THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY

William C. Tindal, Special Referee

Case No. 2008-CP-29-1084
Appellate Case No. 2013-002370

Ned Gregory, Jr.,.....Plaintiff/Respondent,

v.

Howell Jackson Gregory and
The Gregory Company, Inc.,.....Defendants/Appellants.

RETURN TO MOTION TO DISMISS

H. Jackson Gregory, Pro Se Appellant
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James T. Irvin, Jr., Esquire
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Appellant

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Attorney for Ned Gregory, Jr., Respondent

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE COURT OF APPEALS OF SOUTH CAROLINA:

Appellants returning the Motion to Dismiss by Respondent dated December 11, 2013 pursuant to the requirements of Rule 240 (c) and (e), SCRAP respectfully allege:

Respondent's Motion to Dismiss should be denied as it does not conform to the Rule 240 (c) (3), SCRAP in that no affidavit was filed along with the motion as required since no Record on Appeal or Appendix has been filed. That rule uses the term "shall file affidavits..." a word of direction. Respondent has failed to do so.

BACKGROUND

Respondent brings this action in September, 2008 in Lancaster County in an effort to have a deed declared fraudulent via violation of the statute of Elizabeth that was issued and executed by the Horry County Master in Equity J. Stanton Cross, Jr., as grantor to The Gregory Company, Inc., as grantee pursuant to his partition action brought by Respondent in 2000 in Lancaster County and later moved to Horry County in 2002. Documents utilized in the case at bar were gleaned from the partition case. Two hearings were held in Lancaster County by the Special Referee, William C. Tindal on September 26, 2012 and on July 10, 2013 and a court reporter was present both times.

Respondent did not testify at either of the two hearings. Respondent's counsel offered the partition documents used by the special referee in a notebook including orders, the transcript of judgment, deed, fax report of sale and checks.

Only one witness testified at the first hearing in September, 2012 and Robert Folks' testimony was reported in his fax to Welsh and the document speaks for itself. Another witness Clifford Welsh testified by deposition and was not present. A look at

the two orders of special referee dated April 30, 2013 and October 31, 2013 state that Appellant testified in several paragraphs; however, the hearings were basically a round table discussion as the documents relied on by the special referee were the case. Appellant not sworn entered into discussion with special referee at both hearings.

No witnesses testified at the July 10, 2013 hearing as it was a motion under Rule 59(e) to alter or amend the April 30, 2013 Order and just a discussion was held. The Order denying the motion on October 31, 2013 did reduce the amount of judgment by a conceded sum. New judgment amount was ordered in Horry County on May 15, 2013 by successor Master in Equity Cynthia Graham Howe, another partition case document.

ARGUMENT

A. The case presented by Respondent was a collection of partition case documents. As those documents are already set forth in the Appellant's Designation of Matter to be Included in the Record on Appeal filed with the Court on December 9, 2013 judicial efficiency would not require transcripts from the two special referee hearings.

B. The appellate court rules do not require a transcript.

Step One: A transcript is not necessary because:

a) Respondent did not testify at either special referee hearings;

b) All documents presented came from the partition case in Horry County;

c) Special Referee was looking to the partition case for the amount of the judgment;

d) Fax from Robert Folks auctioneer and only live witness speaks for itself; and

e) Respondent's partition case attorney submitted a deposition of his testimony.

Step Two: Rule 208, SCRAP Initial Briefs states "(a) (1) Brief of Appellant. Within

thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal..." So, why include the language "if no transcript is ordered" in the rule, if that is not an option.

Step Three: Rule 207 (a) (1), SCRAP states "Where a transcript of the proceedings must be prepared...." Even though Respondent presents a strict interpretation of Rule 207 (a) (1), SCRAP Appellants do not believe this appellate court rule must be interpreted strictly as it does not use mandatory words of direction. It does not say in all cases on appeal that transcripts shall be prepared of all lower court proceedings. Moving forward under this rule the initial brief of Appellant was filed and served timely on December 9, 2013.

C. A transcript is not needed in this case at bar, but if the Appellants are wrong:

Step One: From the days of the case and exceptions and in the case of an improper jury argument omitted from the transcript South Carolina Supreme Court in South Carolina Highway Department v. Meredith, 241 S.C. 306, 128 S.E.2d 179 at 183 (S.C. 1962) held that "It is necessary that the rules of court and statutes be followed in perfecting an appeal, but it would be sacrificing substance for form to hold that appellant's rights to have the testimony and exhibits included was lost simply because, through an apparent oversight, its attorneys failed to provide for the inclusion of same in the transcript of record..." The Court went on to say "When this Court is of the opinion that the case should contain other facts, it has the power to remand the same for further settlement." Baker v. Irvine, 62 S.C. 293, 40 S.E. 672.

A transcript is not needed in the case at bar as this is an equity case and equity looks at substance and not the form. To require transcripts the Court would be sacrificing substance for form and violating the equitable standards of procedure.

Step Two: When statutes are in conflict with each other and it results in the failure to file a transcript then statutory construction is needed to correct the conflict. In the case of Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (S.C. 2001) such a situation occurred and the Court of Appeals remanded the case for a reconstruction of the record because the Board failed to file with the Circuit Court a transcript of the hearing as required under S.C. Ann. 6-7-760. City claims this was error and the South Carolina Supreme Court agreed with the Cities construction of S.C. Ann. 6-7-760. The Court of Appeals held this section requires that a transcript be filed if evidence was heard before the Board. City asserts that a transcript must be filed only if one has been prepared at the Board's discretion. In construing the statute, City contends the phrase "if any" modifies the noun "transcript," not the phrase "of the evidence heard before it."

The Court goes on to say "The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994). Where a statute is ambiguous, however, we must construe the terms of the statute according to settled rules of construction. Lester v. South Carolina Workers' Compensation Comm'n., 334 S.C. 557, 514 S.E.2d 751 (1999). It is well-settled that statutes dealing with the same subject matter are in pari material and must be construed together, if possible, to produce a single, harmonious result. Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000)."

In its conclusion the Court found that "the language of section 6-7-760 ambiguous and, under our rules of statutory construction, determine it should not be construed to mandate the preparation of a transcript. Under S.C. Code Ann. 6-7-740 (1977), [3] the legislature has instructed that the Board "shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record." In specifying the Board's duties at the time of the hearing, the legislature has imposed no requirement that a verbatim recording be made. Any party wishing to appeal a decision of [346 S.C. 80] the board has access to the record provided under section 6-7-740. Reading section 6-7-760 together with section 6-7-740, as we must, we conclude the legislature intended that preparation of a transcript remains within the Board's discretion. We find the Court of Appeals erred in holding a transcript must be filed when there is an appeal to the circuit court. In light of this conclusion, the remand for reconstruction of the record ordered by the Court of Appeals is unnecessary." Step Three: Court rules are the subject in the case at bar, not statutes; however, the rules of rule construction should follow the path outlined for statutes. So, when two rules are in conflict then they should be construed together. Here Rules 207 and 208 are under the microscope and this is what is said: Rule 207 deals with ordering the transcript and says "where a transcript of the proceedings must be prepared by the court reporter..." and the corresponding part of Rule 208 dealing with the brief of Appellant says "within thirty (30) days after receiving the transcript or, if no transcript is ordered." So far the rules are in sync as no mandatory requirements appear that a transcript is required. However, a review of the last two sentences of Rule 207 (a) (1), SCRAP states that "Unless the parties otherwise agree in writing, appellant must order a transcript of the entire

proceedings below. If a party to the appeal unjustifiably refuses to agree to ordering less than the entire transcript, appellant may move to be awarded costs for having unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211."

A recent Court of Appeals case Adams v. H. R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (S.C. App. 2012) dealt with a workers compensation case and was remanded for a de novo hearing on the merits due to a hybrid manner in correcting the record by the single commissioner. The Court held that such a hybrid approach to rehearing constitutes a structural defect that cannot be reviewed under the harmless error standard. The Court of Appeals relied on the South Carolina Supreme Court case of State v. Mouzon which distinguished between "trial errors, which are subject to harmless error analysis," and "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

Since in the case at bar the Designation of Matter to be Included in the Record on Appeal includes all of the exhibits presented at the two special referee hearings then a transcript of the hearings would be duplication and the opposite side of that coin would be harmless error as no transcript was ordered. Even the two witnesses one of whom did testify at the first hearing in 2012, had his testimony memorialized in his fax in 2005 after the sale of the Lancaster tract acting as auctioneer and the document speaks for itself. The other witness was Respondent's partition case counsel who testified by deposition.

Step Four: Upon revisiting the wording of the entire Rule 207 Transcript of Proceeding

it appears that even though it does not say so initially that the word must is used near the end in ordering the transcript and it may not be a judgment call but at worst it in the case at bar is no more than harmless error as this is an equity matter and in equity substance and not form is the rule. Do not sacrifice substance for form in this equity case.

Step Five: Also, Rule 207 states that the parties may agree in writing to no or a reduced transcript and does allow Appellants to move by final brief if no written agreement can be reached to recoup costs of the transcript.

Therefore, in a good faith effort to resolve this question Appellants did call counsel for Respondent by phone on Friday, December 13, 2013 and in the conversation it was agreed to not transcribe the July 10, 2013 hearing, but the first hearing was taken under advisement and it was stated to Appellants by counsel for Respondent, if you win the motion then we may not require the transcription of the September 26, 2012 hearing. With this edict Appellants will try to reduce to writing the waiver from counsel for Respondent of the second hearing transcript and in a sincere effort to eliminate the present dilemma, also obtain a waiver of the first hearing transcript.

If a blanket waiver cannot be reduced to writing then the Appellants will await the decision of the Court of Appeals before ordering the transcript of the first hearing held on September 26, 2012. Appellants do not think that ordering the transcript is mandatory in this equity case as equity matters are based on substance over form and the documents to be gleaned from the transcript are already on file with the Court.

CONCLUSION

Deny Respondent's motion to dismiss for his failure to strictly comply with Rule 240 (c) (3), SCRAP by failing to submit an affidavit along with his motion as required by the use of the word "shall" in the rule as it states "...the parties shall file affidavits..."

Deny Respondent's motion to dismiss as no transcript is necessary in this case:

1. This is an equity case and substance over form is the standard for equity matters.
2. Don't sacrifice substance for form in this equity case.
3. All exhibits came from the partition case and are in the Appellant's Designation.
4. Apply judicial efficiency. Transcript would duplicate documents in the Designation.

But if it is determined that the transcript is needed then find harmless error analysis over structural defect in the constitution of the trial mechanism, which defy analysis by harmless error standards for not ordering transcript by Appellants and either remand the case to obtain the transcript or grant Appellants leave of Court to obtain the transcript out of time as per rule.

Respectfully submitted,

James T. Irvin, Jr., Esquire
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Attorney for The Gregory Company, Inc.
Appellant

H. Jackson Gregory, Pro Se Appellant
P. O. Box 7111
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December 17, 2013
Myrtle Beach, SC

STATE OF SOUTH CAROLINA

AFFIDAVIT OF H. JACKSON GREGORY

COUNTY OF HORRY

PERSONALLY COMES, H. JACKSON GREGORY, who after first being duly sworn deposes and says:

AFFIANT is a citizen and resident of Myrtle Beach, Horry County, SC and is the Pro Se Appellant in the case at bar and submits this affidavit in furtherance of the Appellant's return to the motion to dismiss the appeal by Respondent now pending.

This 2008 case was instituted by Respondent, Appellant's brother, who in 2000 instituted a partition case in Lancaster County that was removed to Horry County in 2002 and after an Order for Partition by J. Stanton Cross, Jr., Master in Equity the two properties in the estate of the father of the parties were sold. The Horry tract was sold in May, 2005 and the Lancaster tract was sold in June, 2005. This appeal deals with the sale of the Lancaster tract and the issuance of the deed by Master in Equity Cross to The Gregory Company, Inc. in 2006 and the appeal of the special referee order for the sale of the Lancaster tract as a violation of the statute of Elizabeth. The sale order was stayed via supersedeas scheduled for December 2, 2013 per an agreement between counsel.

The basis for the 2008 action is that Respondent claims he is owed monies from the partition case by AFFIANT; however, the transcript of judgment that Respondent received dated June 10, 2008 is in error as it does not reflect the awards by Master in Equity Cross in his orders of 2006 that were not appealed and are the law of the case. Respondent now claims $37,490.44, but the real amount is $11,972.45 and the lower court relies on the partition case follow up for the correct judgment amount as the judgment is not final since the partition case with the faulty transcript of judgment is on

appeal and a motion to consolidate the two appeals has been filed. The basis for the consolidation is that the judgment issue is the same in both cases and the documents presented in the case at bar are the same documents that are from the partition case.

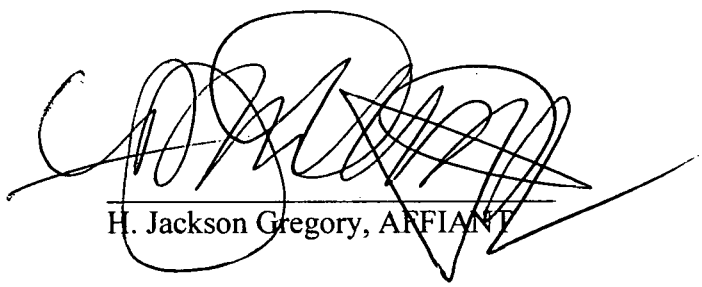
At the two hearings in the case at bar the Respondent did not testify either time and his counsel submitted the documents at the first hearing held in Lancaster on September 26, 2012 that originated from the partition case held in Horry County earlier. Those documents are listed as exhibits in the Designation of Matters to be Included in the Record on Appeal timely filed and served with the Court of Appeals and opposing counsel of record on December 9, 2013.

AFFIANT and counsel for The Gregory Company, Inc., James T. Irvin, Jr. felt that judicial efficiency would not require the necessity of having two transcripts printed that basically show documents that have already been submitted to this Court and in reading the appellate rules it appeared that no mandatory requirement existed that the transcript be ordered. Also, Respondent did not testify at either hearing. The auctioneer Robert Folks testified. Hired by Master in Equity Cross to hold the sale in Lancaster in June, 2005 he did so and then he faxed a report of the sale to Clifford Welsh the day of sale reporting what happened. This fax was an exhibit and speaks for itself. Clifford Welsh's testimony was taken by deposition. AFFIANT did speak at both hearings with special referee and submitted a few documents that are a part of the Designation. AFFIANT does not recollect being sworn at the first hearing and was not sworn during the second hearing in arguing the Rule 59(e) motion. A duplication of documents would be created in obtaining transcripts as the case at bar is based upon those documents from the partition case and not testimony and so no request was made.

At the first hearing a lot of discussion was had between counsel and special referee and house cleaning matters were dealt with and disposed of that made the hearing rather simple. Even the special referee states on page one of his April 30, 2013 Order before going into the background that "There is little dispute on the facts of this case."

The case basically takes the 2005 sale of the Lancaster tract and follows the documents created for the next three years by, to and from the Horry County Master in Equity J. Stanton Cross, Jr., the Horry County Clerk of Court and in 2013 the successor Master in Equity Cynthia Graham Howe. Ironically, Howe's Order of May 15, 2013 did reduce the judgment amount in the Horry Case that was conceded by Respondent and his counsel at the hearing there of two checks to the Master in Equity Cross on August 9, 2006 to be credited off the judgment amount in favor of AFFIANT; however, Howe would not recognize a conceded amount by Respondent and his counsel at trial that was a part of the Cross Order of April 25, 2006 that was not appealed and is the law of the case. Both cases are dealing with a non final judgment from Horry County and that amount is what the special referee relied upon in ordering the sale of the Lancaster tract.

AFFIANT SAYETH NAUGHT.



H. Jackson Gregory, AFFIANT

SWORN to before me this 17th
day of December, 2013

L.S.
Notary Public for South Carolina
My Commission Expires: 4/11/23

CERTIFICATE OF SERVICE

The undersigned did on the 17 day of December, 2013 place into the United States Mail with sufficient postage affixed thereon the following documents and addressed to the following persons pursuant to Rule 240 (c) (1), SCRAP.

DOCUMENTS: Return to Motion to Dismiss with citation of authorities;
Affidavit of H. Jackson Gregory; and
Certificate of Service.

PERSONS: The Honorable Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

SENT: Original and Six (6) Copies

Palmer Freeman, Esquire
P. O. Box 8024
Columbia, SC 29202

SENT: One Copy

James T. Irvin, Jr., Esquire
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December 17, 2013
Myrtle Beach, SC

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December 16, 2013

The Honorable Clerk Jenny Abbott Kitchings
The South Carolina Court of Appeals
Post Office Box 11629 – Zip Code: 29211
1015 Sumter St.
Columbia, SC 29201

RE: Ned Gregory Jr. v. Howell Jackson Gregory & The Gregory Company Inc.
Appellant Case No. 2013-002370

Dear Mrs. Kitchings:

Enclosed herewith please find the original and 6 copies of the Appellants RETURN TO MOTION TO DISMISS in the captioned matter consisting of the return with citation of authorities, Affidavit of H. Jackson Gregory and Certificate of Service. By copy of this letter and enclosures, we are coping opposing counsel.

Also enclosed please find extra copy of transmittal letter and prepaid enveloped for you to clock in and return.

Yours Truly,

James T. Irvin, Jr., Esquire

Enclosures as stated:

Cc: Palmer Freeman, Esquire

Priority Mail
ComBasPrice

UNITED STATES POSTAGE
PITNEY BOWES
02 1P $005.32⁰
0002955994 DEC 17 2013
MAILED FROM ZIP CODE 29577

Irvin Law Firm, LLC
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RECEIVED
DEC 20 2013
SC Court of Appeals

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