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THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM CLARENDON COUNTY
Family Court

R. Wright Turbeville, Family Court Judge

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JUL 11 2013

SC Court of Appeals

Case No. 2003-DR14-128

Daisy Wallace Simpson, Appellant/Respondent.

v.

William Robert Simpson, Jr., Individually and as Shareholder/Member
of Simpson Farms, LLC and William R. Simpson, Jr., as a
Shareholder/Member of Simpson Farms, LLC, Respondents/Appellants.

PETITION FOR REHEARING

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The Respondents/Appellants respectively submit this Petition for Rehearing of the issues raised in their Final Brief and addressed by this Court in its Opinion, No. 5151, filed on June 26, 2013. This Petition for Rehearing is based upon the following grounds:

I. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE LLC HAD BEEN MADE A PART TO THE PROCEEDINGS AND WAS BOUND BY THE DETERMINATION THAT THE PROPERTY IT OWNED WAS INSTEAD MARITAL PROPERTY SUBJECT TO EQUITABLE DIVISION

An underlying premise of the Court of Appeals' decision is that Simpson Farms, LLC was a party to the family court proceedings at the trial of the matter and became bound by the action taken by the family court. The presumption that the LLC was bound somehow by either notions of *res judicata*, *stare decisis*, or law of the case cannot be relied upon when the fundamental right to due process; that being to present evidence and witnesses on all issues affecting the LLC was never afforded the entity. The Court of Appeals overlooked the procedural history of what occurred at the trial.

Simpson Farms, LLC was not made a party to these proceedings until after a trial on the merits had occurred before the family court. The proceedings took place in July, September and October of 2004. The evidentiary record was closed after the final day of testimony on October 26, 2004. Whether by intent or by oversight, the LLC was not a party to those proceedings. Thereafter on October 29, 2004, the Plaintiff-Respondent filed a motion and was granted relief in the form of a "*nunc pro tunc*" amendment of the caption and parties to, in effect, bootstrap the LLC into the case retroactively; four days after all evidence was taken in the case. (See R. VI., pp. 4-5, Order of Judge Turbeville dated December 31, 2004). A copy of the Order is attached hereto as Exhibit A.

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Simpson Farms, LLC did not answer (R. V. 1, p. 3). All references in the pleadings to the LLC were to husband or son as a "shareholder/member" of the LLC.

The use of a *nunc pro tunc* order to correct the name of the Defendant entity was an improper and erroneous exercise of the family court's authority. Obviously, the intended purpose of the Order was to correct the error or omission by the Plaintiff for failing to join the proper party to the action which had been commenced more than a year earlier on February 24, 2003. The action proceeded against the wrong entity and once discovered, the Order by the family court attempted to do a reset of the proper party without affording the new party the opportunity to present evidence or witnesses on issues common to it including, *inter alia*, the LLC's ownership of property that the family court incorrectly concluded belonged to the Defendant, Billy Simpson, was therefore marital and subject to equitable apportionment and distribution.

Nunc pro tunc orders can only be used to place into the record evidence of judicial action that has taken place; not to correct an error or supply an omission of judicial action. *Ex parte, J.P. Strom, Jr.*, 343 S.C. 257, 539 S.E.2d 699 (2000). Once parties are added, they must be given an opportunity to present evidence on any issues involving them. *Frye v. Frye*, 323 S.C. 72, 448 S.E.2d 586 (S.C.App. 1994). The LLC was not afforded such an opportunity.

This failure to properly and timely join a necessary party is a matter of subject matter jurisdiction and can be raised by the aggrieved party at any time. See *Austelle v. Austelle*, 294 S.C. 19, 362 S.E.2d 181 (1987). The LLC raised the issue of its ownership of property the court had decided was marital in kind. When the LLC continued to raise the issue of its ownership on appeal, this court ruled that the matter could not be litigated

anew. This ruling subverts the LLC's right to due process of law by preventing it from raising and presenting evidence on the issue of ownership of property.

Simpson Farms, LLC was not joined as a party during the trial of the case. The only Defendants are William Robert Simpson, individually, and as shareholder/member of Simpson Farms, LLC, and William R. Simpson, Jr., as shareholder/member of Simpson Farms, LLC. Simpson Farms, LLC has not been named as a Defendant and it did not make an appearance in the trial of the case.

"Except as provided in § 12-2-25 for single-member limited liability companies, a limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (2006 & Supp. 2012). The official comment to this section states: "a limited liability company is legally distinct from its members who are not normally liable for the debts, obligations and liabilities of the company. . . Accordingly, members are not proper parties to suits against the company unless an object of the proceeding is to enforce members' rights against the company or to enforce their liability to the company."

Even though William Robert Simpson and William R. Simpson, Jr. were named as Defendants, in their capacity as shareholder/members of Simpson Farms, LLC, this does not make the LLC a party to the case and any determination regarding property owned by the limited liability company is void for lack of jurisdiction.

"A member is not a co-owner and has no transferrable interest in property of the limited liability company." S.C. Code Ann. § 33-44-501(a) (2006 & Supp. 2012). Because the individual members have no property interest in the property owned individually by the company, any determination of whether limited liability company property is marital property is void if the limited liability company has not been joined as

in this case. The limited liability company has not appeared in the trial of the case and it did not file responsive pleadings. Defendant Simpson, Sr., individually, and Simpson, Jr. filed and served responsive pleadings dated April 28, 2003. (R. VI. p. 3, para. 6, in the Final Decree of Divorce.)

II. NOT ONLY WAS THE LIMITED LIABILITY COMPANY NOT JOINED IN THIS CASE, BUT THERE HAS NEVER BEEN A DETERMINATION BY THE FAMILY COURT THAT THE LIMITED LIABILITY PROPERTY WAS MARITAL PROPERTY

In order for the family court to determine that property owned by a third-party is marital property, due process considerations require that the third-party have notice and an opportunity to appear to protect its interest. Typically, this issue is framed in the pleadings and the third-party is given the opportunity to litigate the issue of whether the property is marital property.

Procedural due process did not occur in the trial of this case. The LLC's due process rights have been violated because it was not given notice and an opportunity for a hearing on the issue of whether the real estate owned by the LLC is marital property.

The family court's erroneous finding that the 161.1 acre tract and the 133.2 acre tract were titled in the name of husband is the only determination affecting the property. In fact, the court never actually found the property to be marital property. Instead, the property was found to be titled in the name of the husband.

Wife never argued that the real estate at issue was marital property titled in the name of a third-party. Instead, wife contended that husband and the limited liability company were one and the same. (R. VII, p. 400, lines 17-18 and p. 404, lines 5-12.) This is an effort to avoid the failure to name the LLC as a party defendant.

III. ALL ELEMENTS OF JUDICIAL ESTOPPEL ARE PRESENT. IT WAS ERROR FOR THE COURT TO CONCLUDE THAT THE 4TH ELEMENT WAS NOT SATISFIED.

The court incorrectly concluded that the fourth element of judicial estoppel was lacking.

In its decision, the court found that the evidence in this case failed to satisfy the fourth element of judicial estoppel which requires that "the inconsistency must be part of an intentional effort to mislead the court;" husband and son submit there is ample evidence that wife sought to intentionally mislead the court.

Wife became a real estate agent in 2001. At the time of the trial, she had worked as a real estate agent for three years. During cross-examination at a hearing held on September 15, 2009, wife testified that she was familiar with the property set out in Exhibit 25 entered during the trial. This exhibit is entitled "Property Acquired During Marriage now or formerly, W.R. Simpson, Jr". (R. VII. p. 697)

During cross-examination, wife referred to information that she obtained from the Clarendon County tax maps when asked if she was familiar with the property set out in Exhibit 25. (R. VII. P. 408, lines 7-8.) Wife admitted that she was familiar with Item 1 in Exhibit 25, and was able to identify the property. (R. VII. p. 407, lines 6-23). She was also familiar with and able to identify the following property in Exhibit 25, Item 5, (R. VII. p. 408, lines 17-24), Item 21 (R. VII. p. 410, lines 13-17), and Item 64 (R. VII. p. 411, lines 6-24).

When questioned as to how she could identify property that she called "Charley's House," wife responded "tax map number". (R. VII. p. 410, lines 18-25, and p. 411, line

1). Wife also admitted that all of the properties listed in Exhibit 25 had tax map numbers set out beside the properties.

Trial Exhibit 25 was prepared by Beth Linhardt, an expert retained by wife. It is interesting to note that the two parcels titled in the name of the LLC, the 161.1 acre tract and the 133.2 acre tract, are set out as Items 21 and 62 in Trial Exhibit 25. (R. VII. p. 697).

Wife is a trained real estate agent with an understanding of real estate law. (R. VII p. 405, lines 3-17) Her knowledge of real estate law and the different positions that she has taken as to ownership of the property at trial and in the contempt proceedings is evidence that she sought to intentionally mislead the court.

Wife's refusal to accept quit-claim deeds is further evidence of her intent to mislead the court. Although the Final Decree does not specify that transfer of real estate from Husband must be a warranty deed, Wife's refusal to accept quit-claim deeds indicates that she had knowledge of the real estate being titled in the name of the limited liability company contrary to the positions that she has taken at trial, in the contempt proceedings, and in the previous appeal.

Husband submits that all elements of judicial estoppel are present and that wife is now precluded from demanding that the LLC transfer real estate to her.

IV. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO MODIFY THE DIVISION OF PROPERTY

This court properly determined that the family court did not have jurisdiction to modify the division of property as set forth in the Final Decree. However, by remanding the case to the family court to enforce the property division by ordering husband, son, and the LLC to join in the execution of the deeds to the subject properties, this court has

modified the division of property in the Final Decree. The result is the same, whether the modification occurs by the family court or by this court.

Requiring the son and the LLC to join in the execution of the deeds impose additional terms that did not exist at the time the divorce decree was entered and significantly alters the substance and scope of the original judgment. Previously, this court held that a family court could not significantly alter the substance and scope of the original judgment and that it could not impose additional terms upon the parties that did not exist at the time the divorce decree was entered. See *Brown v. Brown*, 392 S.C. 615, 623, 709 S.E.2d 679, 683 (S.C. Ct. App. 2011).

Just as the family courts lacks jurisdiction to modify a property division, this court also lacks the jurisdiction to do so. “. . . as a general rule if an inferior court or tribunal has no jurisdiction of a cause an appeal from its decision confers no jurisdiction on the appellate court . . .”. *Senn v. Spartanburg County, et al.*, 192 S.C. 489, 494, 7 S.E.2d 454, 456, quoting *Hall v. Artis*, 186 N.C. 105, 118 S.E. 901 (N.C. 1923). See also *Bunkum v. Manor Properties*, 321 S.C. 95, 467 S.E.2d 758 (S.C. App. 1996).

The modification of the property division by requiring the son and LLC to join in deeds transferring the property to wife is an improper modification of the property division in the Final Decree. The effect of the modification defeats the son’s interest in the LLC, something that the family court said it would not allow the wife to do. (R. VI p.21, paragraph 58 and p. 22, paragraph 59)

CONCLUSION

This Court’s decision is premised on the notion that the LLC was a party to the case. Because the LLC has not been a party, and because the 161.1 acre tract and the


133.2 acre tract are titled in the name of the LLC, the family court did not have jurisdiction over the LLC, or its real estate, and could not make a determination that the real estate was marital property.

Wife's knowledge of real estate law and her familiarity with tax maps and the property identified in Trial Exhibit 25 indicates that wife knew, or should have known, that the disputed property was titled in the name of the LLC and not husband at the time of the trial and appeal. Her knowledge, coupled with her actions in refusing to accept quit claims deed from husband, evidences intent on her part to mislead the court. Judicial estoppel applies to prevent wife from demanding that the LLC and son join in the deed transferring the real estate to her.

For the reasons set out herein, Respondents/Appellants respectfully request that the South Carolina Court of Appeals reconsider its ruling in Opinion No. 5154 filed June 26, 2013.

Respectfully submitted,

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July 11, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

DAISY WALLACE SIMPSON,

PLAINTIFF,

VS.

WILLIAM ROBERT SIMPSON, SR.

Individually and as Shareholder/
Simpson Farms, LLC, and
William R. Simpson, Jr., as a
Shareholder/Member of
Simpson Farms, LLC,

DEFENDANTS.

) IN THE FAMILY COURT FOR THE
) THIRD JUDICIAL CIRCUIT
)
) DOCKET NO.: 2003-DR-14-128
2004 OCT 29 PM 3 39

) ORDER AMENDING CAPTION
) AND SUBSTITUTE SIMPSON
) FARMS, LLC FOR W.R. SIMPSON
) FARMS, INC. AS PARTY DEFENDANT

On September 30, 2004, during the trial of this case counsel for Defendants sought to dismiss the corporate Defendant as a party because it was referred to as "W.R. Simpson Farms, Inc." rather than "Simpson Farms, L.L.C." Plaintiff makes to amend the caption to "Simpson Farms, LLC," for "W.R. Simpson Farms, Inc."

After hearing arguments of counsel, I deny Defendant's Motion and grant Plaintiffs' Motion.

This matter has been before the Court for hearings since the initial action was instituted in March 2003.

A significant number of depositions have been taken, extensive discovery has taken place; three (3) days of hearings were held in July 2004; and two (2) days of hearings were held in September.

Service of the Summons and Complaint herein were accepted by Ray E. Chandler, Esquire, then attorney for Defendants, who accepted service and submitted

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EXHIBIT
A

all Defendants to the jurisdiction of the Court. The corporate Defendant named in the caption and in the Acceptance of Service was "W. R. Simpson Farms, Inc.

Defendants herein have filed answers and counterclaims referring "Simpson Farms, L.L.C." as a Party Defendant, rather than "W. R. Simpson Farms, Inc".

Defendant "W. R. Simpson Farms, Inc." was referred to as "L.L.C." throughout the Complaint.

There has been testimony of Certified Public Accountants and others relating to assets transferred into the corporate Defendant (L.L.C.), which was formed in May 2000.

Pursuant to Section 20-7-420 (39), S. C. Code Ann., this Court has subject matter jurisdiction to make third parties and other entities parties to an action if their presence would avoid multiplicity of litigation, if they are holding assets of the marriage, and if their presence is deemed necessary to conclude all issues.

It has been clear to the Court throughout these proceedings that the individual Defendants and their counsel were aware that the entity that had been made a party Defendant was Simpson Farms, L.L.C.

Defendants have answered in the name of Simpson Farms, L.L.C., and did not move under Rule 12 SCRCivP. to dismiss or strike.

I find that Rule 15, SCRCivP., as made applicable to the Family Courts, applies here. I find that the amendment sought by Plaintiff conforms to the evidence pursuant to Rule 15(b) and relates back to the initial proceedings herein because Defendants can show no prejudice (which they acknowledge) and knew, or should have known, that, but

for a clerical mistake concerning the identity of the proper party, the action would have been brought against Simpson Farms, L.L.C.

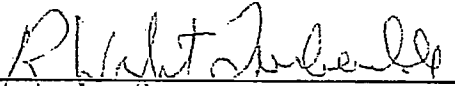
Based upon the foregoing, I find that the caption of this case should be changed to read as set forth above, and such relates back to the institution of this action

THEREFORE, based upon the foregoing findings and conclusions, it is accordingly

ORDERED

1. That Defendant's Motion to Dismiss is hereby denied, and Plaintiff's Motion to amend the caption to include Simpson Farms, L.L.C. as a Defendant herein in the place of W. R. Simpson Farms, Inc., be, and the same hereby is, granted for the reasons set forth herein above nunc pro tunc March 5, 2003, the date of filing.

AND IT IS SO ORDERED


R. Wright Turbeville, Judge
Family Court, Third Judicial Circuit

At Chambers
Sumter, South Carolina

October 29, 2004
nunc pro tunc
March 5, 2003

THE STATE OF SOUTH CAROLINA
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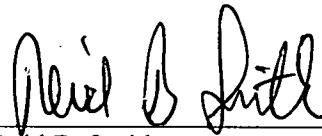
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v.

William Robert Simpson, Jr., Individually and as Shareholder/Member
of Simpson Farms, LLC and William R. Simpson, Jr., as a
Shareholder/Member of Simpson Farms, LLC, Respondents/Appellants.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Daisy Wallace Simpson by depositing a copy of it in the United States mail, postage prepaid, on July 11, 2013, addressed to her attorneys of record, Carrie Ann Warner, Post Office Box 2628, Columbia, SC 29202 and James T. McLaren and C. Dixon Lee, Post Office Box 11089, Columbia, SC 29211.



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