

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM PICKENS COUNTY FAMILY COURT  
Timothy M. Cain, Family Court Judge

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Case No. 08-DR-39-63

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Angela Jo Branyon Shehan, ..... Respondent,

v.

Richard Allen Shehan, ..... Appellant.

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PETITION FOR REHEARING  
and  
SUGGESTION FOR SUBMISSION EN BANC

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J. Falkner Wilkes (SC Bar #12893)  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
(864) 271-6035 (facsimile)

*Counsel for Appellant*

June 28, 2012.

**RECEIVED**  
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SC Court of Appeals

NOW INTO COURT COMES the Appellant who respectfully moves this Court for a rehearing pursuant to Rule 221, SCACR, based on the following. The Appellant further suggests that the matter be heard *en banc* pursuant to Rule 219(b).

This Court's opinion addresses the issue of antenuptial agreements in a way that could have a substantial impact on the development and implementation of the law involving the interpretation antenuptial agreements and determining their enforceability. Although this Court's opinion was issued as an unpublished opinion, due to the nature of the issue, its potential impact and the lack of reported cases on the issue, this case could have an important impact on the future development of the law in this area. The Appellant therefore suggests that this case be submitted for an *en banc* rehearing.

This Court's opinion rests on a finding that the husband did not provide support to the wife during the marriage and that this failure foreclosed the wife from acquiring assets during the marriage. In its ruling the Court creates a rule that did not heretofore exist. It also rests on a misperception of the record in this case. In its consideration of the case, the Court has overlooked or misperceived essential facts in record. As a result, the Court's holding is not in accord with the decision of Hardee v. Hardee.

The record in this case shows undisputed evidence that clearly shows the wife received substantial support from the husband throughout the entire course of the marriage. The record further shows that the wife not only had the ability to acquire assets, but that she did in fact acquire assets of her own choosing. As a result, the Court has erred in holding that there was a substantial change in circumstances during the marriage, and that any such change was completely unforeseeable, so as to make the enforcement of the prenuptial agreement unreasonable or unfair under Hardee v. Hardee.

Where the premarital agreement is found to be valid the family court must enforce the agreement unless it finds that the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003). In addition to a showing that circumstances have changed so dramatically that the enforcement of the earlier agreement is unfair and unreasonable, the party seeking to avoid enforcement of a pre-marital agreement must also show that the change in circumstances was completely unforeseeable. See Hardee v. Hardee, 355 S.C. 382, 585 S.E.2d 501 (2003). Because the record fails to show an unforeseeable change in circumstances so substantial that it would make the enforcement of the parties' antenuptial agreement unfair and unreasonable, this Court's opinion is in conflict

with the decision in Hardee v. Hardee.

The husband in this case provided the wife with a residence in which to live throughout the marriage. The wife admitted that she never had to pay a penny towards rent or mortgage payments. During the time in which there was a mortgage on the property, the husband always paid the mortgage payments. 294. The husband always paid the real estate taxes and homeowners insurance. With the sole exception of a single one thousand dollar gift from the Wife's mother, the husband's income paid for all of the renovations to the property. The husband also paid for all of the utilities, the telephone, and farm equipment used on the property. As a result, and it is essentially undisputed, that throughout the entire marriage the husband provided the wife with all of the foregoing basic living needs without any cost to her. Providing the wife with a home, utilities, telephone as well as other benefits consistently throughout the entire marriage is clearly a means of supporting the wife.

While the Wife paid for certain child related expenses and hospital bills, the record shows that the husband also paid various family bills. The wife admitted that the husband contributed to day care expenses. Between 1997 and 2007 the husband paid approximately \$40,000 in child care expenses alone. The husband also contributed to groceries and other expense during the marriage. The record

clearly shows that during the eighteen years the husband provided the wife a place to live, utilities, and other substantial benefits, he also made other material contributions to the support of his family. While the Court's opinion implies that the issue of support turns on credibility, the foregoing argument rests squarely on facts that are admitted or not otherwise disputed by the wife. The Court's opinion completely fails to account for these contributions or, explain how in light of these contributions the Husband can be considered to have failed to provide support for the Wife during the course of the marriage to such a degree as to bar the enforcement of a valid prenuptial agreement.

The Court's opinion further fails to address the fact that the husband incurred debt on the real property solely in his name. It is uncontradicted that the Wife flatly refused to join the Husband in a mortgage on a portion of the real property. 295. There is no evidence to show that the wife ever made any payment on that debt. Her testimony makes clear that she intentionally protected herself from any liability, and refused to commit to any financial obligation related to the property to which she now claims an equitable interest. In providing the wife with a home, utilities, telephone and other benefits without cost, and free from any associated debt, the husband has provided substantial support to the wife throughout the course of the marriage while the wife has shielded herself from any

liability incurred by the husband.

This Court has further erred in finding that the wife in this case was foreclosed from accumulating assets during the course of the marriage. The record in this case shows that the wife was employed and earned a substantial income throughout the marriage. During the course of the marriage the wife accumulated over \$21,000 in retirement. During the same time the husband accumulated no retirement. During the marriage the wife also purchased and owed without debt a vehicle for which she paid approximately twenty thousand dollars. The husband on the other hand, owned a truck that had little or no value. The wife testified that during the marriage, while keeping her own insurance, unilaterally chose to terminate the Husband's health insurance so that she could have more money to spend from her own paycheck. 321.

The Wife's own testimony shows not only that she had discretionary funds during the course of the marriage, but that she had the ability to spend them on things that she deemed important. That is not to say that the Wife did not spend money on family expenses, but if she could unilaterally terminate the Husband's health insurance just to increase her own take home pay, while enjoying the benefits of the Husband providing her with a home, utilities, phone, maintenance, and contribution to day care, she clearly had the ability to make her own choices

as to what to do with her income. This is evident as she admitted to facts showing that she was able to accumulate forty thousand dollars or more over the course of the marriage, which she chose to spend on a car and put into her own retirement account. Without considering any other discretionary spending, this alone shows a substantial accumulation of assets which this Court's opinion fails to address. Contrary to this Court's findings, the wife not only had the ability to accumulate assets, but did in fact accumulate her own assets during the marriage. As a result, the Court has erred in finding that the wife was foreclosed from accumulating assets.

In this case the wife entered the marriage knowing that the Husband's property was separate property and would remain separate property. The parties never had any joint accounts and they each managed their own money. The evidence simply fails to show the Wife lacked control over her own money or, that she was unable to spend money on assets if she chose to do so. The record in this case fails to show that the Wife could not alter how things were paid for during the long course of the marriage, or that she was without free will to make and implement financial decisions. Had the wife chosen to invest the nearly twenty thousand dollars she paid for a vehicle, or the twenty thousand she accumulated in retirement, or participate in the mortgage of property used by the husband to

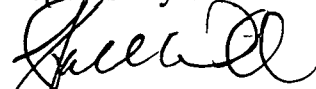
purchase assets, she could have easily invested in real estate or any other asset of her own choosing. But regardless of what she chose to do with discretionary money, the record clearly shows that she did in fact accumulate assets, contrary to this Court's findings.

While this Court found that the agreement contemplates that each party would be able to acquire assets, the agreement does not require that they do, or if they do, that the assets be of equal value or have any relative values. The overriding and clear intent of the agreement is to protect each spouse's separate property from claims by the other spouse. This Court has read into a contract what can only be considered as an implied term in a way that is in direct conflict with the clear and express terms and conditions of the written agreement. This is contrary to well established rules of contract law: When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. B.L.G. Enterprises, Inc. v. First Financial Ins. Co., 334 S.C. 529, 514 S.E.2d 327 (1999). The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. S.S. Newell & Co. v. American Mut. Liab. Ins. Co., 199 S.C. 325, 19 S.E.2d 463 (1942). It was therefore error for the Court to hold that the parties' prenuptial

agreement was unenforceable.

WHEREFORE the Appellant moves this Court to grant a rehearing in this case and further suggests that the rehearing be held *in banc*.

Respectfully submitted,



J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
(864) 271-6035 facsimile

*Counsel for the Appellant*

June 28, 2011.

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CERTIFICATE

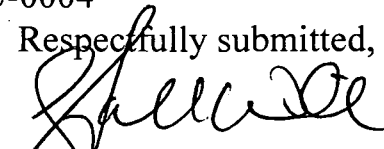
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I certify that on June 28, 2012, I served the Appellant's Petition for Rehearing on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, and by facsimile, addressed to counsel of record as indicated below:

David James Brousseau  
McIntosh Sherard & Sullivan  
P.O. Box 197  
Anderson, SC 29621

via facsimile also to: (864) 255-0004

Respectfully submitted,



J. Falkner Wilkes (SC Bar #12893)  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
(864) 271-6035 (facsimile)  
*Counsel for Appellant*