THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Hon. J.C. Nicholson, Jr., Circuit Court Judge

ROOSEVELT SIMMONS.....
Petitioner

Vs.

HATTIE BAILUM, RUBY BAILUM
VERDONE BAILUM, JULIE B. JOHNSON,
MONICA MIDDLETON, MARIE SMITH,
MELVIN SINGLETON, FRANKLIN SMITH,
LMC, LLC, JOHN MARTIN, ESQ. as TRUSTEE.....
Respondents

REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner
Roosevelt Simmons

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I. THE ISSUES PRESENTED ARE NOVEL AND HAVE NOT BEEN PREVIOUSLY DECIDED

The Petition has presented several novel issues of law. This Court has not previously decided the extent to which due process and fundamental fairness will overcome the preclusive effect of res judicata in the civil context. The lack of due process arises because the petitioner did not obtain a fair and impartial hearing due to the special referee's racial bias. The lack of due process further arises because the special referee was appointed without any showing of cause, contrary to SC Code Ann. Section 14-11-60 and petitioner did not consent. Neither of petitioner's claims were considered and ruled on by any court in the earlier Bailum v. Simmons case or the Circuit Court in this case.

Further this Court has not considered whether an attorney's willful failure to act in response to several court orders will constitute abandonment which is not to be imputed to his client. The Circuit Court held that the petitioner was barred by res judicata because he abandoned the appeal. Therefore if the abandonment is not imputed to petitioner, the basis for the lower court decision is not valid. In addition to each of these issues being novel, the combination of them here is also novel. Therefore, as discussed below, petitioner urges that the Court find the issues involved are suitable for the granting of a writ of certiorari.

A. Res judicata

This Court should decide the extent to which due process and fundamental fairness will overcome the preclusive effect of res judicata in the civil context. In State v. Bacote, 331 S.C. 328, 503 S.E.2d 161 (1998), this Court considered the preclusive effect

of an earlier judgment in a subsequent criminal prosecution for DUI. Bacote involved evidence that the lower court ruled had been barred by collateral estoppel. This Court held: " even if all the requirements of issue preclusion are met, when unfairness or injustice results or public policy requires it, the doctrine's application may be precluded." 331 SC at 331, 503 S.E. 2d at 163. Since Bacote, this Court has not considered the issue in the context of a civil case. Recently, in Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011), this Court held that res judicata barred a litigant from splitting a case of action between the probate court and the Circuit Court, an entirely different factual situation. 712 S.E.2d at 415. The Judy Court was not required to consider whether due process and fundamental fairness overcame the preclusive effect of res judicata to prevent a relitigation of issues. Petitioner here did not file a second action to add an additional claim but sought to vacate the earlier judgment based upon exceptional circumstances and fraud on the court.

Respondents characterize this case as simply applying facts to existing law and not being novel. All cases involve applying the law to the facts so respondents' argument for a lack of novelty is specious. Respondents do not point to any case which deals with the due process issue in the civil context. Furthermore, there has not been any lower court opinion in this or the earlier Bailum v Simmons case specifically addressing these claims. The lower court simply ruled that res judicata applied and did not consider the countervailing effects of due process and fundamental fairness. This Court in Judy v Judy specifically urged against this mechanical approach to application of res judicata. Judy v Judy, supra, 712 S.E.2d at 415. This Court's prior decisions do not consider how due process and fundamental fairness will be applied when res judicata is asserted.

Both the lack of subject matter jurisdiction and the allegation of racial bias have merit. See below. Accordingly, petitioner has presented a novel issue to support the granting of the writ of certiorari.

1. Lack of jurisdiction

The appointment of a special referee is governed by S.C. Code Ann Section 14-11-60 which requires that the Court find that cause has been shown and that the parties have consented. There is no case holding that the parties can by consent waive the requirement of a showing of cause and then ask the Court to appoint a special referee. It is undisputed that the motion submitted for consideration contained only a Consent Order . R. pp. 357,461-462. Petitioner previously cited Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758 (Ct. App. 1996) for the proposition that the parties cannot consent to waive jurisdictional requirements. Respondents have not addressed this case and thus their position is totally unsupported by law.

Respondents never addressed the issue of the special referee's jurisdiction either before the Circuit Court or on appeal. Neither court discussed the issue in its decision. Respondents now contend that the parties need only consent to obtain a Court order but the statute does not say that. They also contend that the petitioner did not object to the special referee's appointment in the Bailum action but their assertion is incorrect. The new trial motion which was filed in the Bailum case was based upon the lack of petitioner's consent to the appointment. R. p. 464.

In summary, the lack of subject matter jurisdiction is by itself a fatal flaw to the underlying judgment entered by the special referee. It is an independent basis to vacate the earlier judgment as well as part of the array of facts which petitioner has presented to

show unusual circumstances . It supports petitioner's contention he was denied a fair hearing. The issue was never decided by any court. Accordingly, the record supports petitioner's assertion that this is a basis for granting the writ of certiorari.

2. Evidence of Racial bias

As indicated in the Petition, the evidence of racial bias in the record consisted of petitioner's assertions that he objected to the appointment of Attorney Mendelsohn in particular as special referee ; that Mendelsohn made a racially disparaging remark to petitioner during a conference ; that Mendelsohn arbitrarily refused the permit petitioner to complete the purchase of parcel 1 since he submitted proof of financing and Mendelsohn claimed that third parties were attempting to complete the purchase ; and that petitioner realized that Mendelsohn was biased only after he refused to permit him to complete the purchase. This is prima facie evidence of bias. For purposes of summary judgment, the allegations created a disputed issue of fact as to whether petitioner obtained a fair hearing.

In summary, the appearance of racial bias raises an issue of fact as to the validity of the underlying judgment entered by the special referee. It is an independent basis to vacate the earlier judgment as well as part of the array of facts which petitioner has presented to show unusual circumstances . It supports petitioner's contention he was denied a fair hearing. The issue was never decided by any court. Accordingly, the record supports petitioner's request for a writ of certiorari.

B. Attorney Abandonment

This Court should also consider whether an attorney's willful and repeated failure to act in response to court orders will constitute abandonment which is not to be imputed to his client. The case law dealing with the issue of abandonment is sparse. In Graham v. Town of Loris, 272 S.C. 442, 452-453 (1978), this Court found that an abandonment by the attorney had occurred where the attorney withdrew from the case without advising the client and went into hiding causing default to be entered. A similar case, Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010) involved a R 60(b),SCRCP motion to vacate a default. This Court found that defendant had been denied due process because her attorney was suspended when he failed to appear. Id. at page 311.

Petitioner asserts that the issue cannot be resolved by reference to the circumstances of a "stealth" withdrawal by the attorney in Graham v. Town of Loris, 272 S.C. at 442, 452-453 (1978) or the forced withdrawal of the attorney due to suspension in Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010). There cases are extreme examples. This Court should consider whether something short of a legal impairment or physical disappearance will constitute abandonment. "[J]ustice to the litigants is always the polestar." Brown v. Butler, 347 S.C. 259, 265, 554 S.E. 2d 431, 434 (Ct. App. 2001).

Respondents assert that there was no evidence of willful abandonment by Attorney Houston upon which to find that his failure to perfect the appeal should not be imputed to petitioner. Return at page 19. Respondents speculate that attorney Houston was busy or uncertain as to whether Petitioner wished to proceed with the appeal and did not abandon the appeal. However, while the appeal was pending in the Bailum case, respondents made the opposite argument based on the same record. They asserted that :

Attorney Houston was fully aware of all of the Court of Appeals scheduling orders, that the Court had said it would not grant any further extensions, that there were no issues of his health or law office administration that which had been brought to the Court's attention and that attorney Houston had not attempted to refer the matter to other counsel. R. p. 570. Respondents argued that there was no reason the excuse his neglect. Id at 570-571.

Petitioner contends that the facts support an inference that attorney Houston abandoned the case on appeal and respondents have not rebutted that inference. Attorney Houston had an ethical obligation to devote the necessary time and resources to the appeal in the absence of petitioner's direction to the contrary. Petitioner was unable to contact attorney Houston during the entire appeal and did not learn that it had been dismissed until many months later, a period of almost 2 years. There is nothing in the record to suggest that Petitioner was unclear about wanting to pursue the appeal or knew that his appellate attorney was not pursuing his appeal.

In summary, there is no precedent upon which to determine whether repeated failures by an attorney to act in response to court orders and his failure to communicate the status of the case to his client for over 2 years will constitute abandonment. Accordingly, that issue is a worthy reason for the granting of the writ of certiorari.

II SUMMARY JUDGMENT WAS PREMATURE

As indicated in the Petition, there were sufficient facts in the record to require the Circuit Court to deny summary judgment. The contradiction between the testimony of the Bailum heirs and Monica Middleton regarding her relationship to Fannie Middleton

establishes that at least there was evidence of intrinsic fraud as the basis for a finding of unusual circumstances. See T v T, 378 S.C.127, 136, 662 S.E.2d 413 (Ct. App. 2008). Discovery had been forestalled when the Court indicated that it wished to consider the assertion by Attorney Martin, the Bailum parties counsel that there were two Monica Middletons. The inference of a fraud on the Court arose from the Bailum heirs admission in their latest pleadings that petitioner has an interest in all the heirs properties and Monica Middleton's failure to appear and be subject to cross examination. See Ray v. Ray, 374 S.C. 79, 647 S.E. 2d 237, 241 (2007)(concealment with intent to defraud was a sufficient basis for the plaintiff to overcome a motion to dismiss)

Those were the facts before the Circuit Court. They are not speculation or unsupported allegations. Petitioner was entitled to all inferences from these facts . The Circuit Court did not address the existence of intrinsic fraud as the basis for setting aside a judgment under R 60(b), SCRCP. The record did not justify dismissing the entire complaint and summary judgment should have been denied.

CONCLUSION

Petitioner respectfully request that this Court grant a Writ of Certiorari and consider the merits of the appeal for all of the reasons set forth in the Petition and herein.

Respectfully submitted

Edward A. Bertele

July 1, 2013

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S.C. SUPREME COURT

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CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Reply to Return to Petition for Writ of Certiorari was served upon the respondents' attorneys, Wills Massalon & Allen, LLC by regular mail postage prepaid at their last known mailing address; and that a copy was filed with the Court of Appeals.

Edward A. Bertele, Esq.
Attorney for Petitioner

July 1, 2013
Charleston, SC