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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2020-000968

Cynthia Holmes, M.D., Respondent/Appellant,

v.

Haynsworth Sinkler Boyd, P.A., successor to Sinkler & Boyd, P.A., Manton Grier, and James Y. Becker
Defendants

Of which Haynsworth Sinkler Boyd, P.A., successor to Sinkler & Boyd, P.A. is the Appellant/Respondent.

Amended Petition for Rehearing
Rule 221, 240 SCACR, *De Novo* Panel Appeal Request

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Appellant hereby submits a petition for rehearing, *en banc*, pursuant to Rule 221 and 240, SCACR. The Court's opinion, filed on April 17, 2024 erroneously confers standing to a party which does not have standing, contradicting the law from the standing South Carolina Supreme Court opinion in *Carr v. Guerard*, 365 S.C. 151, 153 (S.C. 2005). The Court also issues a sanction, *sua sponte*, without procedural due process to Dr. Holmes and exceeds its jurisdiction in doing so. The Court also dismissed Dr. Holmes entire cross-appeal in a footnote stating that Dr. Holmes had not addressed an order in which the Court partially dismissed the cross-appeal (see Footnote 1 of the Opinion). Dr. Holmes, did address the question of whether the Court has jurisdiction to hear her appeal in her brief. The Court erred in dismissing the entire cross appeal without considering any of the arguments therein.

I. The Court's opinion does not address Haynsworth Sinkler Boyd, P.A.'s lack of standing in this case, which would preclude Haynesworth from being able to pursue collection even if the Court could legitimately apply federal bankruptcy law to extend the S.C. Code Ann § 15-39-30 statute of repose.

The Respondent/Appellant, Dr. Holmes, presented the Court with a brief in which she cited to the Supreme Court opinion, *Carr v. Guerard*, 365 S.C. 151 (S.C. 2005). In that case, the Court held that S.C. Code Ann § 15-39-30 conferred standing to pursue collection of a judgment upon a party holding the judgment because it made the party a "judgment creditor." The Court recognized that the plain language of the statute granted this status during a ten-year period from the date of the judgment, and not for one minute longer. The Supreme Court explained that the status of "judgment creditor" conferred standing upon the party seeking to enforce the judgment no longer exists once the ten-year period is over. "First, as soon as his judgment became more than ten years old, Carr lost his judgment-creditor status. Because he is no longer a creditor, he lacks standing to bring an action under the Statute of Elizabeth." *Carr v. Guerard*, 365 S.C. 151, 154 (S.C. 2005). The fact that Mr. Carr, in that case, had lost standing as a judgment creditor, meant that he lacked standing in any action, even one in which he was not trying, directly, to collect on a judgment (in an action under the Statute of Elizabeth, he was asking for return of funds that Mr. Guerard had fraudulently transferred to avoid paying a judgment).

The Court made it abundantly clear that no action that could possibly lead to an attempt to collect on a judgment, would be allowed after the expiration of the ten-year time limit, even an action that was not directly an effort to collect:

> "Although at this point Carr is seeking only to set aside the money transfers, he admits that his next step would be to seek to attach the subject funds. The only way for him to do that would be to try to execute on his judgment, which is stale. It would be a meaningless exercise to permit the setting aside of the transfers despite Carr's inability to effectively take any subsequent action. Thus, under the rationale of *Garrison* and *Hardee*, Carr's Statute of Elizabeth action must fail.
>
> CONCLUSION
>
> Carr is no longer a judgment creditor and lacks standing to bring this action under the Statute of Elizabeth. In addition, Carr's fraudulent-transfer action is actually an impermissible attempt to circumvent the bar to his executing on the expired judgment. For these alternate reasons, the circuit court's decision to grant summary judgment to the respondents is
>
> AFFIRMED.
>
> TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur."

Carr v. Guerard, 365 S.C. 151, 155 (S.C. 2005)

The Carr opinion has been cited and accepted as law in at least seven other cases, in different jurisdictions, including the bankruptcy Court. See *In re DC Dev., Inc.*, 572 B.R. 171, 175 (Bankr. D.S.C. 2017):

> "As the South Carolina Supreme Court has previously held, as soon as a judgment becomes more than ten years old, the creditor loses his judgment-creditor status. *See Carr v. Guerard* , 365 S.C. 151, 154, 616 S.E.2d 429, 430 (2005) ("First, as soon as his judgment became more than ten years old, Carr lost his judgment-creditor status."). Under South Carolina Code Section 15–39–30 DC Development's liability under the Bishop and McBride judgments has been extinguished and the judgments cannot be the basis for an involuntary petition under 11 U.S.C. § 303, as a bona fide dispute exists."

The only legal basis for its decision that the Court offered was to note that "A federal law may either expressly or impliedly preempt a state law." While federal law may preempt state law in some circumstances, the Court did not provide any precedential basis for S.C. Code Ann § 15-39-30 to be preempted by a section of the federal bankruptcy code. There is precedent to the contrary, however. As noted above, the Bankruptcy Court has already ruled that the Supreme Court decision from *Carr v. Guerard* does hold sway over the bankruptcy code.

The Court did not offer an explanation as to how it came to the conclusion that applying an

extension to a collection deadline authorized under bankruptcy code would have any effect on a party's standing. The Court writes, in its opinion that "We find that under section 108(c) of the Bankruptcy Code, the Judgment did not expire until June 11, 2020, thirty days after the expiration of the automatic stay imposed by section 362." It did not find that this conferred standing on the party to collect. In the Carr case, Mr. Carr filed his claim under the Statute of Elizabeth and served it within the statute of limitations. He was pursuing relief that did not include collection. There was no reason why he should not, legally, have been able to pursue the action under the Statute of Elizabeth, except that he lacked standing to bring another action (a collection action) which he was not even pursuing because that standing was limited in time by S.C. Code Ann § 15-39-30. This result came from the Supreme Court, in a case where Carr actually did have standing to bring the fraudulent transfer action. Even if the bankruptcy code extends the life of a judgment, it does not confer standing on a party which does not have standing.

II. The Court did not find that equitable tolling applied in a case involving a statute of repose, or address whether Haynesworth provided sufficient grounds for equitable tolling. The Court's opinion that a party's conduct was offensive to them does not grant the Court authority to ignore the statute of repose set forth in S.C. Code Ann § 15-39-30.

The Court, in the April 17, 2024 Opinion, criticizes Dr. Holmes past history of litigation in the underlying action, and makes that a basis for determining that the statute of repose set forth in S.C. Code Ann § 15-39-30 should be ignored. "Dr. Holmes's tactics have undeniably caused undue delay and prejudice to HSB and warrant reversal of the court's order." *Holmes v. Haynesworth Sinkler Boyd* Unpublished Opinion No. 2024-UP-125 Filed April 17, 2024 This kind of basis for granting standing to a party with no legal standing has been considered and rejected already by the South Carolina Supreme Court.

The concept of equitable tolling does not apply to actions to recover a judgment. The South Carolina Supreme Court has interpreted S.C. Code Ann § 15-39-30 as a statute of repose, not a statute of limitations. *See Hardee v. Lynch* , 212 S.C. 6, 46 S.E.2d 179 (1948) ("[The statute at issue] provides

no limitation period, but completely destroys any right of action upon judgments. The logical result of the [statute] was to utterly extinguish a judgment after the expiration of ten years from the date of entry."). A statute of repose is distinctly different than a statute of limitations, because "a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce* , 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993) ; *see also Goad v. Celotex Corp.* , 831 F.2d 508 (4th Cir. 1987). A statute of repose creates a strict time limit for liability. *See Linda Mc Co., Inc. v. Shore* , 390 S.C. 543, 559, 703 S.E.2d 499, 507 (2010) (Beatty, J., dissenting) ("A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body") (quoting *Langley* , 313 S.C. at 404, 438 S.E.2d at 243)."")

Equitable tolling and estoppel only apply to statutes of limitation. These concepts are based on reliance and stem from the idea a defendant should not be able to rely on a statute of limitations defense when a plaintiff is induced by the defendant to believe a claim would be taken care of without filing a claim. *Black v. Lexington Sch. Dist. No. 2* , 327 S.C. 55, 488 S.E.2d 327 (1997) (Defendant may be estopped from claiming statute of limitations as defense if delay that otherwise would give operation to statute was induced by defendant's conduct; such inducement may consist either of express representation that claim will be settled without litigation, or conduct that suggests lawsuit is not necessary.) The concept of equitable tolling, therefore, has no place in this case, and it was an error of law for the Court to apply it.

Beyond that, the Supreme Court, in *Carr v. Guerard*, 365 S.C. 151, 155 (S.C. 2005) has already considered a case in which the Defendant engaged in conduct that prejudiced the Plaintiff's ability to pursue collection. In that case, the conduct was not even litigation, it was outright fraud, which included lying to the Court and the Plaintiff. For 10 years, as Mr. Carr pursued his judgment in the Courts, Mr. Guerard had been hiding his money by writing checks to his wife and children so as to hide his assets from Carr and the Court:

"The judgment was entered on June 14, 1991. Throughout the next ten years, Carr actively sought but was unable to locate assets of Guerard to satisfy the judgment. On January 11, 2002 — ten years and seven months after entry of the judgment — Carr brought this action based on the Statute of Elizabeth. Carr alleges that beginning in 1997, Guerard wrote checks to his wife and son on funds that should have been used to satisfy the judgment. Carr further alleges that Guerard fraudulently concealed the transfers to avoid fulfilling his obligation to Carr. Guerard and the other respondents moved for summary judgment, arguing that Carr's action was an action to recover on the 1991 judgment and that the judgment was stale because it was over ten years old. The circuit court agreed and granted summary judgment to the respondents. On appeal, Carr argues that his fraudulent-transfer action is not an action to recover on the judgment but rather an independent action. Further, Carr claims, the statute of limitations in South Carolina Code section 15-3-530 applies, and Carr asserts he brought this action within the limitations period." *Carr v. Guerard*, 365 S.C. 151, 153 (S.C. 2005)

In that case, the Court acknowledged that Mr. Guerard's fraudulent efforts would be rewarded by his escaping justice and collection. The Court rejected the notion that this reprehensible conduct would provide any basis for overcoming the statute of repose, even when the action Carr was seeking to pursue was not directly related to collection of the judgment and Carr's action, despite the fact that the case before the Court (to address the fraudulent transactions), had been timely filed and pursued. *Carr v. Guerard*, 365 S.C. 151, 154 n.5 (S.C. 2005) ("Carr is correct that a three-year limitations period and the discovery rule apply to Statute of Elizabeth claims… Carr overlooks that Code section 15-39-30 also applies, rendering the statute of limitations inapposite in this particular case.")

The Supreme Court has clearly already considered the question of whether a party's egregious actions, intentionally causing delay and hindering legal efforts to collect on a judgment could grant grounds to confer standing where the judgment statute had expired and determined that, even in cases where the conduct was blatantly fraudulent, there was no basis to do so. In the instant case, HSB's

judgment began on November 18, 2009 and expired on November 18, 2019, ten years after the Order upon which it was based was issued. Unlike Mr. Carr, who had doggedly pursued Mr. Guerard to collect for ten years, only to be thwarted by intentional fraud, Haynsworth sat on its hands for almost eight of its ten years of standing, not instituting supplemental proceedings until 2017. Any delay caused by Dr. Holmes' litigation was massively outweighed by Haynesworth's own dilatory negligence in pursuing its judgment. The Court's decision in this case, to grant standing, *sua sponte*, as a "sanction" against Dr. Holmes is not only beyond the Court's jurisdiction in this case, but runs directly counter to the Supreme Court's decision in *Carr v. Guerard*, 365 S.C. 151 (S.C. 2005).

IV. The Court does not have jurisdiction to issue what amounts to a sanction against Dr. Holmes, *sua sponte*, by conferring standing on a party that does not have standing as a matter of law.

Issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion. *Johnson v. State*, 319 S.C. 62, 64, 459 S.E.2d 840, 841 (1995). As set forth in the preceding section, the Court appears to have conferred standing on Haynesworth Sinkler Boyd as a sanction against Dr. Holmes for her past litigation efforts, of which the Court obviously disapproves. As authority for its decision, the Court offered the following cite: "*Cf. Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535 (2014) (Finding dismissal of the pleadings was not an unduly harsh sanction in light of the plaintiff's willful and repeated failure to comply with various orders of the trial court, which resulted in unnecessary delay and prejudice to the defendants)." The issue of whether Dr. Holmes should be sanctioned for her bankruptcy filing is not before the Court in this appeal, and never was. No such relief was requested by any motion from any party. The action was taken *sua sponte*. Although the Courts may interpret statutes where there is not plan language, the Appellate Court does not have the authority to confer standing on a party that does not have legal standing, and override a statute or binding precedent from the South Carolina Supreme Court. It certainly does not have the authority to

do so as a sanction for activity that is unrelated to the appeal before it. The Appellate Court's decision on this matter should be stricken, as the Court lacks jurisdiction to take the action. *DeWitt v. S.C. Dept. of Highways & Public Transp.*, 274 S.C. 184, 262 S.E.2d 28 (1980) (all proceedings of a court lacking subject matter jurisdiction are a nullity, and its judgment has no effect). At the very least, if the Court is going to issue a *sua sponte* sanction, Dr. Holmes is entitled, as a constitutional right, to procedural due process including notice and an opportunity to be heard on the matter. S.C. Const. Art I § 3

V. Dr. Holmes did cite to legal authority and offered argument as to why her cross appeal addressing prior orders of the Court should be considered.

The only mention of Dr. Holmes' cross appeal in the opinion is in a footnote, where the Court summarily dismisses the entire appeal finding that she had abandoned her cross appeal. To justify this, the Court cited to "*First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 5124 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement in the appellate brief, the party is deemed to have abandoned the issue on appeal.)" The Court overlooked the fact that Dr. Holmes did address the issue of whether the Court has jurisdiction to review prior orders in this case. Here is the section from pages 5-6 of her brief in which she both offers argument and cites to authority in support:

> **"II. The Appellate Court has Jurisdiction to review the Circuit Court's final Order of May 24, 2019, and all prior orders are appealed including, but not limited to, the order(s) of reference and orders entered June 23, 2017, February 9, 2017, and March 14, 2017.**
>
> When a party timely files its notice of intent to appeal from a judgment, the appellate court may review any intermediate order necessarily affecting that judgment. *SCDOT v. Faulkenberry*, 337 S.C.140, 522 S.E.2dS 822 (Ct. App. 1999). The Appellate Court has found that Dr. Holmes' attempt to appeal those orders after receiving an order purporting to end the case in the lower court were untimely and interlocutory. Now that Haynsworth Sinkler Boyd has asserted that the case is ended in order to bring its own appeal, it is likely safe to assume that Haynsworth Sinkler Boyd will not be arguing that the Order it is appealing is interlocutory.

Thus, Dr. Holmes has filed her cross appeal addressing the order entered May 24, entered May 24, 2019, and all prior orders in the history of the action below. Those intermediate orders issued during the supplemental proceedings including but not limited to the orders entered June 23, 2017, February 9, 2017, and March 14, 2017 are subject to review by this Court."

The dismissive footnote is in error. The Court should have considered and responded to the issues that Dr. Holmes properly raised on cross appeal in this case.

CONCLUSION

Appellant respectfully submits requests a rehearing on this matter, *en banc*, and *De Novo*, under Rules 221 and 240, SCACR. The Appellate panel in this case has overlooked the Supreme Court Opinion from *Carr v. Guerard*, 365 S.C. 151 (S.C. 2005), which precludes its holding. The Appellate Court has also misapprehended the application of federal bankruptcy law to affect a statute of repose imposed by S.C. Code Ann § 15-39-30. The Appellate panel has also exceeded its authority and subject matter jurisdiction of this case by granting standing to a party which does not have legal standing as a sanction, based on matters not before the Court and without affording procedural due process to Dr. Holmes. Finally, the Court should not have dismissed Dr. Holmes entire cross appeal without consideration, as it did, in footnote 1 of the opinion. Dr. Holmes did offer persuasive argument and legal authority in support as to her assertion that the Court does have jurisdiction to consider all prior orders in a case where there has been a final order, concluding the case at the trial court level.

Respectfully submitted,

5-2-24

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Defendants

Of which Haynsworth Sinkler Boyd, P.A., successor to
Sinkler & Boyd, P.A. is the Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Amended Petition for Rehearing on the respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to Mary Caskey, Mary Caskey Box 11889, Columbia, SC 29201, and by emailing the same to Ms. Caskey at mcaskey@hsblawfirm.com on this date.

Dated 5-2-24

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May 2, 2024

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SC Court of Appeals
Clerk of Court, Attn: Catherine S. Harrison
1220 Senate Street
Columbia, SC 29201

Re: Cynthia Holmes v. Haynsworth
Appellate Case No. 2020-000968

Dear Ms. Harrison:

I submitted a petition for rehearing in this case on April 30, 2024. I realized that, although I identified it as a petition for rehearing, I did not actually invoke Rule 221 in the brief. I have amended the brief to cite Rule 221 SCACR in the title and body of the brief. Nothing else has changed. Would you please accept this amended brief and file it? I am sending the hard copies and a second filing fee along as well, in an abundance of caution. Enclosed please find the following:

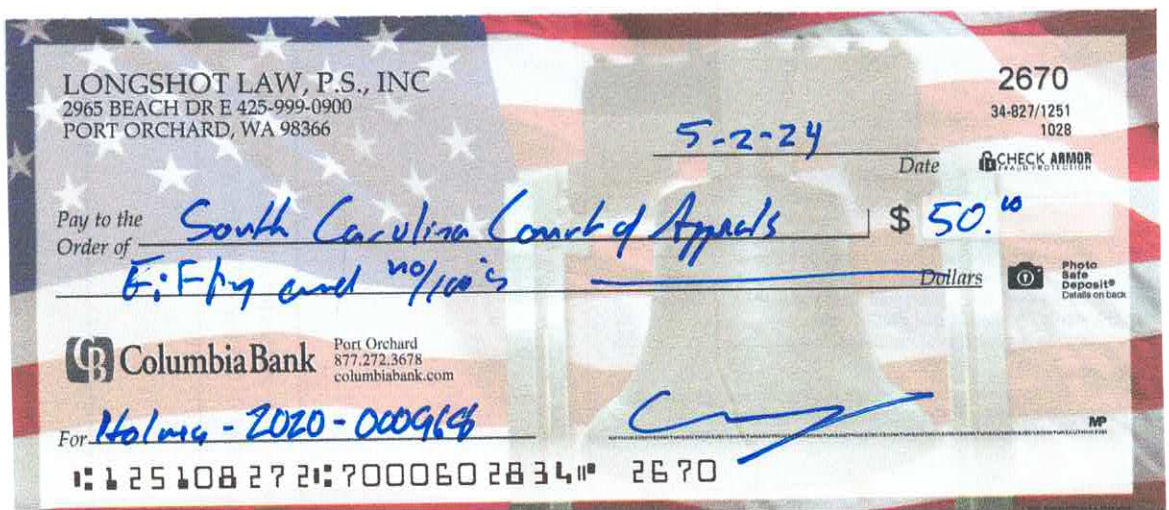
1. 6 Copies of Respondent-Appellant's Amended Petition for Rehearing
2. Check for $50 filing fee
3. Certificate of Service

I have faxed this petition and filed electronically with the Court as well.

Sincerely,

Chalmers C. Johnson

Cc: (With one copy of the Petition and Certificate of service) Mary Caskey Box 11889, Columbia, SC 29211 Also by email mcaskey@hsblawfirm.com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5-2-24
Date

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For Holmes - 2020-000968

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