

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

OCT 9 2010

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

CASE NO. 2008-CP-26-7941

John Sherrill and Estate of Gaye Marie Reynolds.....Appellants

vs.

Gary Moore and Robert Moore.....Defendants,

OF WHOM Gary Moore is theRespondent

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Master-in-Equity correctly ruled that the Respondent is entitled to the protection of the Homestead Exemption in certain real property.
- II. Whether the Master-in-Equity correctly ruled that if Respondent's homestead property is sold in execution of the Appellants' civil judgment, the successful bidder should be required to pay the selling officer cash in an amount equal to the homestead exemption, even if the successful bidder is the judgment creditor.
- III. Whether the Master-in-Equity correctly denied the Appellant's Motion for Reconsideration because the Appellant failed to raise the issues set forth in the Motion for Reconsideration prior to the issuance of the Order.

STATEMENT OF THE CASE

The underlying lawsuit is a declaratory judgment action brought to collect on a judgment issued in a previous civil case. (Complaint p. 2) In the Complaint, the Appellants sought an order seeking to resolve certain issues with respect to a parcel of real property; namely, a lot located in the Socastee section of Horry County. Specifically, the Appellants sought rulings that: 1) the property was subject to the prior judgment and should be sold in execution of the judgment; 2) that a mortgage of record should be extinguished; 3) that Respondent was the sole owner of the property; and 4) that Robert Moore had no ownership interest in the property. (Complaint p. 2) The case was referred to the Master-in-Equity for Horry County. As a result of a hearing in May, 2010, the Master-in-Equity issued an Order dated June 10, 2011 ruling that Robert Moore was the joint owner of the property by way of a resulting trust, and that the Respondent, Gary Moore, was not the sole owner of the property, but a joint owner as tenant in common with Robert Moore. (Order dated June 10, 2011, page 4). The Master also ruled that the Appellant's judgment attached to Respondent's one-half interest in the property, and that if a judicial sale was needed to satisfy the Appellants' judgment, the Respondent's one-half interest would be sold. (Order of June 10, 2011, page 4).

On November 10, 2011, the Appellants filed a motion for an order authorizing an order for judicial sale of the property. (Notice of Motion and Motion for Judicial Sale).

On November 22, 2011, the Respondent filed a motion¹ seeking an order declaring that the Respondent's interest in the property was subject to the homestead exemption set forth in S.C. Code Ann. § 15-41-30 (1976 & Supp. 2012), and that if the property was sold at judicial sale, the minimum bid must be in the amount of the homestead exemption. (Motion of Gary Moore for an Order Declaring that Certain Property is Exempt From Levy Pursuant to the Homestead Exemption). The Motion was supported by the Affidavit of Gary Moore and a Memorandum of Law. (Affidavit of Gary Moore; Memorandum of Law in Support of Claim of Entitlement to Homestead Exemption).

The Respondent, Gary Moore, is incarcerated with a projected release date of July 18, 2018 (Affidavit of Gary Moore). Prior to his being incarcerated, Respondent resided at the property, and he intends to return there to live upon his release. (Affidavit of Gary Moore).

A hearing on these two motions took place on May 15, 2012, before the Master-in-Equity for Horry County. At the hearing, Respondent made an additional motion in open court, based upon conversation with Appellants' counsel prior to the hearing, for an order requiring that the successful bidder at a judicial sale, even if it were one of the Appellants, be required to pay cash in an amount equal to the homestead exemption. (Transcript p. 6, lines 5-9, p. 14, lines 21-25, p. 15, lines 1-19). Appellants argued that

¹ The Respondent was unrepresented at the May, 2010 hearing. On May 3, 2011, the undersigned filed a Notice of Appearance as counsel for Respondent. (Notice of Appearance).

the judgment creditor needed only to put in a credit bid up to the amount of his judgment, and should not have to pay any cash to satisfy the homestead exemption. (Transcript p. 20, lines 16-20).

The Master-in-Equity requested that the parties submit memoranda regarding this issue, and took the matter under advisement. Subsequently, the Master issued an Order dated April 15, 2013 and filed April 19, 2013 in which she ruled that the property is the Respondent's residence under the meaning of S.C. Code Ann. § 15-41-30(A)(1), and that the Respondent was entitled to the homestead exemption in his one-half interest in the property; and further ruling that the successful bidder at a judicial sale of Respondent's interest in the property should be required to pay the selling officer cash in an amount equal to the homestead exemption, even if the successful bidder was the judgment creditor. (Order dated April 15, 2013 and filed April 19, 2013).

Appellants timely filed a Notice of Motion and Motion for Reconsideration in which they argued, for the first time, that permitting the Respondent to claim the homestead exemption violated the "Victim's Bill of Rights" contained in Article I, § 24 of the South Carolina Constitution. (Notice of Motion and Motion for Reconsideration, p 2).

Respondent filed a Reply in which he requested that the motion for reconsideration be denied because the issue contained in the notion was not presented to the trial court at the hearing. (Reply of Gary Moore to Plaintiff's Motion for Reconsideration).

On June 12, 2013, the Master's Amended Order Denying Plaintiff's Motion for Reconsideration was filed. This appeal followed.

ARGUMENT

I. THE MASTER-IN-EQUITY CORRECTLY RULED THAT THE RESPONDENT IS ENTITLED TO THE PROTECTION OF THE HOMESTEAD EXEMPTION IN THE PROPERTY

a. The Respondent is entitled to the protection of the Homestead Exemption

The Master's ruling that the Respondent is entitled to the protection of the homestead exemption in his interest in the real property is in accordance with clear statutory law and well-settled case law.

The "Homestead and Other Exemptions" act, found in S.C. Code Ann. § 15-41-10 through 35 (1976 & Supp. 2012) provides that certain property of a debtor is exempt from "levy, attachment or sale under any mesne or final process issued by any court or bankruptcy proceeding." S.C. Code Ann. § 15-41-30. This property includes a debtor's aggregate interest, not to exceed \$50,000.00 in "real property or personal property that the debtor or a dependent of the debtor uses as a residence."² *Id.*

"The 'rationale for the homestead exemption is well-established: to protect from creditors a certain portion of the debtor's property,' and to prevent citizens from becoming dependent on the State for support.'" Holden v. Cribb, 349 S.C. 132, 140, 561 S.E.2d 634, 639 (Ct.App. 2002).

Although the Respondent is currently incarcerated, he resided at the property prior to his incarceration and intends to return there to live when he is released. (Affidavit of Gary Moore). Appellants argue on appeal that the Respondent cannot claim the homestead exemption in the property because "he is an actual resident at the Department

² Pursuant to S.C. Code Ann. §15-41-30(B), beginning July 1, 2008 and each even-numbered year thereafter, the dollar amount of the exemption must be adjusted to reflect the change in the Southeastern Consumer Price Index, All Urban Consumers, as published by the Department of Labor, Bureau of Labor Statistics, for the most recent year.

of Corrections in Columbia." The same argument was rejected by the South Carolina Court of Appeals in Holden v. Cribb. In that case, which is directly on point, the court of appeals held that a judgment debtor was entitled to the protection of the homestead exemption even though he was incarcerated at the time. 349 S.C. at 140, 561 S.E.2d at 639. The court of appeals quoted Nagy v. Nagy-Horvath for the proposition that "a person's place of residence is largely one of intent to be determined under the facts and circumstances of each case." *Id.* (quoting Nagy v. Nagy-Horvath, 273 S.C. 583, 586-87, 257 S.E.2d 757, 759 (1979) (other citations omitted). The court noted that the "act and intent as to domicil, and not the duration of residence, are the determining factors." *Id.*, quoting Miller v. Miller, 248 S.C. 125, 129, 149 S.E.2d 336, 339 (1966). The court concluded "We daresay [the debtor] has no intent to make the detention center his permanent residence. To hold otherwise would thwart the underlying policy of the homestead exemption." Holden v. Cribb, 349 S. C. at 141, 561 S.E.2d at 639.

The undisputed evidence in this case is that the property is the Respondent's primary residence; that is where he lived prior to being incarcerated, and he intends to return there to live upon his release. (Affidavit of Gary Moore) Under well-settled law he is therefore entitled to the protection of the homestead exemption, and if the homestead property is sold to satisfy Appellants' judgment, the minimum bid *must* be in the amount of the exemption pursuant to S.C. Code Ann. § 15-31-10. See Holden v. Cribb, 349 S.C. at 141, 561 S.E.2d at 639.

b. The Appellants failed to preserve their constitutional argument for appeal

On appeal, the Appellants argue that the Victim's Rights Act contained in the South Carolina Constitution "trumps" the homestead exemption found in S.C. Code Ann.

§ 15-41-30. (Brief of Appellants, page 3). This issue was not raised to the trial court, except in the Motion for Reconsideration, which was denied on the grounds that the Appellants did not raise the issue prior to the issuance of the Order. (Amended Order Denying Plaintiff's Motion for Reconsideration). "In order to preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court." Hill v. South Carolina Dep't of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010), citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

- c. Even if the Appellants' constitutional argument was preserved for appeal, the Victim's Bill of Rights does not apply

Even if the issue were preserved for appellate review, the Victim's Bill of Rights does not apply in this case. The underlying lawsuit is an action to collect on a judgment in a *civil* case. (Final Order filed July 14, 2011). The Victim's Bill of Rights does not affect civil proceedings; rather, it enumerates rights of victims with respect to criminal proceedings. S.C. Const. art. I, § 24. For example, the Victim's Bill of Rights gives victims rights to be informed during criminal proceedings, to confer with the prosecution, and to be informed when an accused or convicted person is arrested or released from custody. S.C. Const. art. I, § 24. The South Carolina Supreme Court, in tracing the history of the Victim's Bill of Rights, notes that it grew out of a victim's rights movement that 'focused on integrating the crime victims' concerns into *the criminal justice process*." Ex parte Littlefield, 343 S.C. 212, 217, 540 S.E.2d 81, 83 (2000) (emphasis supplied).

Moreover, the South Carolina Supreme Court has held that a victim's rights under the Victim's Bill of Rights terminate when the criminal proceedings and the post-conviction actions are resolved. Littlefield, 343 S.C. at 217, 540 S.E.2d at 83.

- d. Under the South Carolina Constitution, the Respondent has a right to claim the homestead exemption

Finally, the homestead exemption is itself a right established by the South Carolina Constitution in Article III, § 28, which requires the General Assembly to "enact such laws as will exempt real and personal property of a debtor from attachment, levy and sale under any mesne or final process issued by any court or bankruptcy proceeding." "The legislature carried out this constitutional mandate under the 'Homestead and Other Exemptions' statute." Scholtec v. Estate of Reeves, 327 S.C. 551, 554, 490 S.E.2d 603, 604 (Ct.App. 1997). To deprive Respondent of his homestead exemption, as the Appellants urge the court to do, would violate the South Carolina Constitution.

II. THE MASTER-IN-EQUITY CORRECTLY RULED THAT IF THE RESPONDENT'S HOMESTEAD PROPERTY IS SOLD TO SATISFY THE APPELLANT'S JUDGMENT, THE SUCCESSFUL BIDDER MUST PAY CASH IN AN AMOUNT EQUAL TO THE HOMESTEAD EXEMPTION, EVEN IF THE SUCCESSFUL BIDDER IS THE JUDGMENT CREDITOR

Appellants argued before the Master-in-Equity that they should not be required to pay cash in the amount of the homestead exemption if they are the successful bidders at a sale of the Respondent's property. (Transcript, P. 20, lines 9-20). Once again, Holden v. Cribb is directly on point. In that case, the judgment creditor, Holden, sought an order compelling the Sheriff of Georgetown County to accept her non-cash bid entered at a judicial sale of property subject to the homestead exemption. 349 S.C. 132, 135, 561 S.E.2d 634, 636. Holden had obtained a civil judgment against Singleton for assault and battery. She then executed on the judgment and sought the sale of real property owned by Singleton. Holden was the only bidder; the sheriff rejected the bid because it was not in cash and Holden did not pay the homestead exemption. 349 S.C. at 135-136, 561 S.E.2d

at 636. The trial court ruled that the sheriff had acted properly in rejecting the bid. 349 S.C. at 138, 561 S.E.2d at 638.

On appeal, Holden argued that her offer to waive past due child support was an acceptable non-cash bid. The court of appeals, without ruling on the legality of Holden's waiving past-due child support, held that "*but for the homestead exemption*, Holden would not be required to deposit cash with the sheriff." 349 S.C. at 139, 561 S.E.2d at 636 (emphasis supplied), and upheld the trial court's ruling that the sheriff had properly rejected Holden's non-cash bid. *Id.*

The Master-in-Equity in this case thus correctly ruled in accordance with the law that if the Respondent's homestead property is sold in execution of the judgment, the successful bidder must pay cash in an amount equal to the homestead exemption, regardless of whether the Appellants make the successful bid.

On appeal, the Appellants argue that Holden v. Cribb should not apply because the judgment debtor in that case was incarcerated for a matter unrelated to the assault and battery for which Holden had obtained a judgment, and the case does not reveal whether the assault and battery judgment was "derived from a criminal conviction." (Brief of Appellant, p. 6). In the first place, a civil judgment is separate from a criminal conviction. It is not "derived from a criminal conviction." In the second place, Appellants' assertion on this point is entirely unsupported by anything in Holden v. Cribb or any other case or statute. The Appellants would have the court effectively create new law out of whole cloth. The policy underlying the homestead exemption is to "protect from creditors a certain portion of the debtor's property and to prevent citizens from becoming dependent on the State for support." Holden v. Cribb, 349 S.C. 132 at 140,

561 S.E.2d 634 at 639 (citations omitted). It would contravene that public policy and the legislative intent as expressed in S.C. Code Ann. § 15-41-10, *et seq*, not to mention Article III, Section 28 of the South Carolina Constitution, to give effect to the Appellants' argument.

III. THE MASTER-IN-EQUITY PROPERLY DENIED THE APPELLANTS' MOTION FOR RECONSIDERATION BECAUSE THE APPELLANT FAILED TO RAISE THE ISSUES SET FORTH IN THE MOTION PRIOR TO THE ISSUANCE OF THE ORDER.

Following the issuance of the Order dated April 15, 2013, the Appellants filed a Motion for Reconsideration, in which they argued, for the first time, that permitting the Respondent to claim the homestead exemption violated the Victims' Bill of Rights contained in Article I, Section 24 of the South Carolina Constitution. (Notice of Motion and Motion for Reconsideration). The Respondent filed a Reply requesting that the Motion be denied because this issue was not presented to the Master-in-Equity at the hearing or at any time prior to the filing of the Motion. (Reply of Gary Moore to Plaintiff's Motion for Reconsideration). The Master denied Appellants' motion. (Order dated June 10, 2013 and filed June 12, 2013)

The Master-in-Equity correctly denied the motion because the grounds supporting the motion were raised for the first time in the motion. Pursuant to Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App. 1990), a party may not use a Rule 59(e) motion to present to the court an issue the party could have raised prior to judgment but did not. 301 S.C. at 456, 392 S.E.2d at 482 (citations omitted). The Appellants argue that this does not apply, because they "could have simply filed a new supplementary proceeding and raised this additional ground in a new hearing;" however, they cite no precedent or case law for the proposition that the rule should not apply in this instance. In any event, the

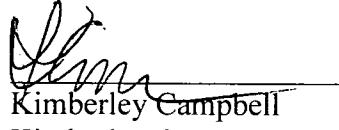
doctrine of *res judicata* would bar the Appellants from raising in subsequent proceedings any issues which might have been raised in a former proceeding: In cases where there is identity of parties, identity of subject matter, and adjudication in a former suit, under the doctrine of *res judicata* "a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. Eichman v. Eichman, 285 S.C. 378, 379. 329 S.E.2d 764, 766 (1985), citing Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967).

CONCLUSION

The Master-in-Equity's ruling that the Respondent is entitled to claim the homestead exemption is supported by statutory law (the Homestead and Other Exemptions act, S.C. Code Ann. § 15-41-10 *et seq*), case law that is directly on point (Holden v. Cribb, 349 S.C. 634, 561 S.E.2d 634 (Ct.App. 2002)), and the South Carolina Constitution (S.C. Const. art. III, § 28). The Appellants' novel argument that the Victim's Bill of Rights operates to preclude the Respondent from claiming the homestead exemption was not preserved for appeal. Even if it were preserved for appeal, no South Carolina authorities support the Appellants' argument, and the Victim's Bill of Rights simply does not apply: This is a proceeding to collect a judgment obtained in a civil action; it is not a criminal case. Moreover, the Respondent's right to the homestead exemption derives from the South Carolina Constitution (S.C. Const. art. III, § 28).

Based upon the foregoing, the Master in Equity's ruling should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kimberley Campbell", is written over a horizontal line.

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October 7, 2013

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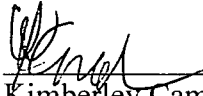
vs.

Gary Moore and Robert Moore.....Defendants,

OF WHOM Gary Moore is theRespondent

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on Appellants by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record, Gene M. Connell, Jr., P.O. Drawer 14547, Surfside Beach, SC 29587 on October 7, 2013.



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**RESPONDENT'S DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL**

Respondent proposes the following be included in the Record on Appeal:

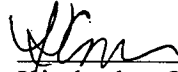
1. Complaint dated September 22, 2008.
2. Order of the Honorable Cynthia Graham Howe dated June 10, 2011
3. Notice of Motion and Motion for Judicial Sale dated November 1, 2011
4. Motion of Gary Moore for an Order Declaring that Certain Property is Exempt From Levy Pursuant to the Homestead Exemption (dated November 21, 2011
5. Affidavit of Gary Moore dated November 21, 2011
6. Memorandum of Law in Support of Claim of Entitlement to Homestead Exemption dated November 21, 2011
7. Notice of Appearance dated May 2, 2011
8. Transcript of Record for hearing on May 15, 2012
9. Order of the Honorable Cynthia Graham Howe dated April 15, 2013
10. Motion for Reconsideration dated April 19, 2013
11. Amended Order Denying Plaintiff's Motion for Reconsideration dated June 10, 2103

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SC Court of Appeals

I certify that this designation contains no matter which is irrelevant to this appeal.



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PROOF OF SERVICE

I certify that I have served the Respondent's Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record, Gene M. Connell, Jr., P.O. Drawer 14547, Surfside Beach, SC 29587 on October 7, 2013.



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