

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

71551

CASE NO. 2010-CP-26-11570

Tim WilkesAppellant

vs.

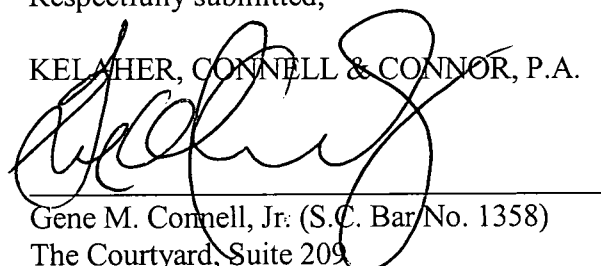
Horry CountyRespondent

PETITION FOR REHEARING

The Appellant, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its decision filed February 26, 2014. The basis of this Petition for Rehearing is the attached Memorandum of Law.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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March 12, 2014

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MAR 13 2014

SC Court of Appeals

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MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR REHEARING

The Appellant respectfully requests pursuant to South Carolina Appellate Court Rule 221 that the Court reconsider its decision, vacate it and reverse and remand to the Circuit Court. The reasons are as follows:

I. The Opinion does not consider that Appellant paid cash at the sale on August 5, 2010.

The Opinion states: “Even assuming Wilkes had paid the full purchase price at the time notice was given, payment of the purchase price does not vest legal title in the purchaser; the issuance of the deed does.”

The Appellant respectfully believes that such holding is an error and that Appellant is entitled to a new hearing. Appellant asserts that for purposes of notice to the County there is no difference between equitable title and legal title. Also, a County employee, the

Master-in-Equity, had conducted the sale. Both an equitable title holder and a legal title holder are entitled to notice prior to enforcement of an ordinance. Here, Appellant had paid the full purchase price on August 5, 2010 and the notice of the ordinance violation was sent to the record title holder on August 20, 2010. At that time Appellant had vested rights in the real property in question since he paid the entire purchase price, and to hold otherwise violates Appellant's constitutional rights to notice of a hearing regarding his vested real property rights.¹ See *South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers' Compensation Commission*, 699 S.E.2d 146, 389 S.C. 380 (S.C. 2010) (Supreme Court holds that State Constitution, Article I, Section 22 requires any person who was bound by an administrative agency affecting private rights has a right to notice and an opportunity to be heard.)

The record in this case shows that Appellant clearly was not given notice of the enforcement action on the swimming pool despite the fact that Appellant had been awarded the winning bid at the foreclosure sale and had paid the entire purchase price.

II. The holding in this case violates the rule in this state which requires the Court to uphold judicial sales and vested rights of the successful bidder.

The Court in this matter holds that because Appellant didn't have legal title he did not have vested rights. Appellant submits that such a holding is in violation of numerous court decisions in this jurisdiction which have always been to uphold judicial sales and the vested rights of the successful bidder. Appellant cites to *Brownlee v. Miller*, 208 S.C. 252, 37 S.E.2d 658 (1996). See also, *Harrington v. Blackston*, 311 S.C. 459, 429 S.E.2d 826

¹ Vested property rights are defined in *City of Myrtle Beach v. Juel P Corp.*, 337 S.C. 157, 522 S.E.2d 153 (S.C.App. 1999) (municipal party may not impair vested property rights); see also *Conway v. City of Greenville*, 254 S.C. 96, 173 S.E.2d 648 (1970); see also *Smith v. Greenville County*, 189 S.C. 424, 1 S.E.2d 502 (S.C. 1939) (vested property rights cannot be impaired or defeated).

(Ct.App. 1993) (purchaser at judicial sale secures the same title and rights in property as the person whose interest was sold).

Appellant respectfully suggests the holding in this case violates *Brownlee* and *Harrington* and also the valid public policy reasons protecting Appellant's vested rights in real property purchased at a judicial sale. Here, Appellant at the very least had the right to be notified before drastic action was taken which damaged his real property. To hold otherwise makes it legal for this type of activity to happen after a purchaser has paid his money for real property at a judicial sale prior to the filing of the deed. (If the property had been completely destroyed the risk of loss would fall on Wilkes, the innocent victim, -- an unjust and unfair result.) Appellant respectfully suggest this is a violation of the public policy of this State.

III. **Goethe v. Cleland, 323 S.C. 50, 448 S.E.2d 574 (Ct.App. 1994) is not applicable to the facts of this case.**

This Court cited to *Goethe* holding that a judicial sale was not completed until the Deed was signed. Appellant believes that *Goethe* simply holds that when Appellant doesn't pay the purchase price there is no deed. In this case, Appellant paid the purchase price and was simply waiting for the deed to be signed. Accordingly, Appellant had vested rights in the property. Because Appellant had vested rights, Appellant was entitled to constitutional protection of those rights and the County did not have the authority legally to damage Appellant's property without notice. In fact, the record reveals that the County's own ordinances prohibited the County from taking action until it notified the buyer at a judicial sale.

This Court also erred in citing *Levi v. Gardner*, 53 S.C. 24, 30 S.E. 617 (S.C. 1898) for the proposition that summary judgment was proper in this case. In fact, *Levi* involved a

case in which the judge charged a jury on the issue of equitable title. *Levi* has no application in this case which dealt with a grant of summary judgment as a matter of law by the trial court. *Levi* precludes summary judgment and actually establishes that when there are disputed facts as to the title for real property, a jury must determine the ownership. This quote from *Levi* is instructive:

If the jury be satisfied, that Felder, the alleged purchaser of the land in dispute, did not procure the sheriff to make a deed to him of the land (if it has been made to appear that all parties in this action claimed from W.N. Gardner), the plaintiff having shown a legal title in himself and traced it back to W.N. Gardner, the defendants cannot set up an equitable title as against the plaintiff's legal title. 30 S.E.2d at 618.

Further, *Levi* points out that these issues (legal and equitable title) are to be decided by the jury upon proper charge by the trial court.

Levi was explained in the case of *Epps v. McCallum Realty Co.*, 139 S.C. 481, 138 S.E. 297 (S.C. 1927). In *Epps*, McCallum Realty Co. sought to foreclose a mortgage. However, prior to delivery of the mortgage, McCallum Realty Co. had filed bankruptcy. The Court noted in citing the case of *Sheorn v. Robinson*, 22 S.C. 32 that "One in possession under an equitable title has nothing that he can record; and possession, open and unconcealed, is the only mode by which he can give notice to the world of his rights; and when this notice is given and the only way in which it could be given, he should be protected. *Epps* 138 S.E. at 299. Appellant asserts he too should be protected as a matter of constitutional law.

IV. Conclusion.

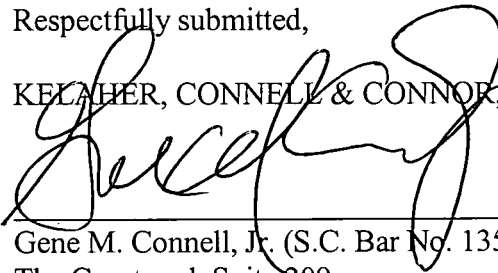
Appellant requests that this Court find that Appellant had vested title because he had paid the purchase price (R. p. 34, Ex. 2) and that Respondent Horry County had no authority

to damage or order the destruction of Plaintiff's property without notice to Appellant.² Notice and the right to be heard before governmental action is a fundamental right in South Carolina protected by both the state and federal constitutions. Appellant had a sign on the property (R. p. 86, lines 15-18); Appellant had paid the purchase price (R. p. 98, lines 21-25); and an Order had been issued proving those facts by the Master in Equity (R. 34, Ex. 2). Based on these facts, Appellant respectfully suggests that the Court reverse its opinion and remand this case to the trial court since at the very least Appellant had shown a material issue of fact to survive summary judgment.

Finally, Appellant asserts this decision is bad public policy. The opinion of the Court gives carte blanche to governmental entities to destroy purchaser's property after a successful bid, but prior to the deed being issued. It is not hard to conceive of a situation where a successful bidder buys a home and the County destroys it for a code violation without giving notice to that bidder, leaving that bidder without a legal remedy.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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Attorney for Appellant

March 12, 2014

² The Appellant's state and federal constitutional rights are in play in this case since his property was destroyed without notice and an opportunity to be heard.

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served **Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Walker H. Willcox, Esq.
Willcox Buyck & Williams, PA
P.O. Box 1909
Florence, SC 29503-1909

DATE OF MAILING: March 12, 2014

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of March, 2014

Maria P. Fraama
Notary Public for South Carolina
My Commission Expires: 6/24/14

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SC Court of Appeals

KELAHER, CONNELL & CONNOR, P.C.

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THE COURTYARD

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March 12, 2014

VIA FEDERAL EXPRESS

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Tim Wilkes v. Horry County*
Appellate Case No. 2012-212994
C/A No. 2010-CP-26-11570
Our File No. 2010-0251C


Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellants' **Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing and Proof of Service** of same in the above-captioned matter. I enclose our check for \$25.00 for the filing fee. Please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated document on Respondent through counsel of record.

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Walker H. Willcox, Esq.

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SC Court of Appeals

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2 Your Internal Billing Reference 2010-0251C

3 To Recipient's Name JENNY AHHOT KITCHINGS Phone 803 734-1890

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