THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James J. Corbett, Special Referee

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Appellate Case No. 2014-001280

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Glen K. LaConey, successor in interest of Lynn G. Yacoubian.....Appellant,

v.

Xavier Troy Smith..... .... .....Respondent.

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# INITIAL BRIEF OF RESPONDENT

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## COUNTERSTATEMENT OF THE CASE

Lynn G. Yacoubian ("Yacoubian") filed suit against Home Assist Real Estate, LLC ("Home Assist") and Respondent Xavier Troy Smith ("Smith"). (Order of Judgment dated February 22, 2005). Yacoubian asserted separate claims against both defendants. Against Home Assist, she sought to collect $26,500, the remaining balance on a loan to Home Assist. (Yacoubian Dep. at p. 12:3-16). Against Smith, she asserted claims for conversion and breach of trust. *Id* at p. 12:20-13:5. Default judgment was entered in 2005 against Home Assist for the unpaid loan balance of $26,500. (Order of Judgment dated February 22, 2005). A separate default judgment was entered against Smith in the total amount of $95,743.69, which represented actual damages of $70,743.69 and punitive damages of $25,000. *Id*

In September of 2005, Yacoubian executed a document entitled "Acknowledgement and Assignment of Judgment," which purports to assign all of Yacoubian's interest in a judgment in the amount of $26,500 to LaConey.[1] (Assignment). The assignment does not refer to a judgment against Smith or a judgment in the amount of $95,743.69. *Id*

LaConey immediately instituted supplemental proceedings against Home Assist based upon the assignment. (LaConey Aff. dated October 17, 2005). The proceedings lasted for several years, but were ultimately dismissed.

LaConey then instituted supplemental proceedings against Smith He continued to rely upon the previously filed assignment. He filed a motion to disqualify the Honorable Joseph M. Strickland, Master-in-Equity of Richland County, and to refer

[1] As discussed herein, Smith contends that the assignment was not a true assignment, but a contingency fee agreement, and, in any event, was invalid.

supplemental proceedings against Smith to a Special Referee. (Motion for Disqualification dated June 3, 2011). This motion was granted on March 29, 2013, and the matter was referred to James J. Corbett, Esq., to serve as Special Referee. (Order of Reference dated March 29, 2013).

On August 27, 2013, the Special Referee issued a Rule to Show Cause, directing that Smith appear at supplemental proceedings to be held on September 13, 2013. (Order and Rule to Show Cause dated August 27, 2013). Smith filed two motions in response: (1) a motion for relief from judgment under Rule 60(b), SCRCP, arguing that Smith was never served with process, rendering the judgment void, (Motion for Relief from Judgment); and (2) a motion to dismiss the supplemental proceedings on the grounds that LaConey was engaged in the same conduct which the South Carolina Supreme Court had recently determined to be the unauthorized practice of law in *Roberts v Laconey*, 375 S.C., 97, 650 S.E.2d 474 (2007). (Motion to Dismiss).

A hearing on the motions was held on the originally scheduled date for examination under oath. Mr. Smith was not required to appear at this hearing. In November of 2013, the Special Referee issued an order which authorized the parties to engage in discovery for forty-five days on issues relating to service of process, the consideration for the assignment, and the identity and amount of the judgment transferred. (Order on Motion to Dismiss and/or Stay Supplemental Proceedings dated November 18, 2013). The parties exchanged written discovery[2] Smith deposed Yacoubian in December of 2013. LaConey was notified of the deposition, but did not appear. Both parties submitted discovery reports to the Special Referee.

[2] LaConey denied receipt of discovery served by Smith.

Smith filed a supplemental motion to dismiss together with supporting materials on March 4, 2014. (Supplemental Motion to Dismiss). This motion asserted additional grounds for dismissal based upon the identity and enforceability of the assignment based upon new information learned in the course of discovery.

The Special Referee elected to hold an evidentiary hearing. The hearing was held on March 26, 2014.[3] Both Smith and LaConey testified at the hearing, and a variety of additional materials were submitted to the Court and made part of the record, including the Yacoubian deposition, emails from LaConey, prior affidavits and pleadings in this matter, and mail received by Smith to establish his work address at certain points in time.[4]

On May 8, 2014, the Special Referee issued an order dismissing the supplemental proceedings. (Order dated May 8, 2014). The Special Referee set aside the default judgment, concluded that Smith had engaged in the unauthorized practice of law, and therefore had unclean hands, which barred him from maintaining supplemental proceedings, and concluded that the purported assignment was invalid. *Id*

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[3] The Special Referee's Order mistakenly states that the hearing was held on March 29, 2014.

[4] LaConey incorrectly states that the Motion for Relief from Default Judgment, the Motion to Dismiss and/or Stay Supplemental Proceedings, and Smith's affidavits were not filed with the Court. All of these materials were filed with the Richland County Clerk of Court. Although LaConey cites repeatedly to the Yacoubian deposition, he also argues that it should not be made part of the Record. LaConey is correct that the deposition was not filed with the Clerk of Court, but the entire deposition was presented to the Special Referee and made part of the record. Additionally, portions of this deposition were filed in connection with Smith's Supplemental Motion to Dismiss.

LaConey served a Motion to Alter or Amend Judgment on May 16, 2014. This Motion was not filed with the Clerk of Court The Special Referee denied the motion by order dated May 30, 2014.

LaConey timely filed this appeal with the South Carolina Supreme Court. The appeal was thereafter transferred to the South Carolina Court of Appeals.

## STATEMENT OF FACTS

The relevant facts cover a lengthy period of time. They involve the underlying suit and prior supplemental proceedings by LaConey. They also involve a separate proceeding in the original jurisdiction of the South Carolina Supreme Court to determine whether LaConey had engaged in the unauthorized practice of law where, as here, he had instituted supplemental proceedings on a judgment purportedly assigned to him in return for his promise to pay the original judgment holder a portion of the amount collected. Facts related to both topics are set out below.

### I. Yacoubian v. Home Assist, LLC and Xavier Smith

Yacoubian sued Home Assist and Smith in 2003. She asserted separate claims against both defendants. She sought to collect $26,500 from Home Assist, which constituted the remaining balance on a loan to Home Assist. She sued Smith for conversion and breach of trust. (Yacoubian Dep. at pp. 12:3 – 13:5).

Yacoubian employed Belec's Process Service to serve both defendants. The affidavit of service upon Smith states both that the process server personally served Smith and that the process server served Smith by leaving one copy of the pleadings for Smith at 7335 St. Andrews Road, Columbia, South Carolina, the address of Smith's former employer. (Affidavit of Service, Smith Aff. at ¶ 5). Smith testified that he did

not receive the summons and complaint. (Order dated May 8, 2014 at pp 2–3). Yacoubian testified that she did not know whether Smith had been properly served. (Yacoubian Dep. at p. 7:2-11).

Neither defendant appeared in Yacoubian's action. Default judgment was entered against Home Assist for the unpaid loan balance of $26,500. (Order of Judgment dated February 22, 2005). A separate judgment was entered against Smith in the total amount of $95,743.69, which represented actual damages of $70,743.69 and punitive damages of $25,000. *Id*

LaConey approached Yacoubian when she was at court after receiving the default judgments. (Yacoubian Dep. at 20:25-21:4). LaConey had found a niche in which he would do the paperwork for people that did not know how to collect on a judgment. *Id* at 21:5-15. Yacoubian completed a form entitled "Acknowledgment and Assignment of Judgment" ("Assignment") on September 23, 2005 The Assignment stated:

> KNOW ALL MEN BY THESE PRESENTS that for valuable consideration, I Lynn Yacoubian, Judgment Creditor in the within matter (hereinafter "Assignor"), do hereby transfer, assign and setover the Judgment rendered to me in this action to GLEN K. LaCONEY at 9401 Wilson Boulevard # 68, Columbia, SC 29203 (hereinafter "Assignee").
>
> Assigner affirms that the entire principal of $26,500, with interest at the statutory rate, is unpaid due and owing to Assignor from February 28, 2005.
>
> Assignee, his agents, assigns, and successors shall have full authority to settle compromise and execute said Judgment, and Assignor withdraws all right to same

(Acknowledgment and Assignment of Judgment). Other than in the caption, the Assignment does not mention Smith. It does not refer to the $95,743.69 judgment entered

against Smith. Yacoubian stated that she might have completed a separate assignment form for the judgment against Smith. (Yacoubian Dep at 16:5-17).

After receiving the purported assignment, LaConey commenced supplemental proceedings against Home Assist. The proceedings were based on the assignment of the $26,500 judgment. In his supporting affidavit, LaConey stated that he had been duly assigned a judgment by Yacoubian in the amount of $26,500 and that "HOME ASSIST REAL ESTATE, LLC (HOME ASSIST)...does have property which it unjustly refuses to apply toward satisfaction of my judgment." (LaConey Aff. dated October 17, 2005 at ¶¶ 1-4) (capitalization in original). The trial court issued an Order of Reference and Rule to Show Cause against Home Assist and Lori Pelzer, as manager of Home Assist on November 7, 2005. (Order of Reference and Rule to Show Cause dated November 7, 2005).

LaConey submitted a second affidavit in the supplemental proceedings against Home Assist. He averred that he was the assignee of the $26,500 judgment and that Lori Pelzer, the manager of Home Assist, failed to appear at trial "resulting in a default judgment against HOME ASSIST." (LaConey Aff. dated January 30, 2006 at p. 1-7). LaConey went on to describe Ms. Pelzer's alleged failure to produce financial documents belonging to Home Assist in supplemental proceedings. *Id*

When his efforts to collect against Home Assist proved unsuccessful, LaConey changed his approach.[5] He brought proceedings against Smith to enforce the same $26,500 judgment he had previously attempted to collect against Home Assist. The

[5] LaConey contends that the dismissal of his prior supplemental proceedings against Home Assist was the result of judicial misconduct on the part of the Honorable James Barber, III and the Honorable Joseph Strickland, Master-in Equity. (LaConey Aff. dated June 3, 2011).

Order and Rule to Show Cause sought a variety of information about Smith's personal assets from 2008 to 2013, long after Smith's association with Home Assist had ended (Order and Rule to Show Cause dated August 27, 2013). The records sought included automobile titles, cancelled checks, bank statements, real property records, and information about jewelry, collectibles, and life insurance. (Order and Rule to Show Cause dated August 27, 2013). LaConey wrote a letter to Smith on August 30, 2013, which stated in part:

> Be advised that I routinely report suspected concealment/falsification or mis-representation of financial information and documents to the IRS Criminal Investigations Division. If you refuse to cooperate in my efforts, perhaps the IRS could be of some assistance.

(Exhibit to Motion to Dismiss; Order dated May 8, 2014 at p. 3).

The question of whether the purported assignment actually conveyed any judgment against Smith arose during supplemental proceedings. The Special Referee concluded that the assignment was either: (1) an assignment of the judgment against Home Assist, in which case it could not be used for collection activities against Smith; or (2) a partial assignment of the judgment against Smith, which was not enforceable against Smith without his consent. (Order dated May 8, 2014 at p.p. 11-12).

In response, LaConey asserts that the assignment was actually an assignment of *both* the $26,500 judgment against Home Smith and the $95,743.69 judgment against Smith. He contends that the omission of any mention of a judgment against Smith or in the amount of $95,743.69 is simply a scrivener's error. (LaConey's Initial Brief at p. 3). The purported assignment itself is unambiguous, however, and it contradicts this argument.

If extrinsic evidence is also considered, such evidence contradicts LaConey's argument. The original judgment debtor testified that she believed separate documents may have been created to transfer each judgment, and that the assignment of the $26,500 judgment could only be: (1) an assignment of the judgment against Home Assist; or (2) a partial assignment of the judgment against Smith. (Yacoubian Dep. at pp. 16:5-17 and 18:14-20:22).

## II. Unauthorized Practice of Law

Meanwhile, in a different case with similar facts involving Laconey, our Supreme Court entertained a petition in its original jurisdiction to determine whether LaConey's activities in using supplemental proceedings to collect on a judgment purportedly assigned to him by a different judgment creditor constituted the unauthorized practice of law. *See Roberts v Laconey*, 375 S.C. 97, 650 S.E.2d 474 (2007). On May 17, 2005, the matter was referred to a special referee, the Honorable John C. Few, to take evidence and issue a report. *Id* at 100, 650 S.E.2d at 475.

In September of 2007, our Supreme Court issued its opinion in *Roberts v LaConey*. It adopted Judge Few's report, which concluded that LaConey had engaged in the unauthorized practice of law. *Id* at S.C. at 100, 650 S.E.2d at 475. LaConey had obtained the assignment in exchange for his promise to pay the original judgment debtor a percentage of whatever he recovered. *Id.* at 101, 650 S.E 2d at 476. The practical effect of this arrangement was that the assignment was not a true assignment, and the original judgment creditor retained an interest in the judgment. *Id* at 103–04, 650 S.E.2d at 477. LaConey therefore represented not only himself, but also the original judgment creditor. *Id*

LaConey, who is not a licensed attorney, had unquestionably engaged in activities which constituted the practice of law. He had filed pleadings, pursued discovery, appeared at hearings, and written threatening letters, one of which threatened to have Roberts arrested "and brought to court in restraints the way Moses was brought before Pharoah." *Roberts*, 375 S.C. at 102–03, 650 S.E.2d at 476–77. Because LaConey represented another in these activities, he had engaged in the unauthorized practice of law. *Id* at 106, 650 S.E.2d at 479.

Undeterred by the South Carolina Supreme Court, LaConey subsequently engaged in identical collection activities against Smith. He filed a petition for supplemental proceedings against Smith based upon a judgment purportedly assigned to him in return for his promise to pay the original judgment holder a portion of the amount collected. He wrote a threatening letter to Mr. Smith. He drafted orders, served discovery, and appeared at hearings. (Order dated May 18, 2014 at pp. 5-6). During supplemental proceedings, LaConey contacted Mr. Smith's employer and the Real Estate Commission[6] in his efforts to coerce Smith to satisfy the judgment. *Id* at pp. 3-4.

## ARGUMENT

### I. The Trial Court Acted Within Its Discretion in Setting Aside the Default Judgment Against Smith.

A Rule 60(b), SCRCP, order setting aside a void judgment is reviewed under the abuse of discretion standard. *Auto-Owners Ins Co v Rhodes*, 385 S.C. 83, 93, 682 S.E.2d 857, 863 (Ct. App. 2009), *rev'd in part on other grounds*, 405 S.C. 584, 748 S.E.2d 741 (2013). An abuse of discretion occurs when a ruling is either controlled by an error of law or based on factual conclusions that are without evidentiary support. *Tri–*

[6] Smith is a licensed real estate agent (Order dated May 18, 2014 at p. 2).

*County Ice & Fuel Co v Palmetto Ice Co*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). Here, there was no abuse of discretion, and the Special Referee's decision to set aside the default judgment against Smith should be affirmed.

**A. The Affidavit of Service Is Ambiguous.**

LaConey relies on the affidavit of service submitted by Belec's Process Service. (LaConey's Initial Brief at p. 7). While a properly executed affidavit ordinarily gives rise to a presumption of proper service, *Delta Apparel, Inc v Farina*, 406 S.C. 257, 267,750 S E.2d 615, 620 (Ct. App. 2013), this presumption is inapplicable here. The Special Referee ruled that the affidavit of service is ambiguous—and it is. The affidavit contains contradictory statements about the manner of service, one of which would render service legally invalid.

The affidavit of service was a pre-printed form. (Affidavit of Service). It contains a blank which can be used to identify the documents served. It next provides three options for service: (1) personal delivery; (2) delivery at the defendant's residence; and (3) delivery at the person's place of business. *Id* The process server is to check the box for the method used, and hand write additional details if necessary. *Id*

The selections and comments made by the process server contradict one another. The process server checked the box for personal delivery to Mr. Smith, but also stated elsewhere in the affidavit that service was made by:

> leaving one copy/copies of the same at 7335 St. Andrews Rd., Columbia, SC on the 15th day of September, 2003 and the deponent is not a party to this action and has no [sic] . .
>
> Time 12.26 ____ A.M.
> __X__ P.M.

(Affidavit of Service). The first statement describes personal service; the second does not. The second statement actually describes invalid service.

Service on an individual by leaving a copy of the summons and complaint for him or her is proper only where the papers are left at the defendant's residence with a resident of suitable age and discretion. Rule 4(d)(1), SCRCP. The affidavit does not indicate that 7335 St. Andrews Road was Mr. Smith's residence, or identify the person with whom the papers were left. These omissions render the affidavit insufficient to establish service of process. 72 C.J.S., *Process* § 112 (Database updated September 2014) (an affidavit of service must show compliance with all the statutory requisites).

Additionally, the St. Andrews Road address was a business address, not a residence. (Smith Aff. at ¶ 4). Our rules do not permit service of process upon an individual by leaving suit papers at a place of business. Rule 4(d)(1), SCRCP. If service was attempted in this manner, it is improper as a matter of law, and the default judgment is void.

Because the affidavit of service is ambiguous at best, and may be read to invalidate service of process, it would be inappropriate to allow a presumption of service to be based upon the affidavit.

**B. The Presumption of Proper Service, if Any, Was Rebutted.**

Assuming the affidavit facially establishes valid service, any presumption created thereby was properly rebutted. An affidavit of service is only *prima facie* evidence of the facts stated therein, and, where attacked, may be impeached by extrinsic evidence. *MCC Financial Services, Inc v Duffell*, 265 S.C. 519, 523–24, 220 S.E.2d 127, 128–29 (1975). A conclusory denial is insufficient to impeach a presumption of service, *Delta*

*Apparel*, 406 S.C. at 267, 750 S.E.2d at 620, but a sworn denial of service rebuts the presumption of proper service and necessitates an evidentiary hearing. 72 C.J.S., *Process* § 112 (Database updated September 2014); *Skyline Agency, Inc v Coppotelli, Inc*, 117 A.D.2d 135, 502 N.Y.S.2d 479, 483–84 (N.Y. App. Div. 1986); *accord Graham Law Firm, P A v Makawi*, 396 S.C. 290, 299–300, 721 S.E.2d 430, 435 (2012) (court should grant discovery to explore service of process unless the claim appears to be clearly frivolous).

Here, Smith submitted not one but two affidavits. (Smith Affidavit at ¶ 4; Smith Supplemental Aff. at ¶ 4). The affidavits go beyond a mere denial. They contain supporting detail. They establish that the St. Andrews Road address was not Smith's personal residence, but the former address of a Bob Capes Realty office at which he worked. (Smith Affidavit at ¶ 4). Smith was rarely in the realty office, because his work as a realtor kept him out meeting clients and showing homes. *Id* at ¶ 5. Smith did not authorize anyone at Bob Capes Realty to accept service on his behalf. *Id* at ¶ 6.

Smith also testified under oath before the Special Referee. He stated that he was not served with process. He was a new employee on the date in question, and would have been embarrassed if he had been served with suit papers at his new place of employment. (Order dated May 8, 2014 at p. 3). He would have remembered service of process if it had been made under the circumstances described in the affidavit. *Id* The Special Referee specifically found Smith to be credible. *Id*

Finally, the original judgment holder, Ms. Yacoubian, testified that she did not know whether Mr. Smith had been served with the summons and complaint. (Yacoubian Dep at p. 7 7-10). She further stated that she did not know the process server and had

not spoken to him. (Yacoubian Dep. at p. 8:13-20). She also testified that the St. Andrews Road address had no meaning to her. *Id* at 9:18-23.

LaConey did not call the process server as a witness. Nor did he submit any other evidence to bolster his affidavits. He argues that records involving the purchase of Smith's home in 2010 suggest that Smith was aware of the judgment against him, at least at that time. According to LaConey, the fact that the home is titled solely in Smith's wife's name suggests that Smith structured the transaction to avoid the default judgment, and accordingly, must have had knowledge of the default judgment.

This argument is not before the Court. LaConey did not introduce copies of any property records at the evidentiary hearing. He did not argue that an inference should be drawn from the records at the evidentiary hearing. (Order dated May 8, 2014 at p. 1) (affidavit of service and damages hearing notice were the "only" support presented for good service). LaConey did not raise the matter until he filed his Rule 59(e), SCRCP, motion to alter or amend. At that point, however, it was too late. LaConey could not raise an issue which he failed to raise prior to judgment. *Hickman v Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (party may not use Rule 59(e) to present an issue that party could have raised prior to judgment, but did not). LaConey also failed to submit copies of the property records in connection with the Rule 59(e) motion, and these records were never viewed by the trial court.

In any event, the inference which LaConey attempts to draw from this evidence is not permissible. There are many reasons why title to real estate might be held in the name of a particular spouse. These reasons include the credit history, employment history, and potential income of the individuals involved. LaConey has made no showing

that any of the other many possible reasons for Mr. and Mrs. Smith's choice did not apply. As the Special Referee stated:

> Petitioner failed to present *any* evidence concerning the purchase of a home by Smith's wife or its relevance to service on Smith, so that evidence was not considered in the Order and cannot be considered on reconsideration.

(Order dated May 30, 2014 at p. 1-2) (emphasis added).

The Special Referee acted well within his discretion in setting aside the default judgment, and the ruling should be affirmed.

## II. LaConey Engaged in the Unauthorized Practice of Law.

Under similar if not identical facts, the South Carolina Supreme Court previously determined that LaConey had engaged in the unauthorized practice of law. *Roberts v LaConey*, 375 S.C. 97, 106, 650 S.E.2d 474, 479 (2007). In *Roberts*, LaConey solicited assignment of judgments for collection under the business name "Refunds Plus." *Id* at 101, 650 S.E.2d at 476 n. 1. He took a purported assignment of judgment against Eddie Roberts using a form called "Notice of Assignment and Assignment of Judgment." *Id* at 101, 650 S.E.2d at 476. He obtained the purported assignment in exchange for his promise to pay a percentage of any amount recovered to the original judgment creditor. *Id* The purported assignment stated that the original judgment creditor withdrew all rights to the judgment. *Id*

Thereafter, LaConey wrote Roberts and explained that he planned to require Roberts to appear, testify, and produce financial records. *Id* at 102, 650 S.E.2d at 477. He threatened Roberts if he did not cooperate and willingly satisfy the judgment. *Id* LaConey served extensive requests for production of documents, and then filed a motion for supplemental proceedings, which resulted in the entry of a Rule to Show Cause

against Roberts. LaConey personally appeared at these proceedings. *Roberts,* 375 S.C. at 102, 650 S.E.2d at 477 He also sent mail to Roberts, threatening to have him arrested and "brought to courts in restraints the way Moses was brought before Pharoah." *Id* at 103, 650 S.E.2d at 477.

The Supreme Court adopted the report of the Special Referee, Judge Few, which held:

> The "Notice of Assignment and Assignment of Judgment" is not an assignment of the judgment as it purports to be. [LaConey] gained an interest that had value only on the successful collection of some portion of it. [LaConey] paid nothing for the interest he acquired. He was to be paid, if at all, only when the judgment was collected. *The practical effect of their agreement is that Respondent was to be paid a fee to collect the debt Therefore, the supposed "assignee," [LaConey], was not acting on his own behalf under a true assignment* However, because he was acting on behalf of the original judgment holder, his actions must be examined to determine whether they constitute the practice of law.

*Roberts, 375 S C* at 103-04, 650 S.E.2d at 477 (emphasis added). Judge Few went on to hold that LaConey performed many actions which fit within the definition of the practice of law, including preparing pleadings and papers such as the requests for production and motion for supplemental proceedings, management of the collection action, appearing at hearings, and sending letters containing legal opinions. *Id* at 104, 650 S.E.2d at 477-78.

The Special Referee here correctly concluded that *Roberts* is controlling. As in *Roberts,* the consideration for the assignment was LaConey's promise to pay Yacoubian a percentage of whatever was recovered through his collection efforts. (Order dated May 8, 2014 at pp. 5–6). As in *Roberts,* LaConey represented Ms. Yacoubian's interest in addition to his own. As in *Roberts*, LaConey engaged in a number of actions which constituted the practice of law, such as filing pleadings and appearing at hearings *Id*

The Special Referee therefore concluded that LaConey, who is not a licensed attorney, engaged in the unauthorized practice of law. (Order dated May 8, 2014 at pp. 6–7). The unauthorized practice law constituted unclean hands,[7] which barred LaConey from relief in supplemental proceedings, which are equitable. *Ag-Chem Equip Co v Daggerhart*, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984) (supplemental proceedings are equitable in nature).[8]

**A. LaConey Represented the Judgment Creditor's Interest.**

Ms. Yacoubian clearly and repeatedly testified that she was promised a percentage of whatever Mr. Laconey was able to recover. For example:

Excerpt 1:

Q: So am I correct—and, if I'm not, tell me—that, when you signed this paper, you were intending to transfer the $26,500 judgment against Home Assist?

A: This is what I remember. **He would get a percentage and I would get a percentage,** and I think it was more than one – what's the name of this form?

(Yacoubian Dep. at p. 15:22 to 16:4) (emphasis added).

[7] LaConey did not appeal the Special Referee's ruling that his unauthorized practice of law constituted unclean hands, and that ruling stands as the law of the case. *Atlantic Coast Builders and Contractors, LLC v Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). As a result, the only question before the Court on this issue is whether the Special Referee correctly found that LaConey engaged in the unauthorized practice of law.

[8] Supplemental proceedings are equitable, and the defense of unclean hands is an equitable defense. *Emery v Smith*, 361 S.C. 207, 220–21, 603 S.E.2d 598, 605 (Ct. App. 2004). Accordingly, this Court may accordingly find facts in accordance with its own view of the evidence. *Van Blarcum v City or North Myrtle Beach*, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct. App. 1999). It is not, however, required to disregard the findings of the trial court. *Friarsgate, Inc v First Federal Sav & Loan Ass'n*, 317 S.C. 452, 454 S.E.2d 901, 904 (Ct. App. 1995).

Excerpt 2:

Q: So you think there might have been a second one for the judgment against Mr. Smith?

A: Yes. Yes, and then, at one point, I was so angry—I'm trying to remember now—no because I could have – I was so angry, I just wanted him to pay somebody, you know, because he wasn't paying me, **but I seem to remember that there were percentages involved.**

(Yacoubian Dep. at pp. 16:10-17) (emphasis added).

Excerpt 3

Q: But you think that there were actually two of these forms signed, one for the 26,500 for Home Assist and a second one for the judgment against Mr. Smith?

A: Yeah. Yeah What I remember is, so LaConey could make his money, because he was doing what I was unable to do and didn't have the heart to do, and so he was making his money, and then for me to assign it over to him. **I wanted some of it, too, you know,** like that, and that's what I remember about it. Uh-huh.

*Id* at p. 16:18-17:5) (emphasis added).

Excerpt 4

Q: And the papers we're talking about would have been the assignment of acknowledgement of judgment?

A: Yes.

Q: Did he pay you any money for that?

A: No.

Q: Did he write you a check?

A: Mr. LaConey?

Q: Yes.

A: No.

Q: Do you get any kind of money or cash, or anything?

A: Never.

Q: If I understand what you've told me so far, **your deal with him was, if he could collect on the judgment, he could keep a percentage and you would get a percentage?**

A: **Yes.**

Q: You don't remember what those percentages were?

A: No.

Q: But you think he was going to get more than you?

A: I think so.

Q: **And that's the only thing you got in exchange for filling these papers out, was his promise to pay you a percentage?**

A: **Yes.**

(Yacoubian Dep. at p. 22:19 to 23:21) (emphasis added).

LaConey argues that Yacoubian's direct testimony should be ignored because she also testified that she did not recall the transaction well, had not maintained contact with LaConey, and wanted to make sure Smith would "pay somebody." (LaConey's Initial Brief at p. 8). He essentially contends that the assignment was a gift, and that, therefore "no consideration was required." *Id* at p. 9. Finally, he suggests that because Yacoubian did not reserve any rights in the judgment, she had no interest which he could represent. These arguments lack merit.

The arguments about Yacoubian's memory and intentions are contradicted by the very deposition on which LaConey relies. While Yacoubian may not have remembered in 2013 the details of a transaction which occurred in 2005, she did clearly remember the contingency arrangement. She stated, "This is what I remember. He would get a

percentage and I would get a percentage...." (Yacoubian Dep. at p. 15:22 to 16:4) (emphasis added).

Moreover, LaConey himself confirmed the contingency fee arrangement. The Special Referee summarized LaConey's testimony on this issue as follows:

> Mr. LaConey admits that he did not pay Ms. Yacoubian anything except the "emotional value" of the judgment possibly being enforced against Mr. Smith. He stated that "no tangible property" was given by him to Yacoubian as consideration, just the "emotional satisfaction." **Mr. LaConey admitted both he and Ms. Yacoubian were to receive a percentage of the amount recovered from Yacoubian's judgment.**

(Order dated May 8, 2014 at p. 5).[9]

LaConey also relies on a portion of the purported assignment which states that "[a]ssignee, its agents, assigns and successors shall have full authority to settle, compromise and enforce said Judgment, and Assignor withdraws all right to same." (Acknowledgement of Assignment). He contends that Yacoubian's withdrawal of rights leaves her without an interest which could represented in supplemental proceedings. However, this same language appears in the assignment LaConey used in the *Roberts* case, and it did not alter the Supreme Court's conclusion that LaConey was not acting entirely on his own behalf, but also on behalf of the judgment holder. *Roberts*, 375 S.C. at 101, 650 S.E.2d a 476.

LaConey was to remit a percentage of whatever he collected. Such an arrangement is a contingent fee arrangement in which LaConey represents both his own interest and that of the judgment debtor. *Id* at 103-04, 650 S.E.2d at 477.

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[9] LaConey contends that this statement is not supported by the record. However, LaConey did not employ a court reporter, and, as a result, there is no transcript. The Special Referee's Order is the only record of the testimony presented at the hearing.

### B. LaConey's Actions Constitute the Practice of Law.

LaConey argues that improper threats cannot be considered evidence of unauthorized practice of law because that issue was not addressed by the *Roberts* Court. This argument is flawed. It is both incorrect and misses the point. The Supreme Court adopted the Special Referee's report, which noted that LaConey's threats were improper, stating that "[m]any of these threats are entirely inappropriate, and would violate the Rules of Professional Conduct if made by a lawyer." *Roberts*, 375 S.C. at 101, 650 S.E.2d at 476 n. 2. But, in any event, threats were not the reason the Special Referee concluded that LaConey had engaged in the practice of law. It is undisputed that LaConey took actions which fall within the general definition of the practice of law. For example, the Special Referee found that LaConey was not a licensed attorney, but nevertheless filed the Rule to Show Cause, served discovery and appeared at hearings. (Order dated May 8, 2014 at p. 5).

## III. The Default Judgment Against Smith Was Not Assigned to LaConey.

The Special Referee ruled that the assignment was invalid as against Smith for two reasons: (1) the assignment was an assignment of a default judgment entered against Home Assist rather than Smith, *i e*, the wrong judgment was assigned; or (2) the assignment was only a partial assignment of the judgment against Smith. (Order dated May 8, 2014 at p. 13). LaConey asserts that the Special Referee failed to consider testimony from Yacoubian in arriving at these conclusions.

This argument is incorrect. The assignment is unambiguous, and does not require resort to extrinsic evidence. In any event, the extrinsic evidence indicates that the

assignment was in fact an assignment of the judgment against Home Assist rather than an assignment of a judgment against Smith.

**A. The Assignment Is Unambiguous.**

The interpretation of a written agreement is a question of law for the court. If a contract's language is plain, no construction is required and its language determines the instrument's force and effect. *Jordan v Security Group, Inc*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Here, the assignment is clear, and resort to extrinsic evidence may not be had. The assignment recites as follows:

> KNOW ALL MEN BY THESE PRESENTS that for valuable consideration, I Lynn Yacoubian, Judgment Creditor in the within matter (hereinafter "Assignor"), do hereby transfer, assign and setover the Judgment rendered to me in this action to GLEN K. LaCONEY at 9401 Wilson Boulevard # 68, Columbia, SC 29203 (hereinafter "Assignee").
>
> Assigner affirms that the entire principal of $26,500, with interest at the statutory rate, is unpaid due and owing to Assignor from February 28, 2005.
>
> Assignee, his agents, assigns, and successors shall have full authority to settle compromise and execute said Judgment, and Assignor withdraws all right to same.

(Acknowledgment and Assignment of Judgment).

The assignment specifies the amount of the judgment assigned. That principal balance is $26,500, which is the exact amount of the judgment against Home Assist. This reference to the amount of the judgment against Home Assist is a clear indication that the judgment being assigned is the judgment against Home Assist. The language of the assignment does not refer in any way to Smith or the $ 95,734.69 default judgment entered against Smith.

Nor can the language be construed as a partial assignment of the judgment against Smith. Aside from what would have to be a remarkable coincidence that the portion of the judgment against Smith assigned to LaConey equals the exact amount of the judgment against Home Assist, other language in the assignment negates the possibility of partial assignment. The assignment states that $26,500 is the "entire" amount of the judgment. Moreover, Ms. Yacoubian parted with *all* of her rights to settle, compromise, or enforce the judgment, something which would not be done if both parties retained some degree of ownership of part of the judgment against Smith.

A plain reading of the assignment shows that it is intended to be a transfer of only the $26,500 judgment against Home Assist.

### B. Extrinsic Evidence Indicates that the Assignment Refers to a Judgment Against Home Assist Rather than Smith.

LaConey argues that the Special Referee failed to consider extrinsic evidence in construing the assignment. A review of the Special Referee's order suggests that the extrinsic evidence was considered For example, the Order refers to prior statements made by LaConey that the judgment assigned was a judgment against Home Assist. (Order dated May 8, 2014 at p. 4). It also refers to testimony by Yacoubian that the assignment was either an assignment of the judgment against Home Assist or a partial assignment of the judgment against Smith. *Id.* at p. 5.

The extrinsic evidence overwhelmingly indicates that judgment assigned was entered against Home Assist. LaConey's prior conduct establishes that he viewed the judgment as a judgment against Home Assist. LaConey originally instituted supplemental proceedings using the assignment in 2005. The proceedings, however, were not brought against Smith, but rather against Home Assist. As the timeline below

demonstrates, LaConey repeatedly represented to the court that his $26,500 judgment was a judgment against Home Assist.

| | Date | Event |
|---|---|---|
| 1. | 9/23/2005 | Yacoubian executes the $26,500 assignment. (Acknowledgement of Assignment); |
| 2. | 10/17/2005 | LaConey institutes supplemental proceedings against Lori Pelzer, Manager of Home Assist Real Estate, LLC, and Home Assist Real Estate, LLC. LaConey's supporting affidavit states that he had been duly assign a judgment by Lynn Yacoubian in the amount of $26,500 and that "HOME ASSIST REAL ESTATE, LLC (HOME ASSIST) ..does have property which it unjustly refuses to apply toward satisfaction of my judgment." (LaConey Aff. dated October 17, 2005 at ¶¶ 1-4); |
| 3. | 11/7/2005 | The trial court relies upon these representations and issues an Order of Reference and Rule to Show Cause against Lori Pelzer, as manager of Home Assist, and Home Assist itself on November 7, 2005. (Order of Reference and Rule to Show Cause dated November 7, 2005); |
| 4. | 1/30/2006 | LaConey files an affidavit in which he states that he was the assignee of the $26,500 judgment and that Lori Pelzer, the manager of Home Assist, failed to appear at trial "resulting in a default judgment against HOME ASSIST." LaConey went on to describe Ms. Pelzer's alleged failure to produce financial documents belonging to Home Assist at the scheduled supplemental proceedings. (LaConey Aff. dated January 30, 2006 at pp. 1-7). |

It was not until 2013 that LaConey first asserted that the $26,500 was a judgment recoverable from Smith's personal assets.

Yacoubian also indicated that the assignment was not an assignment of the $95,734.69 judgment against Smith. Yacoubian testified that the assignment was either

an assignment of the entire judgment against Home Assist or a *partial* assignment of the judgment against Smith.[10]

The omission of Smith's name or the amount of the judgment against Smith cannot be regarded as a mere scrivener's error. Judgments in different amounts were entered against different parties. As LaConey states in his brief, the default judgment was not joint and several. (LaConey's Initial Brief at p. 2). The omission of a separate judgment in the amount of $95,734.60 is material, and not the product of a transcription error. Moreover, there is no evidence whatsoever that the parties intended the assignment to transfer the $95,734.69 judgment against Smith.[11]

## IV. LaConey's Equitable Assignment Argument Was Not Preserved.

LaConey argues that the Special Referee erred in refusing to recognize an equitable assignment of the judgment, even if a legal assignment was not accomplished.[12] This argument was not preserved. There was no mention of an "equitable assignment" prior to the filing of LaConey's motion to reconsider. (Order date May 30, 2014 at pp 2-3). It was too late to raise this argument on a Rule 59 motion, *Hickman,* 301 S.C at 456, 392 S.E.2d at 482, and it is too late to raise the argument now.

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[10] LaConey did not appeal the ruling that a partial assignment of a judgment is invalid against the debtor without his or her consent, and the decision to dismiss the supplemental proceedings must be affirmed if the assignment is regarded as a partial assignment.

[11] LaConey has not sought to reform the assignment and cannot do so in Yacoubian's absence.

[12] LaConey did not appeal the Special Referee's ruling that a partial assignment of judgment is invalid against the judgment debtor, and this issue is not before the Court.

## V. LaConey Cannot Rely on an Alleged Equitable Assignment.

Even if an equitable assignment may be considered, LaConey may not rely on an equitable assignment for two reasons. First, LaConey is guilty of unclean hands, which precludes any attempt to enforce an equitable assignment. Second, supplemental proceedings may only be commenced by a party holding a legal, as opposed to equitable, interest in a judgment.

### A. LaConey Has Unclean Hands.

The Special referee found that LaConey's unauthorized practice of law constituted unclean hands. While LaConey appealed the Special Referee's determination that his actions constituted unauthorized practice of law, he did not appeal the trial court's ruling that the unauthorized practice of law constitutes unclean hands. This ruling is therefore the law of the case. *Atlantic Coast Builders and Contractors, LLC v Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

As discussed in detail above, the Special Referee's ruling that LaConey engaged in the unauthorized practice of law should be affirmed, and LaConey's unclean hands therefore bar him from pursuing a claim based upon an equitable assignment. *Anderson v Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005) (if a party has unclean hands, the party is precluded from recovering in equity).

### B. Supplemental Proceedings May Only Be Commenced by a Party Holding Legal Title to a Judgment.

The Special Referee correctly dismissed supplemental proceedings even if the judgment was equitably assigned to LaConey. Only a "judgment creditor" is authorized to prosecute supplemental proceedings. S.C. Code Ann. § 15-39-310 (1976) (when a sheriff has returned an execution against property wholly or partially unsatisfied, the

"judgment creditor" is entitled to an order for supplemental proceedings). A judgment creditor is "[a] person having a *legal* right to enforce execution of a judgment for a specific sum of money." *Black's Law Dictionary* (9th ed. 2009) (emphasis added).

To maintain supplemental proceedings in South Carolina one must hold legal, as opposed to equitable title, to a judgment. An equitable assignment does not convey legal title. 5 S.C. JUR., *Assignments* § 3 (Database updated September 2014) (an equitable assignment is an assignment that gives the assignee a title which, though not cognizable at law, will be recognized and protected in equity). Accordingly, possession of an equitable assignment does not permit the maintenance of supplemental proceedings.

## VI. The Special Referee Was Not Arbitrary, Capricious, or Biased.

LaConey argues that the Special Referee was prejudiced against him and acted in an arbitrary, capricious, and unreasonable manner. (LaConey's Initial Brief at p. 11). Attacking the tribunal as biased is a tactic LaConey frequently employs. For example, in his June 30, 2011 affidavit, Laconey accuses the Honorable James Barber, III, of failing to review the record so that he would not become aware of various affidavits which might affect his decision. (LaConey Aff. dated June 30, 2011 at ¶ 10). In the same affidavit, he states "I contend that Judge Strickland is a corrupt judge who will not refrain from judicial impropriety unless he is removed from his judicial seat." *Id* at ¶ 14.

The allegations against the Special Referee are as groundless as the allegations against prior judges who ruled against LaConey in this matter LaConey has presented no evidence whatsoever of bias on the part of the Special Referee toward LaConey apart from the fact that the case was decided against him, which is clearly insufficient. *Davis v Parkview Apartments*, 409 S.C. 266, 288, 762 S.E.2d 535, 547 (2014).

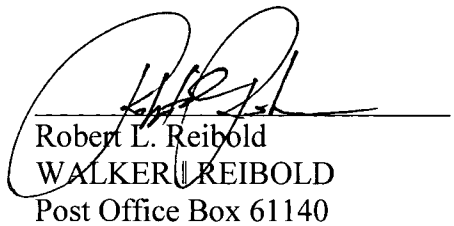
## VII. The Court Should Affirm on Any Ground Appearing in the Record.

Pursuant to Rule 220(C), SCACR, Respondent respectfully requests that the Court affirm the Order of the Special Referee on any ground appearing in the record which the Court finds appropriate.

## CONCLUSION

Smith respectfully requests that the orders of the Special Referee be affirmed.

Respectfully submitted,



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November 14, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James J. Corbett, Special Referee



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Appellate Case No. 2014-001280

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Glen K. LaConey, successor in interest of Lynn G. Yacoubian.....Appellant,

v.

Xavier Troy Smith..... .. ..... .....Respondent.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on this date I have served (1) Respondent's Initial Brief, (2) Respondent's Designation of Matter to Be Included in the Record on Appeal, and (3) Respondent's Rule 209(c), SCACR, Certificate, all by first-class United States mail, postage paid, to the *pro se* Appellant, Glen K. LaConey, 9401 Wilson Boulevard #68, Columbia, South Carolina 29203.

Respectfully submitted,

Cesaire Chase

Cesaire N. Chase
Legal Assistant to Robert L. Reibold

November 14, 2014

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November 14, 2014



The Honorable Jenny Abbott Kitchings
Clerk – SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Appellate Case No.: 2014-001280
Glen K. LaConey, successor in Interest of Lynn G. Yacoubian v. Xavier T. Smith
Civil Action No.: 2003-CP-40-4186
Judgment Roll No.: 258732

Dear Ms. Kitchings:

Enclosed please find an original and copy of Respondent Xavier T. Smith's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Rule 209(c), SCACR Certificate and Certificate of Service for filing in connection with the above-referenced matter. Please time-stamp one the copy and return same in the self-addressed stamped envelope provided.

Thank you for your assistance with this matter.

Sincerely,

Cesaire Chase

Cesaire N. Chase
Legal Assistant

:cnc
Enclosures
cc: Glen K. LaConey

Walker & Reibold, LLC
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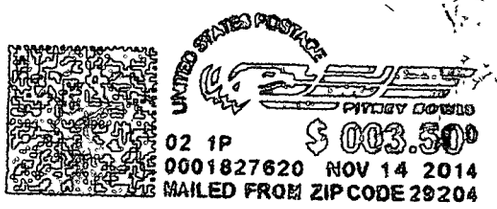




**The Honorable Jenny Abbott Kitchings**
**Clerk – SC Court of Appeals**
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