

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

Cynthia Graham Howe, Master in Equity

Unpublished Opinion No. 2014-UP-466
(S.C. Court of Appeals - Filed December 17, 2014)

John Sherrill and Estate of Gaye Marie Reynolds..... Petitioner

vs.

Gary Moore and Robert Moore.....Respondents

PETITION FOR WRIT OF CERTIORARI

RECEIVED

MAR 17 2015

SC Court of Appeals

Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Petitioner

Other Counsel:
Kimberley Campbell (S.C. Bar No. 7133)
Kimberly Campbell, LLC
P. O. Box 760
Murrells Inlet, SC 29576
(843) 947-0071
kcampbell.law@gmail.com
Attorney for Respondent

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was filed timely and finally ruled upon by the Court of Appeals on February 19, 2015

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in holding that if the Plaintiff was a bidder he must offer cash in an amount equal to the homestead exemption?
- II. Did the Court of Appeals err in not holding that the South Carolina Constitution trumps the homestead exemption and as a result Moore was not entitled to the homestead exemption?
- III. Did the Court of Appeals err in holding that the Plaintiff could not raise additional grounds as to why the homestead exemption should not apply in subsequent supplemental proceedings?
- IV. Is the homestead exemption inequitable in a case in which the Plaintiff attempts to collect a civil judgment from a criminal defendant for his crime?
- V. Is *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (S.C.App. 2002) unfair as a matter of law and contra with S.C. Code Ann. § 15-41-10?

STATEMENT OF THE CASE

On October 20, 2002, Gaye Marie Reynolds, the deceased, was walking down U.S. Highway 17 Business in Surfside Beach on her way to her job at a hotel in the early morning hours when Gary Moore struck her with his vehicle and killed her. Moore left the scene and was later identified by witnesses as the driver of the vehicle in question. Moore was charged with felony DUI involving a death and hit and run with great bodily

injuries/death. Moore was convicted by a jury and was sentenced to fifteen years in prison on October 24, 2005. Moore currently is in custody and serving that sentence at the South Carolina Department of Corrections. Shortly thereafter, Plaintiff filed a wrongful death suit and eventually obtained a judgment against Gary Moore in the amount of \$500,000.00. Later, the Plaintiff discovered Moore had deeded the subject real property to his girlfriend in an attempt to evade collection efforts. An action was brought in the Circuit Court and the real property was placed back into Moore's name. (See Consent Order dated August 28, 2007, C/A No. 2006-CP-26-5460) (R. p. 17). Plaintiff then brought supplemental proceedings against Gary Moore and his brother Robert Moore since they jointly owned the subject real property in Myrtle Beach, South Carolina. The collection of the judgment was referred to the Master-in-Equity pursuant to S.C. Code § 15-31-10 of the 1976 Code of Laws, as amended, and Rules 53 and 71 of the South Carolina Rules of Civil Procedure.

At the Master's hearing, Plaintiff sought to enforce the judgment and sell the property jointly owned by Defendants Robert A. Moore and Gary R. Moore located at 5848 Creekside Drive in Myrtle Beach, South Carolina. The Honorable Cynthia Graham Howe found that the Plaintiff's judgment only attached to one-half of the Creekside Drive property because Gary R. Moore was a tenant in common. (Order of Judge Howe, June 10, 2011, C/A No. 2008-CP-26-7941) (R. p. 7). The Master then referred the matter to the Sheriff for a Writ of Execution. The Defendants accepted service of the Writ and the Plaintiff requested the property be sold at a Court ordered auction.

An additional hearing was held before the Master-in-Equity who issued a ruling on April 15, 2013 (R. p. 4) that Gary Moore was entitled to a homestead exemption of \$50,000.00 in the real property located at 5848 Creekside Drive, Myrtle Beach, South

Carolina and that the judgment creditor should be required to pay the selling officer cash in an amount equal to the homestead exemption pursuant to *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002).

The Appellant moved for reconsideration of the Master's Order which was denied by the Master-in-Equity on June 10, 2013.

The Court of Appeals issued an Unpublished Opinion No. 2014-UP-466 on December 17, 2014 affirming the Master-in Equity. Appellant filed a Petition for Rehearing which was denied February 19, 2015. Petition now files a Writ for Certiorari in this case.

REASONS FOR GRANTING CERTIORARI

The Petitioner requests that this Court grant a writ of certiorari in the matter. There are substantial issues of statewide importance (including a constitutional issue) which this Court should review. The issues in this case are of public importance to the citizens of this state and the Bench and the Bar.

First, the judgment creditor at a judicial sale should not be required to pay the debtor a homestead exemption in cash.

Second, the South Carolina Constitution requires that the right of victims of a crime are supreme as compared to S.C. Code Ann. §15-41-10.

Third, when a judgment creditor is attempting to collect a judgment he or she may assert additional reasons for the collection of a judgment at any supplemental proceeding hearing.

Fourth, *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002) is inequitable as a matter of law and not consistent with S.C. Code Ann. § 15-41-10.

Fifth, SCRCP 59(e) is not a bar to supplementary proceedings.

Sixth, the Court of appeals erroneously applied *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct.App. 1999) to this case.

Each of the above issues involves collection of judgments throughout the State of South Carolina on a daily basis and implicate various rules including the homestead exemption statute, SCRCP 59(e), the South Carolina Constitution and South Carolina statutory law including S.C. Code § 15-41-10. Thus, because of interplay between the statutes, the Constitution and the case law Petitioner requests that the court issue a writ of certiorari to consider this case in detail especially in light of the horrendous facts of this case.

ARGUMENT

I. The Court of Appeals erred in holding that Petitioner could not raise new arguments in a motion to reconsider.

At the hearing before the Master-in-Equity, Petitioner made a Constitutional argument pursuant to Art. I, Section 24 entitled Victim's Bill of Rights. The Court of Appeals in its Opinion dated December 17, 2014 found that new arguments could not be raised in a motion for reconsideration. The Court cited *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct.App. 1999). In *Commercial Credit Loans*, the Court of Appeals merely held that because the transcript of the proceedings were omitted from the record it appeared that Commercial Credit made a novel argument for the first time.

Petitioner believes that a motion for reconsideration does allow additional arguments to be raised and, further, because Petitioner was attempting to collect a judgment and the litigation had ended, there was no bar to Petitioner raising additional arguments in a motion for reconsideration.

The Petitioner argued in a motion for reconsideration before the Master-in-Equity that the South Carolina Constitution protects victims' rights to restitution and that this judgment was akin to restitution because it was for the wrongful death of the Petitioner's wife during the commission of a crime by the Defendant. South Carolina amended its Constitution and adopted the Victims' Bill of Rights, which provides in pertinent part:

Article I.

Section 24. Victims' Bill of Rights.

(A) To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion or economic status, victims of crime have the right to:...

(9) receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury including both adult and juvenile offenders....

South Carolina has also adopted a homestead exemption statute for protection of debtors from judgments. It provides:

Section 15-41-30. Property Exempt from Attachment, Levy and Sale.

The following real and personal property of a debtor domiciled in this state is exempt from attachment, levy, sale under any mesne or final process issued by a court or bankruptcy proceeding:

1. The debtor's aggregate interest not to exceed \$50,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence...¹

Petitioner timely argued before the Master-in-Equity that the Victims' Rights Act was enacted as part of the Constitution and thus trumped the homestead exemption statute. (S.C. Code § 15-41-30(1)).

¹ This statute was amended on May 22, 2008 to increase the exemption from \$5,000 to \$50,000—the same day that the wrongful death Order (R. p. 11) in this case was signed by the Circuit Court. Thus, Plaintiff challenges the amount of the homestead exemption as \$5,000 under the old statute and not \$50,000 as found by the Court.

The reason that the South Carolina Constitution is supreme is found in Article I, Bill of Rights, Section 23 entitled “Provisions of Constitution Mandatory.” It states:

The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms.

Thus, the Constitution directs that the victim has a constitutional right of restitution which the homestead exemption (S.C. Code § 15-41-30(1)) cannot prohibit because the Constitution is the supreme law of the state.

This argument was echoed by this Court in *Littlefield v. Williams*, 343 S.C. 212, 540 S.E.2d 81 (S.C. 2000). In that case the Supreme Court held:

South Carolina citizens overwhelmingly ratified the Victims’ Bill of Rights, which ensures victims are informed of their rights and any alternative means that might be available to them if the criminal prosecution is unable to meet their needs.

Further, when construing the Constitution, the Supreme Court applies rules similar to those relating to the construction of statutes. See *McKenzie v. McLeod*, 251 S.C. 226, 161 S.E.2d 659 (1968). Accordingly, the Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the Constitution’s operation. The plain language of Article I Section 24(9) of the Constitution requires victims to receive “prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim’s loss or injury.” In this case, the homestead exemption for a criminal defendant is in clear contravention of the Victims’ Bill of Rights and the plain and ordinary language of the Constitution which allows the victim to have prompt and full restitution. Thus, the homestead exemption statute cannot be used as a shield from the plain command of the Constitution. Accordingly, the Master-in-Equity erred in not giving the Constitution of South Carolina priority over a state

statute and in failing to discuss the issue which was brought to the Court's attention. See *Gilstrap v. South Carolina Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992) (holding repeatedly this Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to a forced construction). With this in mind, the Master-in-Equity on reconsideration should have held the Constitution was the supreme law of the land and nullified the homestead exemption defense since the judgment arose from a criminal conviction of Moore.

While not completely on point, a similar issue has been decided in the United States Courts. In *U.S. v. Lamien*, 89 F.3d 1316 (1996), the Court held the homestead exemption was not a bar to a restitution order of the district court. See also *U.S. v. Rogers*, 461 U.S. 677, 691-694, 700-702, 103 S.Ct. 2132, 2141-43 (1983) (The government may enforce a lien upon property owned by a delinquent taxpayer including homestead property in which taxpayer's spouse shares an interest with the taxpayer.) See also, *U.S. v. Jaffe*, 314 F.Supp. 2d 216 S.D.N.Y. (2004) (Florida homestead exemption will not protect a defendant from his duty of restitution pursuant to a valid court order); *U.S. v. Hyde*, 497 F.3d 103 (1st Cir. 2007) (once a home is sold the homestead exemption does not follow the proceeds).² See also *Steward v. Bader*, 154 N.H. 75, 907 A.2d 931 (N.H. 2006) (Defendant convicted of murder of his wife; Defendant's homestead exemption extinguished because he was sentenced to life in prison.

² Some states have held that their homestead exemption statutes do not apply in civil forfeiture cases. *In re: Forfeiture of 5118 Indian Garden Road*, 654 N.W.2d 646, 650 (Mich.App. 2002); *In re: 1632 North Santa Rita*, 801 P.2d 432, 437 (Ariz.App. 1990). See also *U.S. v. Fleet*, 498 F.3d 1225 (11th Cir. 2007) (Appeals Court holds when a criminal defendant did not have enough cash to cover a payment ordered by a Court upon conviction the government could seize the defendant's interest in his homestead).

Finally, the Court of Appeals did not consider Petitioner's argument that he be allowed to file a new supplemental proceedings to enforce the judgment and have the Constitutional issue ruled on by the Master.

II. The Court of Appeals erred in applying *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct.App. 2002) to this case.

Plaintiff was attempting to collect a judgment in this case for the wrongful death of his wife. The Master-in-Equity and Court of Appeals ruled the homestead exemption protected Moore and that Petitioner was required to pay the homestead exemption of \$50,000 to Moore. This is illogical. First, Moore only owns half the home; thus, the exemption at best is \$25,000 (or less). Second, the homestead exemption was never intended to protect criminals' wrongful acts and to allow it to do so here is inequitable and unjust. Third, the Defendant signed the Confession of Judgment in this case on April 4, 2008 (R. p. 16) and the Circuit Court signed the Wrongful Death Settlement Order in this case on May 22, 2008 (R. p. 11), the same day the General Assembly increased the homestead exemption from \$5,000 to \$50,000.

Petitioner also believes that *Holden, supra* is unfair and inequitable because it allows the criminal wrongdoer to claim a homestead exemption. Fair play and justice require that the homestead exemption never apply to criminal acts of defendants. In fact, parts of the homestead exemption statute prohibit fraudulent conveyances into retirement accounts and thus allow the homestead exemption to be trumped for certain criminal acts. See S.C. Code § 15-41-30(A)(13) "a claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." Surely, the felony death of a person is as important as a forger or embezzler stealing money

and putting it into his or her retirement account? Accordingly, this Court ought to review this important legal issue because of the public policy issues at stake in this case.

III. The Court of Appeals erred in holding that the Plaintiff must pay cash in an amount equal to the homestead exemption pursuant to *Holden*.

The Court of Appeals erroneously ruled that the Plaintiff must pay cash to the Defendant in the amount of the homestead exemption. (See Order of Master dated April 15, 2013) (R. p. 4). In fact, S.C. Code Ann. § 15-41-10 provides the “Sheriff or other officer shall state the minimum bid for the property must be in the amount of the exemption...” Petitioner believes that this section means the Petitioner is not required to pay cash. It at most means no bid shall be accepted less than the homestead exemption. The effect of the Court of Appeals decision limits the sale of the property since it requires cash to be paid at the sale. Petitioner believes a sale should have been held and the bidding should have started at the homestead exemption amount. (This procedure only applies if Petitioner’s constitutional argument fails before this Court.) To hold otherwise frustrates the collection of a valid debt by the Petitioner since he is required to pay the homestead exemption at the sale.

IV. The Court erred in holding that the Petitioner could not raise additional grounds to a motion for reconsideration in a supplemental proceeding after judgment.

The Master in her Order found that the constitutional argument raised in these briefs could not be raised on a motion for reconsideration. The Court of Appeals affirmed. The Master cited *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct.App. 1990) for that proposition. However, this was not a trial. The trial was over and the Petitioner has a judgment. This was simply an attempt to enforce a judgment through supplemental proceedings. Thus, SCRCP 59 does not apply. Further, this additional ground could have

been raised at a new supplemental proceeding even if the Master and the Court of Appeals are correct. Thus, not allowing Appellant to raise this ground by a motion for reconsideration was judicially inefficient and a waste of scarce judicial resources.

Further, the Court should have considered the additional ground on the basis of manifest injustice. Here, Petitioner's wife had been killed by the Defendant who was serving a prison sentence for that act. Petitioner was only trying to add an additional argument as to why he should be able to sell the Defendant's property for the heinous death of Petitioner's wife. The Rules of Civil Procedure and the rules of supplementary proceedings ought to allow the Petitioner every opportunity to collect his judgment against the Defendant. The Court's Order requiring the homestead exemption to be paid in cash chills the collection of judgments and is unjust to the Petitioner who under the Court's Order would have been required to have \$50,000 cash at the sale – a completely unfair requirement which is not based on any statute.

CONCLUSION

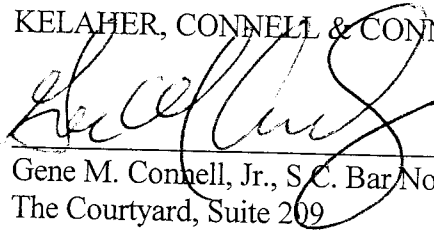
Petitioner submits that this case was wrongly decided. Further, the Court of Appeals and the Master-in-Equity should have considered Petitioner's constitutional argument regarding the Victims' Bill of Rights and the unfairness and inequitable results of *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct.App. 2002). Defendant should not be given the benefit of a \$50,000 homestead exemption especially since the Confession of Judgment signed by the Defendant was April 4, 2008 and the wrongful death order approving the settlement was signed on May 22, 2008 at a term of civil court in Horry County. This was the same day that the General Assembly amended S.C. Code Ann. § 15-41-10(1) to increase the homestead exemption from \$5,000 to \$50,000. Petitioner asserts that at the very most

the homestead exemption in this case is \$5,000 (if it is constitutional) and because Defendant Moore is only half owner it would only be \$2,500 not \$5,000.

It is for these reasons Petitioner requests this Court grant an Order of Certiorari to review these significant legal issues in this tragic case.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr., S.C. Bar No. 1358

The Courtyard, Suite 209

1500 U. S. Highway 17 North

Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

gconnell@classactlaw.net

Attorney for Petitioner

March 16, 2015
Surfside Beach, South Carolina.

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(S.C. Court of Appeals - Filed December 17, 2014)

John Sherrill and Estate of Gaye Marie Reynolds.....Petitioner

vs.

Gary Moore and Robert Moore.....Respondents

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 Writ of Certiorari** on the Respondent, through attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Kimberley Campbell, Esquire
Kimberley Campbell, LLC
P. O. Box 760
Murrells Inlet, SC 29576

DATE OF MAILING: March 16, 2015

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 16th day of March, 2015

Marie P. Freeman
Notary Public for South Carolina
My Commission Expires: 6/11/24

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW
SUITE 209
THE COURTYARD
1500 U.S. HIGHWAY 17 NORTH
P.O. DRAWER 14547
SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

March 16, 2015

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: *John Sherrill as Personal Representative of the Estate of Gaye Marie Reynolds v. Gary Moore and Robert Moore*
Appellate Case No. 2013-001433
C/A No. 2008-CP-26-7941
Our File No. 2002-0579C

Dear Mr. Shearouse:

Enclosed please find the following in the above-captioned matter:

- (1) Original and seven (7) copies of our Petition for Writ of Certiorari and Proof of Service;
- (2) Two (2) copies of the Appendix (one of which is unbound);
- (3) Our check for \$100.00 for the filing fee;
- (4) A self-addressed, stamped envelope for return of one filed copy of the Petition for Writ of Certiorari to this office.

By copy of this letter, I am hereby filing the Petition for Writ of Certiorari with the South Carolina Court of Appeals.

Further, by copy of this letter, I hereby serve attorneys for Respondents with the Petition for Writ of Certiorari.

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MAR 17 2015

SC Court of Appeals

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
March 16, 2015
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Thank you for your kind assistance in this matter.

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Jenny A. Kitchings, Clerk
South Carolina Court of Appeals

Kimberly Campbell, Esquire

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

P. O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587



Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

292111629 8012

