Petitioner and filed an Amended Notice of Appeal appealing the January 11, 2007 Special Referee's Order, the March 6, 2007, Amended Special Referee's Order, and the March 6, 2007 Order denying Petitioner's

[3] It is unclear from Petitioner's Notice which March 6, 2007, Order of the Special Referee he is appealing.

Motion to Alter or Amend, or for new trial. (R. p. 471-p. 473). On May 4, 2007, Attorney Houston filed Petitioner's Motion for Staying Judgment, For Sale or Delivery of Land in the Charleston County Court of Common Pleas. (R. p. 474-p. 476).

On May 31, 2007, the Court of Appeals dismissed Petitioner's appeal for failure to provide proof of the transcript being ordered and/or failure to serve and file the Initial Brief. (R. p. 398-p. 399). On or about June 6, 2007, Attorney Houston responded to the Court of Appeals dismissal by filing a Motion for Reinstatement of Appeal. (R. p. 477-p. 484).

The Special Referee held a hearing on June 6, 2007, for Petitioner's Motion to Stay. (R. p. 401-p. 407). Attorney Houston requested that the Special Referee stay the delivery of deeds to Parcel 1, and to Parcels 2, 3 and 4 pending the outcome of the appeal. (R. p. 474-p. 476). Although his motion only addressed a stay, at the hearing Attorney Houston argued that Petitioner should be again offered the opportunity to buy a part or all of Parcel 1. (R. p. 401-p. 407, p. 474-p. 476, p. 649, l. 8-p. 655 and 666, l. 1-7). Attorney Houston also offered and argued 'newly discovered evidence' in the form of census reports. (R. p. 405, p. 657, l. 3-p. 663, and p. 667, l. 1-23). The Special Referee accepted the census documents into the record over the objections of Respondent Martin and Attorney Berlinsky. (R. p. 661, l. 24-p. 663 and p. 667, l. 1).

During the hearing, the parties, including Petitioner with his attorney, reached agreement on the record on several issues which were memorialized by the Special Referee's Order filed June 28, 2007. (R. p. 401-p. 407) including the following:

1. Petitioner's Motion to Stay would be denied and Parcel 1 would be sold

with the net proceeds of such sale to be distributed in accordance with prior orders;

2. Petitioner would proceed with his appeal on the sole and exclusive grounds of adverse possession as to Parcel 1;

3. the Motion to Stay as to Parcels 2, 3 and 4 would be denied, and the parcels sold pursuant to a pending contract;

4. the net proceeds from the sales would be distributed per the prior orders except that 1/3 of these proceeds would be escrowed pending the outcome of Petitioner's appeal; and

5. as to Parcels 2, 3, and 4, he would proceed with his appeal on the exclusive issue of whether the Special Referee erred in concluding that he did not have any interest in Parcels 2, 3 and 4 by virtue of intestacy and distribution. If successful on appeal, that claim could affect the amount Petitioner would receive from the escrow fund. He agreed to waive any claim, suits or appeals alleging adverse possession, and any all claims affecting title to Parcels 2, 3 and 4.

(R. p. 163 (Transcript p. 54), l. 8-p.164 (Transcript p. 91), l. 14 and p. 403-p. 407).

Additionally, the Special Referee found that Petitioner failed to timely exercise his option to purchase by failing to file with the Clerk the appropriate proof of financing required by the prior orders, and therefore, the parcel was being sold to Mark Goldberg, per a prior contract, and to Marie Smith, who did comply with the orders and preserved her right as an heir to purchase Parcel 1. (R. p. 165 (Transcript p. 87), l. 15-p. 166 (Transcript p. 90), l. 3 and p. 403). Petitioner did not appeal this June 28, 2007 Order.

On July 13, 2007, Attorney Houston filed a Motion for Supersedeas or Other

Relief, along with a Memorandum of Law, his affidavit and supporting exhibits, with the Court of Appeals seeking relief based on the following: jurisdiction was not proper; process was insufficient; Petitioner's right to purchase property was improperly denied due to an error of law, error of fact or abuse of discretion; the lack of due process and sanctions imposed; the underlying facts as determined by the Special Referee were false or fraudulently presented; the census reports and burial records should have been considered as newly discovered evidence for the purposes of granting a new trial and/or under Rule 60(b) for relief for judgment based on fraud; the Special Referee failed to maintain itself as a court of record; and whether the Special Referee had the authority to dictate and frame the scope of Petitioner's appeal.[4] (R. p. 485- p. 527).

On September 4, 2007, the Court of Appeals denied Petitioner's Motion for Supercedeas. (R. p. 411-p. 412). In response, on September 13, 2007, Attorney Houston filed a Petition for Full Appellate Review which appears to have been denied. (R. p. 540-p. 542).

On March 24, 2008, the Court of Appeals dismissed, for the second time, Petitioner's appeal based on his failure to file and serve the Initial Brief and the Designation of Matter. (R. p. 413-p. 414). Attorney Houston filed a Motion for Reinstating Appeal, Securing Transcript Out of Time and for Filing Petitioner's Brief Out of Time on March 24, 2008. (R. p. 547-p. 549). Respondents objected to both of Petitioner's motions. (R. p. 543-p. 545, and p. 556-p. 558). The Court of Appeals, on

[4] Petitioner's Motion for Supersedeas or Other Relief also requested relief on behalf of Deloris Singleton. The references to Ms. Singleton have been omitted because Ms. Singleton is not a party to this case or to this appeal.

May 14, 2008, reinstated the appeal, granted Petitioner thirty days to file his brief, and ordered no further extensions absent extraordinary circumstances. (R. p. 415-p. 416). Sometime thereafter, Petitioner filed a Motion for Leave to File Late, and, it appears, a Motion for an Extension of Time. (R. p. 559-p. 561). Respondents again objected to Petitioner's motions as well as to the restatement of Petitioner's appeal. (R. p. 562-p. 571).

After the briefing deadline but prior to any ruling by the Court of Appeals, Attorney Houston filed Petitioner's Initial Brief on August 7, 2008. (R. p. 572-p. ___[*sic: the page between R. p. 618 and p.619*]). By Order filed on August 21, 2008, the Court of Appeals dismissed the appeal for Petitioner's failure to file and serve the Initial Brief by the deadline, and dismissed the pending motions to dismiss and for extension of time as moot. (R. p. 417-p. 418).

On August 28, 2008, Attorney Houston filed a Petition for Full Appellate Review, which Respondents opposed. (R. p. 619-p. 625). The Court of Appeals denied a rehearing of the dismissal or reinstating the appeal on October 27, 2008. (R. p. 419-p. 420). Attorney Houston filed a Motion for Reconsideration on October 31, 2008, also opposed by Respondents. (R. p. 626-p. 634).

Sometime in November 2008, the Court of Appeals returned the Bailum '04 Case Respondents' Return to Petitioner's Motion advising it was not going to consider either Petitioner's Motion for Reconsideration, or the Bailum '04 Case Respondents' Return. (R. p. 665). On December 1, 2008, the Court of Appeal remitted the appeal to the Clerk of Charleston County. (R. p. 421-p. 422).

Shortly thereafter, the property was sold pursuant to the Special Referee's prior orders. Respondent Martin sent Petitioner's proceeds, as set forth in the prior orders, to Attorney Houston. (R. p. 294, l. 14-22). However, Attorney Houston returned the check advising he no longer represented Petitioner. (Id.). Respondent Martin then mailed Petitioner letters and advised him to claim his share of the proceeds. (Id.). Petitioner never responded and Respondent Martin continues to hold in excess of $50,000 in his trust account for Petitioner. (Id.). No further action was taken by Petitioner until almost nine months later when he commenced the underlying suit.

ARGUMENT

1. THE PETITION DOES NOT COMPORT WITH THE REQUIREMENTS OF RULE 242, SCACR

The granting of a writ of certiorari is not a matter of right, but is within the Supreme Court's sole discretion, and is granted only where there are "special and important reasons." Rule 242(b), SCACR. Although not exhaustive, Rule 242(b) lists the following reasons which will normally be considered for review: novel questions of law; dissent in the decision of the Court of Appeals; conflict between the decision of the Court of Appeals and the Supreme Court; substantial constitutional issues; or a federal question exists and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Id.

Petitioner attempts to reframe his claims as novel legal issues in an apparent attempt to trigger a review under Rule 242. In reality, Petitioner's questions have been litigated exhaustively, and involve only questions of fact and their application to well settled legal principles. The Petition does not articulate special and important reasons,

and he has not presented a case that warrants the Supreme Court's issuance of a writ of certiorari. Therefore, the Petition must be denied as it fails to meet the standard for a writ of certiorari set by Rule 242, SCACR.

2. SUMMARY JUDGMENTWAS PROPERLY GRANTED TO RESPONDENTS AND PROPERLY AFFIRMED

In August 2009, Petitioner filed an independent action pursuant to Rule 60(b), SCRCP, to set aside the judgment in the Bailum '04 Case based on fraud on the court and on rare, special, exceptional or unusual circumstances. Throughout the underlying action and in this appeal, Petitioner has consistently made conclusory arguments, allegations and statements in an attempt to establish the purported fraud on the court and demonstrate the rare, special, exceptional or unusual circumstances. However, then, as now, he has not, and cannot, present the requisite evidence to support his claims.

Judge Nicholson found that Petitioner failed to establish fraud on the court or on rare, special, exceptional or unusual circumstances. Well over a year after this case was filed Judge Nicholson therefore found that Petitioner was not entitled to relief under Rule 60(b), SCRCP, and granted summary judgment to Respondents. The Court of Appeals agreed with Judge Nicholson and affirmed his ruling.

3. PETITIONER'S CLAIMS ARE RECYLCED VERSIONS OF HIS CLAIMS PREVIOUSLY RAISED, AND ARE INSUFFICIENT FOR RELIEF

Petitioner's claims do not present novel legal issues. This path is well traveled. This case boils down to little more than Petitioner's disagreement and dissatisfaction with the result that numerous courts have reached after considering the facts and applying the law to those facts.

A. Petitioner was not denied due process.

Petitioner's argument that the trial court's application of res judicata denied him due process is circular and nonsensical. If it were accurate, the doctrine of res judicata would become meaningless. Petitioner was provided with a fair and adequate opportunity for his Rule 60(b), SCRCP, action to be heard. However, Judge Nicholson found that Petitioner's case did not comport with the requirements of Rule 60(b), SCRCP, and was merely an attempt to reopen the Bailum '04 Case. For that reason, res judicata barred Petitioner's claims.

Petitioner now additionally lumps his previous claims of jurisdictional defect and racial bias deprivation (part and parcel of his Rule 60(b) argument of rare, special, exceptional or unusual circumstances) into a single claim for deprivation of due process. However, Petitioner was not denied due process in the Bailum '04 Case for racial bias or lack of jurisdiction, or on any other ground. On the contrary, the history of this appeal, the underlying case and the prior Bailum '04 Case reveals that Petitioner received all of the legal process to which he could possibly be entitled.

Petitioner repeatedly asserts that the Special Referee did not have jurisdiction to hear the Bailum '04 Case based on the S.C. Code Ann: S.C. Code Ann. § 14-11-60. That statute provides:

> In case of a vacancy in the office of master-in-equity or in case of the disqualification or disability of the master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all the powers of a master-in-equity. The special referee must be compensated by the parties involved in the action.

The statute unambiguously permits the appointment of a special referee for any

cause by agreement of the parties and, contrary to Petitioner's assertion, does not require findings of 'just cause'. In the Bailum '04 Case, Petitioner entered into a Consent Order of Reference to Special Referee appointing Joseph S. Mendelsohn, Esquire. (R. p. 357). That consent was later reaffirmed at the Special Referee hearing and memorialized in the Special Referee's January 11, 2007 Order and March 6, 2007 Amended Order Quiet Title Partition and Sale. (R. pp. 358 and 376). Although Petitioner was *pro se* for a few months, he was represented at the time the Consent Order was entered into, and he was represented at, during and after the hearings with the Special Referee when such consent was reaffirmed. While Petitioner now claims that he objected to the Special Referee's appointment, Petitioner does not point to any evidence in the record to establish such objections were made prior to Petitioner's pleadings and affidavits filed in the underlying almost four years later.

Petitioner also argues that the Special Referee was racially biased against him which denied him due process. However, Petitioner's claims of racial bias did not appear until after the Special Referee rendered his final decision, which was not in Petitioner's favor, in the Bailum '04 Case. On or about June 25, 2007, Petitioner sent a letter to the Commission on Judicial Conduct complaining of the alleged bias stating that the Special Referee had referred to him as "you people". (R. pp. 206-07). In Petitioner's Affidavit filed March 1, 2010, he stated "I knew that the Special Referee had biased against me from the beginning, probably because I tried to stop his appointment." (R. pp. 94-5). In yet another Affidavit signed by Petitioner on October 25, 2010, he testified that "[a]fter the Special Referee refused to allow me to complete the purchase of the 18 acres in June

2007, I realized that he had biased against me from the beginning, probably because I tried to stop his appointment." (R. pp. 169). Taken as a whole and read fairly, this evidence does not yield the conclusion that the Special Referee was motivated by racial animus or that his decision was biased.

B. Petitioner Abandoned His Prior Appeal.

Part of Petitioner's argument to show rare, special, exceptional or unusual circumstances requiring relief under Rule 60(b), SCRCP, is attorney abandonment. The Supreme Court recognizes that the general rule is

> that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client.

Graham v. Town of Loris, 272 S.C. 442, 451-2, 248 S.E.2d 594, 599 (1978). To overcome this general rule, the client must establish that its former attorney willfully and unilaterally abandoned him. Id. at 452, 248 S.E.2d at 599 (emphasis added). In Graham, the Supreme Court affirmed the decision of the trial court on the grounds that "under the rare circumstances of this case," the client "should not be charged with the abandonment of the case by its counsel." Id. at 452-3, 248 S.E.2d at 599. (emphasis added).

Stearns Bank v. Glenwood Falls, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) is controlling authority. In that case, Glenwood Falls asked the court to assume that its attorney's failure to appear at the foreclosure trial was abandonment requiring relief from judgment under Rule 60(b), SCRCP. The Court of Appeals affirmed the Master's denial of relief and found that even if the attorney's failure to act was neglectful, the Court

could not assume that negligence rose to the level of willful abandonment or withdrawal from the case. In the absence of evidence of willful abandonment, the Court refused to speculate about the reasons for the attorney's failure to act and denied relief to that Petitioner.

Petitioner bore the burden of proving that his former attorney, Charles Houston, willfully and unilaterally abandoned or withdrew from the case. Although Petitioner cites general statements of law regarding attorney abandonment or the imputation of a lawyer's negligence to his client, he cannot and did not point to any evidence in the record to prove attorney abandonment or to defeat the imputation of his attorney's negligence, if any, to him.

The only evidence in the record to purportedly establishing abandonment is Petitioner's own March 1, 2010 Affidavit. Therein, Petitioner states he hired Attorney Houston "to continue with the appeal I started. As time passed, I tried contacting him many times but couldn't get through to him to find out what was happening. . ." (R. pp. 95-96). Thus, Petitioner's assertion in his Petition that "the Record establishes that Petitioner was unable to contact his attorney during the appeal" is overreaching and inaccurate. (Petition for Writ of Certiorari, p. 17, para. B). Nonetheless, even if taken as true, this statement only proves that Petitioner tried to contact Attorney Houston several times and failed to reach him. It does not establish willful or unilateral abandonment or withdrawal by Attorney Houston.

Petitioner also argues that the various dismissals and reinstatements of his appeal of the Bailum '04 Case prove Attorney Houston "exceeded the bounds of negligence . . ."

However, the true explanation of that conduct is a mystery. While Petitioner argues it is proof of abandonment, a review of Attorney Houston's appellate court filings could just as easily lead to the conclusion that he was very engaged and busy with Petitioner's appeal filing numerous pleadings, but that Petitioner was undecided about whether to proceed or withdraw his appeal. Thus, Petitioner, like Glenwood Falls, has asked the courts, in the absence of proof, to speculate about (and assume in Petitioner's favor) the reasons for Attorney Houston's failure to meet all of the deadlines or why Petitioner did not retain substitute counsel if he was unable to contact Attorney Houston.

There is no evidence that Petitioner tried to obtain a copy of Attorney Houston's file which may have shed some light on the circumstances of his representation of Petitioner. Furthermore, there was no attempt to take Attorney Houston's deposition despite the fact that this action was pending for over a year (from August 2009 until January 2011). Petitioner produced no evidence that Attorney Houston willfully and unilaterally abandoned or withdrew from Petitioner's case. Thus, even if Attorney Houston was neglectful, which Petitioner also failed to establish, Petitioner is bound by Attorney Houston's acts and omissions, and by the abandonment of his appeal of the Bailum '04 Case. Therefore, Judge Nicholson correctly applied Petitioner's facts to the law and found that Petitioner abandoned his appeal, and the Court of Appeals agreed.

C. There was insufficient evidence in the record of extrinsic fraud or unusual circumstances to support a denial of summary judgment.

Petitioner again argues that the alleged: racial bias of the Special Referee, lack of jurisdiction in the Bailum '04 Case, and attorney abandonment of his prior appeal constitute the rare, special, exceptional or unusual circumstances required by Rule 60(b),

SCRCP. To establish his claim for fraud on the court, Petitioner points to the alleged contradictory testimony regarding Monica Middleton (based on differing testimony from two different witnesses in two separate and distinct civil actions); and purported misconduct by Attorney McFarland who Petitioner asserts he hired in 2000, who had no role in the Bailum '04 Case or the underlying action, and which issue was first raised in Petitioner's appeal herein. Petitioner posits that there was sufficient evidence in the record to support a denial of Respondents' summary judgment motion.

Throughout the trial and appeal, Petitioner has consistently made conclusory arguments and allegations to establish the purported fraud on the court and the rare, special, exceptional or unusual circumstances. However, then, as now, he has not and cannot present the requisite evidence to support his claims. As set forth above, based on the evidence presented by Petitioner, the trial court and the Court of Appeals disagreed with Petitioner and found that he failed to prove fraud on the court or the rare, special, exceptional or unusual circumstances needed to set aside a judgment under by Rule 60(b), SCRCP. For that reason, Judge Nicholson granted Respondents' motion for summary judgment and the Court of Appeals affirmed.

4. Summary Judgment Was Not Premature Due To Lack Of Discovery

Petitioner continues to take the position that that summary judgment was premature in the underlying case due to the lack of discovery. Petitioner mischaracterizes the record. During the March 1, 2010, motions hearing, Judge Nicholson simply acknowledged that he understood discovery had not yet been done. (R. p. 288, l. 5- p. 290, l. 5). Five months later, at the August 2, 2010, hearing, an issue arose regarding the

existence of two Monica Middletons. (R. p. 342, l. 6-14). To decide that issue, the judge converted the motion to dismiss to one for summary judgment and invited the parties to submit whatever affidavits and transcript testimony they deemed necessary. (R. p. 342, l. 15 – p. 344, l. 18, p. 345, l. 23-p. 347, l. 12). The judge offered this alternative as a way of saving the parties the expense and effort of depositions and continued litigation. Id. The judge did not, however, during either of the hearings, prohibit or restrict the ability of any party in the case to engage in discovery. Judge Nicholson specifically stated: "If you think that it is appropriate. I'm not trying to tell you how to try your case. I am just going to give you an opportunity to submit whatever affidavits that you want concerning the Middletons, or whatever you want to submit to me. I am not trying to tell you what to submit to me. You try your case." (R. p. 344, l. 3-10).

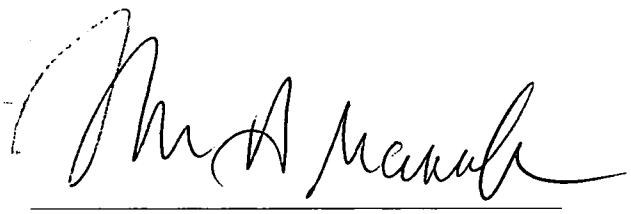
There is no order, written or verbal, limiting or abridging any party's right or ability to undertake whatever discovery they desired in the underlying case. Both the hearings were largely focused on dispositive motions; first the motion to dismiss which was later converted to a motion for summary judgment. Thus, Petitioner was certainly on notice and aware that his case was hanging on Judge Nicholson's resolution of those motions. (R. p. 342, l. 6-14.) During the sixteen-month-pendency of the underlying action, Petitioner should and could have undertaken whatever discovery he believed necessary or prudent to uncover the evidence to support his allegations, whether or not they were related to the issues before the circuit court in the motions, and especially to the extent he thought any of his claims might survive. Id. This is especially true of Petitioner's attorney abandonment claim: he was the sole party making this claim and

alone bore the burden of proving its truth. Moreover, if Petitioner believed his rights to discovery were abrogated or restricted, he could and should have filed a motion to resolve such issues. He did none of the above.

Petitioner's failure to engage in discovery prevents him from now complaining that summary judgment was premature due to a lack of discovery, and his Petition must therefore be denied.

CONCLUSION

Petitioner in his Petition is simply rehashing the issues raised, considered and disposed of at the trial level and by the Court of Appeals. He has not raised any novel issues of law, or any special and important reasons that warrant the issuance of a writ of certiorari. As such, Petitioner's Petition for Writ of Certiorari must be denied as a matter of law.



June 19, 2013

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen LLC
Post Office Box 859
Charleston, South Carolina 29401
(843) 727-1144

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-5343

Roosevelt Simmons,.....Appellant,

v.

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Marie Smith, Melvin Singleton, Franklin Smith, LMC, LLC, John Martin, Esquire, as Trustee

of which,

Hattie Bailum, Ruby Bailum, Verdone Gray, Julie B. Johnson, Monica Middleton, Melvin Singleton, LMC, LLC, and John Martin, Esquire, as Trustee, are.....Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Return to Petitioner's Writ for Certiorari by depositing a copy in the United States Mail, postage prepaid, on June 19, 2013, addressed to it's attorney of record, Edward A. Bertele, Esquire, 1812 Pierce Street, Charleston, South Carolina 29492.

June 19, 2013

John A. Massalon, Esquire
I. Sonja Taylor, Esquire
Wills Massalon & Allen LLC
Post Office Box 859
Charleston, South Carolina 29401
(843) 727-1144

ATTORNEYS FOR RESPONDENTS