

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

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Case No: 2008-CP-40-0009

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**RECEIVED**

JUN - 3 2014

**S.C. Supreme Court**

Larry A. Yates ..... Petitioner,

v.

The Estate of Alvin Yates ..... Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED ON APPEAL

1. Did the Motion Court Judge err in using the "Sound Discretion of the Reviewing Judge" as a Standard of Review for a Rule 60(b)(4) Motion to Set Aside the Trial Court Judge's Order of Judgment for Defendant (Respondent)?
2. Did the Motion Court Judge err in her failure to determine that the Trial Court Judge's finding for the Defendant (Respondent), violated the Plaintiff's (Appellant) "Due Process Rights" to a fair trial, because the Record shows that all the substantial evidence presented at trial, supported a finding for the Plaintiff (Appellant)?
3. Did the Motion Court Judge err in her failure to determine that the Trial Court Judge's Order of Judgment was a "Void" Judgment because it was based on clearly erroneous suppositions that are not found as part of the Trial Record?

## QUESTIONS PRESENTED ON PETITION FOR REHEARING

Appellant Court Rule 221(a) requires petitioner for rehearing to, "state with particularity the points supposed to have been overlooked or misapprehended by the Appellant Court."

4. How could the Motion Court Judge determine "preponderance of evidence" and/or "constitutional rights" and/or "rights to fair trial" issues without reviewing the Trial Court Record, de novo?
5. How could the Motion Court Judge determine "clearly erroneous" and/or "substantial evidence" and/or "denial of due process" issues without reviewing the Trial Court Record, de novo?
6. Why the "standard of review" for Rule 60(b)(4) is not the same "standard of review" as for Rule 60(b)(1), (2), (3) or (5)?
7. Why would the Appeals Court (in its Opinion) cite BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006) to justify "within the sound discretion of the Motion Court Judge" as a standard of review for appellant's Rule 60(b)(4) motion, when the Supreme Court determined that its, "standard of review" (for BB & T v. Taylor) "is limited to determining whether there was an abuse of discretion"? Would not, "determining whether there was an abuse of discretion," require a de novo standard of review?

8. In *BB & T v. Taylor*, why was this Appeal Court's affirmation of the Circuit Court's denial of Appellant Taylor's motion to set aside, reversed by the Supreme Court?
9. Would the Trial Court Judge's failure to rule for the existence of a partnership, be an abuse of discretion by the Trial Court Judge, and void her October 26, 2009, order when the "substantial evidence contained in the Trial Record" clearly documents the existence of a partnership?
10. Would the Motion Court Judge's failure to determine that the Trial Court Judge's failure to rule for the existence of a partnership, be an abuse of discretion by the Motion Court Judge, and void her June 7, 2012, order, when the "substantial evidence contained in the Trial Record" clearly documents the existence of a partnership?
11. Would the Trial Court Judge's issuing an order that was "clearly erroneous" be an abuse of discretion, by the Trial Court Judge, and void her October 26, 2009, order?
12. Would the Motion Court Judge's failure to determine that the Trial Court Judge issued an order that was "clearly erroneous" be an abuse of discretion by the Motion Court Judge, and void her June 7, 2012, order?
13. Would the Trial Court Judge's issuing a order that contained mostly "opinions of defendant's attorney not in evidence that were obtained after trial by way of ex parte communications" be an abuse of discretion, by the Trial Court Judge, and void her October 26, 2009, order?
14. Would the Motion Court Judge's failure to determine that the Trial Court Judge issued an order that contained mostly "opinions of defendant's attorney not in evidence that were obtained after trial by way of ex parte communications" be an abuse of discretion by the Motion Court Judge, and void her June 7, 2012, order?
15. Would this Appeal Court have affirmed the Motion Court Judge's appealed order, had this Appeal Court confirmed that the Trial Court Judge's October 26, 2009, order was controlled by "opinions of defendant's attorney not in evidence that were obtained after trial by way of ex parte communications"?
16. Would this Appeal Court have affirmed the Motion Court Judge's appealed order, had this Appeal Court confirmed that the Trial Court Judge's October 26,

2009, order was controlled by statements of fact that are not supported by the trial record?

17. Would the Trial Court Judge's failure to rule with the "preponderance of evidence" be an abuse of discretion, by the Trial Court Judge, and void her October 26, 2009, order?

18. Would the Motion Court Judge's failure to determine that the Trial Court Judge failed to rule with the "preponderance of evidence" be an abuse of discretion by the Motion Court Judge, and void her June 7, 2012, order?

19. Why the Motion Court Judge would have cited, *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, case law for a Rule 60(b)(3) Motion as a justification of her standard of review for Appellant's Rule 60(b)(4) Motion?

20. Why the Motion Court Judge would have cited, *Tobias v. Rice*, 379 S.C. 357, case law for a Rule 60(b)(1) Motion as a justification of her standard of review for this Appellant's Rule 60(b)(4) Motion?

#### STATEMENT OF THE CASE

Jan 3,'08 Appellant (Plaintiff) Yates filed suit (Case No: 08-CP-40-0009) challenging the Estate of Alvin Yates' Respondent (Defendant) claim against his and his deceased cousin's (Alvin Yates) Partnership's property. Complaint (R.pp.186-190)

Jul 13,'09 A non-jury trial was held in Circuit Court, before Circuit Court Judge, J. Michelle Childs; on July 13, 2009. Trial Transcript (R.pp.52-121)

Oct 26,'09 Judge Childs issued her October 26, 2009, Order of Judgment, denying the existence of any partnership between Appellant (Plaintiff) Yates' and his cousin, Alvin Yates. Appellant (Plaintiff) Yates was served with a copy of the Order, on November 2, 2009. (R.pp.35-47)

Nov30,'09 Appellant (Plaintiff) Yates filed his "Motion to Reconsider" and "Memorandum in Support of Plaintiff's Motion to Reconsider" on November 30, 2009.

- Mar 10, '10 Judge Childs issued her March 10, 2010, Order denying Appellant (Plaintiff) Yates' Motion for Reconsideration. The Motion was denied on grounds that the Motion was not filed within 10 days after receipt of this Court's October 26, 2009 Order of Judgment.
- Mar 15, '10 Appellant (Plaintiff) Yates filed his Notice of Appeal with the SC Court of Appeals, for a review of Judge Childs' October 26, 2009, Order of Judgment, denying the existence of Appellant (Plaintiff) Yates' Partnership with his cousin, Alvin Yates.
- Mar 29, '10 Respondent (Defendant), the Estate of Alvin Yates filed its Motion to Dismiss Appellant (Plaintiff) Yates' Appeal of Judge Childs' October 26, 2009, Order of Judgment, denying the existence of Appellant (Plaintiff) Yates' Partnership with his cousin, Alvin Yates.
- Apr 28, '10 The SC Court of Appeals issued its Order "Granting" the Respondent's, March 29, 2010, Motion to Dismiss Appellant (Plaintiff) Yates' Appeal of Judge Childs' October 26, 2009, Order of Judgment. The March 15, 2010 Appeal was Dismissed because the March 15, 2010, filing date was too late to file, because Plaintiff Yates' Motion to Reconsider was filed late, and therefore did not stay the time for filing Appellant (Plaintiff) Yates' Notice of Appeal.
- Dec 15, '11 Appellant (Plaintiff) Yates filed his Rule 60(b) Motion for Relief from Judge Childs' October 26, 2009, Order of Judgment. (R.pp.32-34)
- Mar 9, '12 Appellant (Plaintiff) Yates filed his Memorandum in Support of his Rule 60(b) Motion for Relief from Judge Childs' Order of Judgment. **Memorandum (R.pp.20-31)**
- Mar 9, '12 Appellant (Plaintiff) Yates' Rule 60(b) Motion for Relief from Judge Childs' October 26, 2009, Order of Judgment was heard by Circuit Court Judge, Allison Renee Lee on March 9, 2012.
- Jun 7, '12 Judge Lee issued her June 7, 2012, Order denying Appellant (Plaintiff) Yates' Motion for Relief from Judge Childs' October 26, 2009

Order of Judgment. Appellant (Plaintiff) Yates was served Judge Lee's June 7, 2012 Order on June 14, 2012. Order (R:pp:14-19)

Jun 22,"12 Appellant (Plaintiff) Yates filed his Motion to Amend Judge Lee's June 7, 2012, Order based on grounds of Hearing Court's error in its standard of review for determining the Hearing Court's finding for denial of Appellant (Plaintiff's) December 15, 2011, Motion to Set-aside Judge Childs' October 26, 2009 Order of Judgment. (R.pp.6-13)

Jun 27,"12 Judge Lee issued her June 27, 2012, Order denying Appellant (Plaintiff) Yates' June 22, 2012, Motion to Amend. Order (R.p:5)

July 26,"12 Appellant (Plaintiff) Yates filed his Notice of Appeal with the SC Court of Appeals on July 26, 2012.

Dec 28,"12 After receipt of transcript of non Jury trial and receipt of two (2) Orders of this Court granting enlargements of time for filing Appellant's Initial Brief and designation of matter, this Appellant filed his Initial Brief and designation of matter, on December 28, 2012.

Jan 22,"13 Respondent (Defendant) filed its Initial Brief and designation of matter, on January 22, 2013.

Jul 05,"13 Appellant (Plaintiff) filed the "Record on Appeal," on July 5, 2013.

Jul 26,"13 Appellant (Plaintiff) filed "Appellant's Final Brief," on July 26, 2013.

Jul 21,"13 Respondent (Defendant) filed its Final Brief," on July 21, 2013.

Feb 12,"14 Appellant Court filed its "Unpublished Opinion No. 2014-UP-066," on February 12, 2014.

Feb 18,"14 Due to a "Columbia Area Ice Storm," the Clerk of Court could not mail the Appellant (Plaintiff) notice of the Appellant Court's "Unpublished Opinion," on February 12, 2014, as was normal, but instead mailed it on February 18, 2014.

- Feb 19,"14 Appellant (Plaintiff) received notice of the Appellant Court's "Unpublished Opinion," on February 19, 2014.
- Feb 28,"14 The Clerk of Appellant Court "remitted" Appellant Case No. 2012-212594 to Richland County Court of Common Pleas on February 28, 2014, which was only nine (9) days after the February 19, 2014, date that the Appellant (Plaintiff) received notice of the Appellant Court's "Unpublished Opinion."
- Mar 6,"14 Appellant (Plaintiff) filed his "Petition for Rehearing" of the Appellant Court's "Unpublished Opinion," on March 6, 2014.
- Apr 5,"14 Appellant (Plaintiff) received notice from the Appellant Court, that the Court would not consider the Appellant's (Plaintiff's) "Petition for Rehearing" because it was filed later than fifteen (15) days after February 12, 2014, the date the Appellant Court's "Unpublished Opinion" was filed.
- Apr 8, "14 On April 8, 2014, Appellant (Plaintiff) filed his "Motion for Enlargement of Time" for making, March 6, 2014, a timely filing date for his "Petition for Rehearing,"
- May 5, "14 On May 5, 2014, Appellant (Plaintiff) received a letter from the Clerk of Court, with information that, "*[b]ecause this appeal has been remitted, this Court has no jurisdiction to consider this (Motion for enlargement of time) filing. We are returning this filing to you with no action having been taken.*"
- Jun 2, "14 This Petitioner, Larry A. Yates, Appellant (Plaintiff) serves and files his "Petition for Writ of Certiorari," seeking this South Carolina Supreme Court to grant review of the Court of Appeal's "Unpublished Opinion No. 2014-UP-066," that was filed on February 12, 2014.

## ARGUMENT FOR WRIT OF CERTIORARI

Any consideration of the questions cited in this Petition for Writ of Certiorari and those discussed in the Appellant Court's and the Motion Court's decisions must begin with the knowledge of the General Powers of partnerships set out in Section 33-2-102 of the Uniform Partnership Act, Code of Law of South Carolina, 1976 as amended. Those enumerated powers are automatically available to all Partnerships adopted in South Carolina.

The courts reviewing the alleged partnership paid extra attention to the two facts tending to favor the Decedent's Estate – that he financed the building project and that the real property was deeded in the name of Decedent. But those courts failed to give equal credit to several facts in favor of the Petitioner – (1) the building funds were in joint bank account; (2) Petitioner has sole discretion on spending that money in favor of the partnership; (3) Petitioner was solely responsible for supervising the construction of the partnership property; and (a) he did all the paying of subcontractors and accounting for those payments for the benefit of the partnership.

Both the Motion Court and the Appellant Court had the authority and duty to review the Trial Court's decision, de novo; the Appellant Court erred in not reviewing the underlying facts on which Motion Court's Judge Lee's decision was based. Following a bench trial, the reviewing judge must consider the trial court's legal determinations de novo and its factual finding for clear error. Furthermore, under Rule 60(b)(4), the reviewing court must make the determination as to whether to set aside a judgment as void. *Rutherford v. Rutherford*, 414 S.E.2d 152 (S.C. 1992).

The per curium decision of the Appellant Court failed to make any review of the facts relied on by Motion Court's Judge Lee, and failed to state the factual basis for its conclusions on the due process issues raised by Petitioner. While the fact a lower court decision is deemed void is one reason for finding a violation of the Petitioner's due process rights, another reason would be the clear abuse of discretion by the trial judge or the motion reviewing court.

The Trial Court's reliance of *Halersberg v. Berry*, 394 S.E.2d 7 (Ct.App. 1990), is misplaced because the facts in that case are remarkably similar to the Yates case, and that court found a partnership after a detailed review of all the arguments made by Berry. There was no in depth consideration of the four facts favorable to Yates in the instant case. Trial Court and affidavit testimony by Yates evidenced that (1) The partnership Partners were sharing the profits; (2) The building funds were in a joint bank account; (3) Petitioner had sole discretion on spending that money in favor of the partnership; (4) Petitioner was solely responsible for supervising the construction of the partnership property; and (5) he did all the paying of subcontractors and accounting for those payments for the benefit of the partnership.

#### CONCLUSION

Petitioner respectfully prays for this Supreme Court to grant his Petition for Writ of Certiorari so this Court can review both lower court decisions in great detail and again review the rulings of both *Stephens v. Stephens*, 50 S.E.2d 577 (S.C. 1948) and *Halersberg v. Berry*, 394 S.E.2d 7 (Ct.App. 1990), in light of the fact that both Courts found a partnership even though there was no written agreement.

Respectfully submitted,



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June 2, 2014

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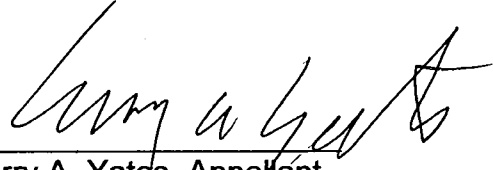
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**PROOF OF SERVICE**

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I certify that I have served the "Petition for Writ of Certiorari" on the Respondent, by depositing copie in the United States Mail, postage prepaid, on June 2, 2014, to the attorney of record, addressed as follows:

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