**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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S.C. SUPREME COURT

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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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Ct. App. Appellate Case No. 2020-001253
Ct. App. Opinion No. 2023-UP-044 (Filed Feb. 1, 2023)

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Supreme Court Appellate Case No. _____

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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* *Petitioner*.

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# Petition for Certiorari

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## CERTIFICATE OF COUNSEL

Undersigned counsel certifies that a Petition for Rehearing was filed in the Court of Appeals and was denied via order filed on March 23, 2023

## QUESTION PRESENTED

Where the Master-in-Equity below previously served as counsel of record prior to ascending to the bench and later presided in the case without any on-the-record waiver of disqualification from the parties, were his orders and judgments void and thus subject to being set aside under R. 60(b)(4), SCRCP?

## STATEMENT OF THE CASE

### I. The Proceedings in the Trial Court

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 Fore-

closure 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 on 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. The Court of Appeals' Decision

Via an unpublished opinion, the Court of Appeals Affirmed. In Division 1 of the Slip Opinion, the Court of Appeals 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)].[1]

## STANDARD OF REVIEW

"In an appeal from an action in equity, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *Pinckney v. Warren*, 344 S.C. 382, 387 (2001) (citation omitted). Questions of law are likewise subject to *de novo* review. *See, e.g.*, *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564 (2008) (citation omitted).

## ARGUMENT

[1] In Division 2, the Court of Appeals held that Ms. Dixon also could not obtain relief from the judgment via R. 60(b)(1), SCRCP, and in Division 3, it held that she could not obtain relief from the judgment under R. 60(b)(5), SCRCP. This Petition only invokes the power under R. 60(b)(4), SCRCP, to set aside judgment.

### *A. The Judgment Was Void.*

Among the reasons that a final judgment or order can be set aside is that "the judgment is void." R. 60(b)(4), SCRCP. "[J]udicial proceedings are void, when the court in which they are taken is acting without jurisdiction, either as to the subject matter or the parties." *Ruff v. Elkin*, 40 S.C. 69, 77-78 (1893). Likewise, a judgment is void when the court that issued it "failed to provide proper due process." *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 644 (Ct. App. 1996). (citations omitted). Facts establishing a "void" judgment "appear[] upon the face of the record," while facts establishing a merely voidable judgment "must be shown by evidence outside of the record." *Hankinson v. Charlotte, Columbia & Augusta R.R. Co.*, 41 S.C. 1, 18 (1894).

The Circuit Court erred as a matter of law in concluding that Judge Kirven had jurisdiction to preside over this case given his prior involvement. "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*…." Canon 3(E)(1)(b), CJC, R. 501, SCACR (emphasis added).

Here, "[t]he pertinent facts in this matter are all readily ascertainable from the court records on file in the office of the Clerk of Court for Anderson County…."

[R. 028]. Prior to assuming the bench Judge Kirven successfully sued Ms. Dixon on behalf of AnMed, [R. 028-29]. He then appeared on behalf of AnMed in the foreclosure proceedings below. [R. 29; 084-85]. His prior service as counsel for a litigant in the matter is a specifically enumerated cause for mandatory disqualification.

Given the now mandatory language used in the Code of Judicial Conduct—"shall disqualify himself or herself," Canon 3(E)(1), CJC, R. 501, SCACR—and given the importance of maintaining public confidence in the impartiality of the judicial system, Judge Kirven should have recused himself *sua sponte*. *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"). Further, even if Judge Kirven's recusal somehow required a motion, Respondent's and/or AnMed's counsel, as officers of the Court, should have alerted Judge Kirven to the issue. *See Friends of the Chattahoochee, Inc. v. Longleaf Energy Assocs., LLC*, 684 S.E.2d 632, 635 (Ga. 2009) (urging members of the bar to alert a justice to any overlooked case in which the justice's wife's law firm was representing a party so that the justice could recuse himself because "it is imperative that the public have faith and trust in the impartiality of the justice system" (citation omitted)).

Where a judge should have recused himself but did not, the judge's actions must be set aside regardless as to whether they were or were not correct on the merits.[2] *See Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 392 (2019) (finding recusal required and not engaging in 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

[2] Ms. Dixon does not contend that Judge Kirven displayed actual impartiality in his rulings. The issue is one of mandatory recusal as an enumerated instance of appearance of impartiality.

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)).

Judge Kirven confirmed a judicial sale of Ms. Dixon's home for $18,765.00, [R. 023], which left her not only without a home, but with a deficiency judgment entered against her for $28,280.08. [R.068-69]. "Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments." *People v. Dist. Court of Third Judicial Dist*., 560 P.2d 828, 831-32 (Colo. 1977) (quotation and footnote omitted)). This Court ought not approve of Judge Kirven's orders, especially given that the need for disqualification was not even close, despite the lack of any objection from any party until undersigned counsel's Rule 60 motion. *Cf. Neal v. Honeywell Inc.,* 191 F.3d 827, 830 (7th Cir. 1999) ("This is something in which the judicial system is vitally in-

terested….. [Appellant's] failure to stand on a procedural objection therefore is not dispositive. Sometimes the judiciary must act in self-defense.").

### *B. While Caselaw Is in Conflict About Whether a Deadline Exists to Challenge a Void Judgment, Ms. Dixon's Motion Was Timely in any Event.*

Below the Circuit Court wrongly thought that Ms. Dixon's motion had not been filed "within a reasonable time," R. 60(b), SCRCP, the Circuit Court was wrong there, too.

As the Court of Appeals has recognized elsewhere, "[t]here is inconsistency among the decisions of South Carolina appellate courts as to whether the reasonable time' requirement applies to Rule 60(b)(4) motions." *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 642 (Ct. App. 1996) (collecting cases) (footnote omitted).

On the one hand, this Court, without analysis, said in *Sijon v. Green* that "motions to set aside a judgment on the ground it is void must be brought within a reasonable time," 289 S.C. 126, 128 n.2 (1986). Yet two years later, however, the Court of Appeals in *Gatling v. Beach Palace, Inc.*, explained that "because a void judgment is a nullity, it may be attacked at any time and, for this reason, the provision of the rule which requires a motion for relief from a judgment to be made within a reasonable time does not apply to motions made on the ground the judg-

ment is void." 294 S.C. 464, 464 (Ct. App. 1988) (citations omitted). In other words, "a reasonable time on a motion asserting voidness, especially when the facts are all on the record, is any time ever…," *Bookout v. Beck*, 354 F.2d 823, 825 (9th Cir. 1965), otherwise "a void judgment [would] gain validity with the movant's delay…." *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 642 n.1 (Ct. App. 1996). Relatedly, this Court has repeatedly stressed since *Sijon* that judgments entered without subject-matter jurisdiction are examples of void judgments and that subject-matter challenges can be raised "at any time." *E.g.*, *Gantt v. Selph*, 423 S.C. 333, 338 (2018) (citations omitted).

Five years after *Gatling* disavowed any time limit for challenges to void judgments, however, the Court of Appeals held that the appellant in *Smith Cos. v. Hayes*, could not be heard on a Rule 60(b)(4), SCRCP, voidness challenge because there was "no justifiable reason" for the delay in raising the issue. 311 S.C. 358, 359 (Ct. App. 1993). The Court of Appeals engaged in no analysis as to why—pursuant to *Gatling*—voidness challenges should not always be deemed made within a reasonable time, nor why *Gatling*'s earlier treatment of the issue ought not control, *see, e.g.*, *State v. Hoyle*, 397 S.C. 622, 629 (Ct. App. 2012) ("[O]ne panel of this court cannot overturn prior published precedent of another panel of this court absent *en banc* review…."). Subsequent decisions from the Corut of Appeals

have followed *Hayes* and imposed a reasonable-time requirement for voidness challenges. *E.g.*, *Rish v. Rish*, 435 S.C. 681, 689 (Ct. App. 2021) (noting conflicting decisions but finding motion raising voidness was not timely made).

The conflicting decisions from the Court of Appeals make review from this Court especially appropriate. On review, this Court should hold that voidness challenges are always made within a reasonable time, as *Gatling* did. *See, e.g.*, *Vinten v. Jeantot Marine Alls., S.A.*, 191 F. Supp. 2d 642, 650 (D.S.C. 2002) (surveying caselaw and concluding that supposed untimeliness cannot bar a challenge to a potentially void judgment).

Even if the Court keeps a timeliness requirement, however, Ms. Dixon would still meet it. As the Circuit Court itself noted, the *pro se* Ms. Dixon "never appeared at any hearing before Judge Kirven (prior to the February 2019 hearing on [the Rule 60(b) motion])." [R. 051]. Unlike Judge Kirven (and all the other parties' attorneys in this matter who failed to remind Judge Kirven), Ms. Dixon did not know of the prohibitions contained in the Code of Judicial Conduct. To whatever extent that she should somehow be chargeable with the Code of Judicial Conduct as though it were a criminal statute, she would have been objectively entitled to believe that some other judge would take the bench at any hearing unless and until she had affirmatively consented to Judge Kirven's presence. See Canon 3(F), CJC,

R. 501, SCACR (allowing a judge to preside who is otherwise subject to recusal only after dis-closure to the parties and an "agreement [of the parties that is] … in-corporated in the record of the proceeding"). In the absence of a time when she appeared in court and saw Judge Kirven yet remained silent, her motion—made within a year of the judgment—ought not be deemed untimely, if timeliness is in fact part of the required analysis.

## CONCLUSION

This Court should grant the Petition, 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 24th day of April, 2023.

Respectfully submitted,

DORIS J. DIXON

s/Howard W. Anderson III
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