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**May 11 2023**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas  
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2015-CP-04-01518  
Appellate Case No. 2023-000648

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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 the ..... Petitioner.

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**RETURN TO  
PETITION FOR WRIT OF CERTIORARI**

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May 11, 2023

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Respondent Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1 (“Respondent”), opposes the Petition for a Writ of Certiorari (“Petition”) of Petitioner Doris J. Dixon (“Dixon”) on the following grounds:

### **QUESTIONS PRESENTED FOR REVIEW**

- I. Do any special and important reasons exist for the Court to issue a Writ of Certiorari?**
  
- II. Did the Court of Appeals err in affirming Judge Maddox’s denial of Dixon’s motion under Rule 60(b)(4), SCRCP, where Judge Kirven’s orders were not void for lack of personal or subject matter jurisdiction and where Dixon failed to demonstrate any evidence of judicial bias or prejudice?**

### **STATEMENT OF THE CASE**

This is an appeal by a mortgage foreclosure defendant from a Circuit Court judge’s order denying her relief from a series of post-foreclosure, ministerial, and procedural orders entered by a Master in Equity whom had previously represented a junior lienholder defendant in this foreclosure prior to being appointed to the bench. While Dixon concedes that the Master in Equity did not display any actual bias or prejudice during his time presiding over the case, she contends nonetheless that he should have *sua sponte* recused himself before the entry of those orders.

On June 24, 2015, Respondent filed this mortgage foreclosure action against Dixon and Defendant AnMed Heath (“AnMed”), the holder of a judgment against Dixon from a prior lawsuit (R. pp. 75-78.) On July 6, 2015, Steven C. Kirven, Esquire, then a practicing attorney, filed a relatively generic, protective Answer on behalf of AnMed. (R. pp. 84-85.) The Answer took no position with respect to the allegations in Respondent’s Complaint other than acknowledging the lien of AnMed’s judgment against the subject property and took no position with respect to any defenses that Dixon may have had to the foreclosure. (*Id.*)

On October 23, 2015, Respondent filed a Certificate of Default and Non-Military Service stating that Dixon was in default for failure to plead or otherwise respond to the Complaint. (R. p. 86.)

On October 23, 2015, the Clerk of Court entered an Order of Reference referring this case to the Honorable Ellis B. Drew, Jr., Master in Equity for Anderson County. (R. p. 1.) On November 23, 2015, Judge Drew held a final foreclosure hearing. (R. pp. 115-16.) Only Respondent's foreclosure counsel and Dixon attended this hearing. (*Id.*)

On November 25, 2015, Judge Drew entered a Judgment of Foreclosure and Sale, which held that Dixon was in default for failing to respond to the Complaint, fully adjudicated Dixon's liability for her default under the terms of the promissory note and mortgage at issue, ordered that her property be sold at a foreclosure sale, and determined that Dixon would be liable for any deficiency remaining on the judgment debt after the foreclosure sale. (R. pp. 60-67.)

Subsequently, the case encountered delays. On May 16, 2016, Judge Drew held a supplemental hearing (R. pp. 130-34), after which he entered a Supplemental Order Post Judgment for the sole purpose of updating the judgment debt amount due under the previously entered Judgment of Foreclosure and Sale. (R. pp. 2-4.)

Subsequently, Judge Drew retired and was replaced by The Honorable Steven C. Kirven. On June 28, 2016, Judge Drew entered an Order Substituting Counsel that took judicial notice of the appointment of Judge Kirven as the Master in Equity, relieved him as counsel for AnMed in this action, and substituted William E. Phillips, Esquire, as counsel for AnMed in his place. (R. p. 5.)

Thereafter, on October 12, 2016, Judge Kirven held a second supplemental hearing (R. p. 135), after which he entered a Second Supplemental Order Post Judgment on October 17, 2016.

(R. pp. 6-8.) On June 13, 2017, Judge Kirven held a third supplemental hearing (R. pp. 136-39), after which he entered a Third Supplemental Order Post Judgment on June 13, 2017. (R. pp. 9-15.) On December 4, 2017, Judge Kirven held a fourth supplemental hearing (R. pp. 140-143), after which he entered a Fourth Supplemental Order Post Judgment on December 4, 2017 (R. pp. 16-22). Each of these supplement orders merely updated the judgment debt amount due under the previously entered Judgment of Foreclosure and Sale.

Dixon received notice of all of these supplemental hearings and that Judge Kirven would be the presiding judge over them (Appellant’s Br. p. 3; R. pp. 115-143), but failed to appear at any of them and never complained that Judge Kirven needed to recuse himself. (R. pp. 115-143.)

On February 6, 2018, Judge Kirven sold the subject property at a foreclosure sale, at which Respondent was the successful bidder. (R. pp. 23-24.) On March 8, 2018, the sale became final and Judge Kirven issued a deed to Respondent. (*Id.*) On May 7, 2018, Judge Kirven entered a Report on Sale and Disbursements and Order Confirming Sale (*Id.*) as well as an Order for Deficiency Judgment against Dixon. (R. p. 32 ¶ 19.) On May 15, 2018, Judge Kirven entered a Writ of Assistance. (R. pp. 25-27.)

All six of the orders entered by Judge Kirven in this case—the Second Supplemental Order Post Judgment, the Third Supplemental Order Post Judgment, the Fourth Supplemental Order Post Judgment, the Report on Sale and Disbursements and Order Confirming Sale, the Order for Deficiency Judgment, and the Writ of Assistance—are collectively referred to hereafter as “Judge Kirven’s Orders.”

On January 10, 2019, Dixon filed a “Motion for Relief from Judgment/Order”, complaining that Judge Kirven should have recused himself from this case when he became the Master in Equity because of his prior involvement in the case as counsel for AnMed. (R. pp. 91-

95.) The motion contended that Judge Kirven's failure to *sua sponte* recuse himself pursuant to Canon 3(E)(1)(b) of the Code of Judicial Conduct constituted "mistake" or "inadvertence" within the meaning of Rule 60(b)(1), SCRCF, and/or rendered Judge Kirven's Orders "void" within the meaning of Rule 60(b)(4), SCRCF, and/or rendered it not "equitable that the judgment should have prospective application" within the meaning of Rule 60(b)(5), SCRCF. (*Id.*) Dixon's motion sought relief from not only Judge Kirven's Orders, but also from the Judgment of Foreclosure and Sale and First Supplemental Order Post Judgment entered by Judge Drew. (*Id.*)

At a hearing on the motion on February 6, 2019, Dixon acknowledged that she never appeared at any hearing presided over by Judge Kirven and conceded that Judge Kirven had not shown any actual partiality in this case. (R. p. 33.) However, Dixon argued that the provisions of Canon 3(E)(1)(b) constituted a list of situations in which a judge must recuse himself regardless of whether the judge's impartiality may be reasonably questioned under the circumstances. (*Id.*)

On June 5, 2019, Judge Kirven entered an Order setting forth the reasons why his disqualification was not mandatory under Canon 3(E)(1)(b) (R. pp. 28-42), giving assurances of his impartiality (R. p. 37), questioning the timeliness and merits of Dixon's motion (R. p. 35), but ultimately concluding that he should recuse himself only from ruling on Dixon's motion. (R. p. 39). He returned the case to the Circuit Court for the purpose of hearing and deciding Dixon's motion. (*Id.*)

On July 11, 2019, the Circuit Court held a hearing before The Honorable J. Cordell Maddox, Jr., on Dixon's Motion for Relief from Judgment/Order. (R. pp. 43-47.) By Order entered on August 21, 2019, Judge Maddox held the motion in abeyance for 60 days to allow the parties time to determine whether any mortgage-relief payments may have been made on Dixon's behalf with respect to the loan at issue in this case. (*Id.*) On October 21, 2019, Dixon

filed a Status Report conceding that no mortgage-relief payments were made on her behalf for this loan. (R. pp. 96-102.)

On August 31, 2020, Judge Maddox entered an Order Denying Defendant's Motion for Relief from Judgment/Order on the grounds that: 1) Dixon's motion was untimely, 2) Judge Kirven's failure to recuse himself did not constitute "mistake" or "inadvertence" within the meaning of Rule 60(b)(1), SCRCF; 3) Judge Kirven's failure to recuse himself did not render any of the judgments or orders void under Rule 60(b)(4), SCRCF; 4) Dixon was not entitled to relief under the rarely-applied "no longer equitable" provision of Rule 60(b)(5), SCRCF, and 5) Dixon's motion was futile because vacating Judge Kirven's Orders would not change the outcome of the foreclosure. (R. pp. 48-55.)

On September 17, 2020, Dixon served and filed a Notice of Appeal from Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order. (R. pp. 103-104.)

On September 23, 2020, Dixon filed a Motion for Stay Pending Appeal, requesting a stay of the enforcement of the Writ of Assistance during this appeal. (R. pp. 113-14.) On January 12, 2021, the Circuit Court held a hearing before The Honorable R. Lawton McIntosh on the Motion for Stay Pending Appeal of Defendant. (R. pp. 56-59.)

On January 15, 2021, Judge McIntosh entered an Order Setting Terms of Supersedeas Bond and Conditions of Appellate Stay, which gave Dixon 30 days to either file a bond with two sureties or deposit cash with the Clerk of Court in the amount of \$15,000 in order to stay Respondent's enforcement of the Writ of Assistance. (R. pp. 56-59.)

Dixon failed to comply with the conditions of the Order Setting Terms of Supersedeas Bond and Conditions of Appellate Stay. On April 2, 2021, Dixon's counsel informed the

undersigned counsel for Respondent by email that Dixon had voluntarily vacated the subject property. Respondent's agents thereafter changed the locks and secured the property.

On February 1, 2023, the Court of Appeals affirmed Judge Maddox's Order Denying Defendant's Motion for Relief from Judgment/Order. *Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1 v. Dixon*, No. 2023-UP-044 (S.C. Ct. App. filed Feb. 1, 2023)(unpublished opinion).

The Court of Appeals held that Judge Maddox did not abuse his discretion in denying Dixon's motion under Rule 60(b)(4), SCRCF, because there was no evidence that Judge Kirven's Orders were void for lack of personal or subject matter jurisdiction and Dixon failed to demonstrate any evidence of judicial bias or prejudice. *Id.* at ¶ 1. The Court of Appeals held that Judge Maddox did not abuse his discretion in denying Dixon's motion under Rule 60(b)(1), SCRCF, because Dixon failed to timely file the motion as to Judge Kirven's three supplemental orders, failed to assert a mistake of fact, and failed to present a meritorious defense to the proceeding. *Id.* at ¶ 2. The Court of Appeals held that Judge Maddox did not abuse his discretion in denying Dixon's motion under Rule 60(b)(5), SCRCF, because Judge Kirven's Orders did not have prospective application. *Id.* at ¶ 3. The Court of Appeals did not decide the issue of whether or not Dixon filed her motion under Rule 60(b)(4), SCRCF, with a "reasonable time" as required by the rule. *Id.*

On February 16, 2023, Dixon filed a Petition for Rehearing in which she requested that the Court of Appeals reverse only the portion of its opinion affirming Judge Maddox's denial of Dixon's motion under Rule 60(b)(4), SCRCF. (Pet. Reh'g pp. 4-7.) Dixon's Petition for Rehearing did not raise the issue of whether she filed her motion under Rule 60(b)(4), SCRCF, with a "reasonable time" as required by the rule. (Pet. Reh'g.)

On March 23, 2023, the Court of Appeals entered an Order denying Dixon’s Petition for Rehearing.

Dixon now petitions this Court to review the decision of the Court of Appeals in affirming Judge Maddox’s denial of Dixon’s motion under Rule 60(b)(4), SCRCF.

## ARGUMENTS

### **I. No special and important reasons exist for the Court to issue a Writ of Certiorari.**

Dixon’s Petition does not meet the “special and important” standard required by Rule 242(b), SCACR.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. “The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.”

*Id.*

Here, none of the judges on the Court of Appeals issued a dissenting opinion, and Dixon’s Petition does not involve any substantial constitutional issues or federal questions.

Dixon’s Petition presents no novel questions of law and the decision of the Court of Appeals does not conflict with any prior decision of this Court; rather, the question presented in

the Petition can be answered (and was answered by the Court of Appeals) by resorting to existing, consistent case law, the South Carolina Rules of Civil Procedure, and the Code of Judicial Conduct.

In a desperate attempt to pique the Court's interest in this unremarkable case, Dixon's Petition argues that there is conflicting case law in this state governing the "reasonable time" requirement for filing a motion pursuant to Rule 60(b)(4), SCRPC. However, the Court of Appeals did not decide the issue of whether or not Dixon's motion was made within a reasonable time. It affirmed Judge Maddox's denial of Dixon's Rule 60(b)(4) motion on only two grounds: 1) that there was no evidence that Judge Kirven's Orders were void for lack of personal or subject matter jurisdiction, and 2) that Dixon had failed to demonstrate any evidence of judicial bias or prejudice.

Further, Dixon did not argue this timing issue within her Petition for Rehearing and it is therefore not properly included in her Petition to this Court. Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

Accordingly, Dixon's Petition fails to present any of the traditional special and important reasons that justify this Court's review of a decision of the Court of Appeals, and the Court must deny her Petition.

**II. The Court of Appeals did not err in affirming Judge Maddox's denial of Dixon's motion under Rule 60(b)(4), SCRPC, because Judge Kirven's orders were not void for lack of personal or subject matter jurisdiction and Dixon failed to demonstrate any evidence of judicial bias or prejudice.**

The Court of Appeals correctly decided that Judge Maddox did not abuse his discretion in denying Dixon's motion under Rule 60(b)(4), SCRPC.

"On motion and upon such terms as are just, the court may relieve a party or his legal

representative from a final judgment, order, or proceeding for the following reasons ... the judgment is void...” Rule 60(b)(4), SCRCF. “A void judgment is one that, from its inception, is a complete nullity and is without legal effect[.]” *Ware v. Ware*, 404 S.C. 1, 11, 743 S.E.2d 817, 822 (2013). “The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.” *Id.* “A judgment is not rendered void by irregularities which do not involve jurisdiction.” *Id.*

Dixon does not dispute being properly served with process at the outset of this case, does not dispute receiving all hearing notices in this case, and does not dispute receiving notice of entry of all orders and judgments in this case. Dixon does not dispute the validity of the Order of Reference granting subject matter jurisdiction to the Master in Equity. Therefore, Judge Kirven had personal and subject matter jurisdiction at the time of entry of his orders in this case.

Dixon never filed a motion for recusal, but contends that Canon 3(E)(1)(b) of the Code of Judicial Conduct mandated Judge Kirven’s *sua sponte* recusal from this case immediately upon taking the bench and that his failure to do so deprived him of jurisdiction to enter any orders.

“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...” Rule 3(E)(1)(b), CJC, Rule 501, SCACR.

Dixon’s argument is flawed in two significant respects. First, Canon 3(E)(1)(b) did not mandate Judge Kirven’s recusal because he did not serve as lawyer in the matter “in controversy.” His role as an attorney in this case prior to taking the bench was limited to the

filing of a simple Answer on behalf of a junior lienholder defendant that took no position other than acknowledging the lien of his client's judgment against the subject property. (R. pp. 36; 84-85.) He did not appear at the final foreclosure hearing on November 23, 2015, or the first supplemental hearing on May 16, 2016. (R. pp. 115-143.) He served no role in litigating the matters actually in controversy in this mortgage foreclosure case—the debt owed by Dixon to Respondent and Dixon's default on that debt. *See United States Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-375, 684 S.E.2d 199, 205 (Ct. App. 2009)("[T]he party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt."). Therefore, Canon 3(E)(1)(b) did not mandate his disqualification.

Second, Dixon's advocacy for a bright line rule of automatic disqualification under Canon 3(E)(1)(b) loses sight of the fact that evidence of actual prejudice is required before this Court will reverse based on a judge's failure to disqualify himself. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Davis v. Parkview Apartments*, 409 S.C. 266, 284, 762 S.E.2d 535, 545 (2014)(internal citations and quotations omitted)(analyzing a judge's duty to recuse under Canon 3(E)(1) of the Code of Judicial Conduct). "Appellate courts accord great weight to the trial judge's assurance of his own impartiality." *Id.* "It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality." *Id.*; *see also State v. Quinn*, 430 S.C. 115, 127-28, 843 S.E.2d 355, 362 (2020)("When the moving party has failed to demonstrate some evidence of judicial bias or prejudice, an appellate court will not reverse a judge's decision not to recuse.").

Here, Dixon does not contend that Judge Kirven showed or acted with any partiality toward any party at any point in this case (Pet. for Cert. p. 8 n. 2; R. pp. 33,37) and has made no

showing of any prejudice that she suffered as a result of his failure to immediately recuse himself. While Dixon complains that Judge Kirven's Orders "confirmed a judicial sale of Ms. Dixon's home ... which left her not only without a home, but with a deficiency judgment entered against her ..." (Pet. for Cert. p. 9), "[t]he fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009)(internal citations and quotation marks omitted). Further, Judge Kirven's Orders confirming the sale and setting the deficiency judgment amount were largely ministerial and procedural acts that simply carried out the relief required by Judge Drew's unappealed orders in this case.

The only South Carolina case relied upon by Dixon to refute this "evidence of judicial prejudice" requirement is *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 835 S.E.2d 509 (2019). However, her reliance on this case is misplaced.

*Ledford* concerned an appeal from the denial of a motion to recuse a Workers' Compensation Commissioner who "allegedly threatened criminal proceedings against [the petitioner] if the case was not settled; indicated that she engaged in her own investigation and made findings based on undisclosed materials outside the record; suggested [the petitioner] used 'creative accounting' in his tax returns; and questioned [the petitioner]'s credibility regarding his claims of neck pain." *Id.* at 389, 835 S.E.2d at 510. The *Ledford* court's reversal of the Commissioner's failure to recuse herself was based on evidence of the actual conduct and behavior of the Commissioner that showed partiality, including her threatening the petitioner with criminal proceedings and giving a false affidavit. 428 S.C. at 392, 835 S.E.2d at 511 ("In our view, Commissioner Barden's behavior in this case would undoubtedly lead one to

reasonably question her impartiality.”). The Commissioner’s conduct in *Ledford* did in fact prejudice the petitioner because it left him “with two equally undesirable options: (1) move forward with his claim and risk being referred for criminal prosecution; or (2) settle the case and forfeit his right to have his claim adjudicated...” 428 S.C. at 391, 835 S.E.2d at 511. Finally, the holding in *Ledford* was limited to “the discrete situation where a trial court judge (a workers’ compensation commissioner) threatened criminal prosecution against a party if that party did not settle the case.” 428 S.C. at 392-93, 835 S.E.2d at 512.

In summary, *Ledford* does not negate the “evidence of judicial prejudice” requirement for reversal on appeal and is not dispositive of the issue in this case. Rather, *Ledford* undermines Dixon’s position because it demonstrates the type of extraordinary conduct and behavior of a judge that must occur before a judge’s failure to recuse herself/himself will warrant reversal on appeal. 428 S.C. at 392-93, 835 S.E.2d at 511-12 (finding that the Commissioner’s actual conduct and behavior was “unacceptable”, “offensive to the ideals of a fair and impartial judiciary”, “abusive”, “strident”, and “appalling”). Dixon has conceded that Judge Kirven never showed or acted with any partiality toward any party at any point in this case. (Pet. for Cert. p. 8 n. 2.)

For all of these reasons, the Court of Appeals correctly affirmed Judge Maddox’s denial of Dixon’s motion under Rule 60(b)(4), SCRCP.

## CONCLUSION

No special and important reasons exist for this Court to issue a Writ of Certiorari in this matter. Based on the foregoing, the Court must deny Dixon's Petition for a Writ of Certiorari.

Respectfully submitted,

*s/ Sean M. Foerster*

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