

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master-in-Equity

Appeal No. 2015-001820

Case No. 2013-CP-23-01715

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SC Court of Appeals

Michael Stehney, Jr.,.....Respondent,

v.

Ronald E. Ferguson, Susan M. Ferguson, and Ronald J. Ferguson, Defendants,

Of whom Ronald J. Ferguson is theAppellant.

Case No. 2013-CP-23-03179

Ronald E. Ferguson and Susan M. Ferguson,Plaintiffs,

v.

Christopher Todd Usher, Addison Corporation, and Addison Homes, LLC,.....Defendants.

**APPELLANT'S MEMORANDUM ADDRESSING
ISSUE OF APPEALABILITY**

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STATEMENT OF ONE ISSUE OF APPEALABILITY

Looking at the Master-in-Equity's Order dated July 24, 2015, an uninformed party might perceive the matter as an interlocutory discovery order quashing a subpoena. In reality the court was moved to act pursuant a Motion to Quash filed in Michael Stehney, Jr., v. Ronald E. Ferguson and Susan M. Ferguson, Civil Action No. 2013-CP-23-01715 along with a second Motion to Quash filed in Ronald E. Ferguson and Susan M. Ferguson v. Christopher Todd Usher, Addison Corporation and Addison Homes, LLC, Civil Action No. 2013-CP-23-03179, seeking to quash subpoenas issued in '1715'.

What the record fails to clearly indicate is the subpoena, issued in 1715, was to a financial institution, Greer State Bank, seeking financial information of a specific person and a specific period of time. This is not a new or novel topic as the United States Supreme Court ruled nearly three decades earlier in U.S. v. Miller, that the parties seeking to quash the subpoena lacks standing. Consequently, the Master-in-Equity lacked authority to entertain the motions or issue an order related to such.

Recognizing that when a court acts contrary to law, such as when the court lacks jurisdiction, South Carolina Code recognizes an immediate appeal to address the judicial errors.

BACKGROUND

On March 25, 2013, Civil Action No. 2013-CP-23-01715, Michael Stehney, Jr. v. Ronald E. Ferguson and Susan M. Ferguson was filed by Chace Campbell, P.A. in the Court of Common Pleas, Thirteenth Judicial Circuit, State of South Carolina. The underlying complaint alleges four causes of action which essentially claim Stehney suffered property damage to a "pond" he "developed" as a result of construction on the Ferguson's property and they are liable pursuant to the doctrine of respondeat superior and/or restrictive covenants filed by the former developers in 1974.

This matter is likely least convoluted of the trio of cases with Chace Campbell representing the plaintiff, the defendants acting pro-se, and an Order for Intervention making Ronald J. Ferguson a party

to the matter.

April 1, 2013, Rodney M. Brown filed a Civil Complaint styled as John D. Hatcher, Rachel Shaluly, James F. Gilbert, Molly A. Miller and Michael Stehney individually and as members of the Architectural Committee of Mill Creek Estates v. Ron Ferguson, Civil Action No. 2013-CP-23-01810, in the Court of Common Pleas, Thirteenth Judicial Circuit, State of South Carolina. The complainants in this action seem to premise they are vested with authority from the developers in 1974 to personally designate persons to inspect properties and determine if they are complaint with the restrictive covenants. Then, the same Michael Stehney, Junior, represented by Chace Campbell in '1715' claiming violations of restrictive covenants, goes on to claim he is a member of the committee now alleging violations with representation by Rodney M. Brown.

This case is one of the worst procedurally. Plaintiff's Complaint uses names not contained in records, not recorded or recognized by State of South Carolina, from pleading to pleading names of parties change, parties who have never been mentioned in the Complaint or served appear without motion or judicial approval. One item not in dispute, Ronald J. Ferguson was added to the matter by judicial order in 2014.

A third civil action (2013-CP-23-03179) was filed on June 5, 2013, Ronald E. Ferguson and Susan M. Ferguson v. Christopher Todd Usher, Addison Corporation and Addison Homes, LLC. The basis of action in this case centers around multiple disputes between Ronald E. Ferguson and Susan M. Ferguson and state licensed homebuilder Christopher Todd Usher along with the two companies he operates as part a residential building contract entered into between the parties on or about October 16, 2012 and breached on or about May 24, 2013.

This action is just as convulted with the original filing being a pro-se Complaint in response to actions taken by defendant(s) counsel Zachary Horton. Upon service the initial response was Counselor Horton was not retained to that extent. Following the intial hearing the plaintiffs obtained counsel for

representation who subsequently filed an Amended Complaint which included, among other allegations, Unfair Trade Violations, Constructive Fraud, and Negligent Misrepresentation. After two hearings over six months and mediation some five months later, defendant(s) filed an insurance claim and some fourteen months after litigation began the insurance company retained counsel, Brent M. Boyd. Subsequent to two hearings with Master-in-Equity Simmons in November and October 2014, plaintiffs obtained new counsel in December 2014. Ronald J. Ferguson is not a party to this case and not represented by counsel appearing on behalf of Ronald E. Ferguson or Susan M. Ferguson in the matters at bar.

All three cases have had multiple motion hearings over the past two years. Often the motions of more than one action are held on the same date. At one of the hearings a Circuit Judge Welmaker suggested it would be best if the cases were moved to the Master-in-Equity for disposition. Counselor Campbell consented to an Order of Reference in 1715 and Counselor Horton likewise consented in 3179. Plaintiffs nor their counsel has consented to transfer in 1810 and a Motion for Order of Reference has been pending since August, 2014.

Once 1715 was transferred to the Master-in-Equity, the court scheduled a status hearing on September 23, 2014. During that proceeding the lower court moved sua sponte to address an outstanding Motion to Amend Complaint to Name Third Party Indemnifiers. While there is no hearing transcript or formal order denying such, at the time the lower court denied such motion based on the naming of John Doe parties who were employed and/or otherwise provided services to Christopher Todd Usher, Addison Corporation and Addison Homes, LLC. As a result the lower became aware of the other pending litigation and counsel for 1715 admitted that they were employing the doctrine of respondeat superior in their action. At the conclusion of that hearing Counselor Campbell was directed to contact counsel in the other cases to appear at a second hearing on October 6, 2014.

October 6, 2014, there was a hearing including pro-se parties, Counselors Campbell (1715),

Balencia, Shealey, Horton, and Boyd (3179), and Brown (1810) appeared at the direction of Special Circuit Judge Simmons. This culminated with the Master-in-Equity's Order dated November 6, 2014.

The lower court was moved to hold a hearing on July 14, 2015 due to multiple motions filed by parties in 1715 and 3179. Among those being Addison Homes, LLC's Motion to Quash and all Subpoenas by Plaintiffs which states, in part "Specifically, counsel for Addison Homes, LLC received information from counsel for Michael Stehney, Jr. in the case of Michael Stehney, Jr. v. Ronald E. Ferguson and Susan M. Ferguson, Civil Action No. 2013-CP-23-01715. Counsel for Stehney Advised that he had received information the Ferguson issued a subpoena commanding Greer State Bank to produce records showing names of all deposits and withdrawals for any accounts related to Addison Homes, LLC for the period of October 12, 2012 through June 28. The Fergusons failed to provide a copy of this subpoena to counsel for Addison Homes, LLC, which means Plaintiffs also failed to give counsel for Defendant a ten (10) day notice required under Rule 45(5) of the South Carolina Rules of Civil Procedure."

ISSUE

While there exists multiple items subject to appellate review, this memorandum will be limited to a single, well settled issue regarding the issuance of a subpoena by Appellant, a party in 1715, to a financial institution regarding one of their customers (who happens to be a party in 3179) and the United States Supreme Court's long standing ruling that banking customers do not possess a property interest right in the records, lack standing to move for quashing production of such and there is no requirement to provide prior notice for that purpose.

ADDISON HOMES, LLC MOTION TO QUASH SUBPOENAS BY PLAINTIFFS (3179)

Based on the Motion To Dismiss Appeal filed with this Court on or about September 3, 2015 by Counselor Boyd, which states, "...Appellant Ronald J. Ferguson is not a party to Case No. 2013-CP-23-

03179[.]”, we can conclude that Appellant is not involved in that action and at this point dispense with addressing their 'Motion to Quash' was not properly noticed or served upon the Appellant in accordance with the South Carolina Rules of Civil Procedure or heard by the lower court in accordance with same. Additionally, we will not address the Rules of Professional Conduct where their lower court filing made allegations of the Ferguson's attempts to circumvent discovery in 3179 by seeking such in 1715 as it is obviously not only contradictory but an invalid argument to file a pleading in the lower court seeking to prevent a party from performing due diligence in discovery matters in an action, then files a pleading before this Court stating that party is not part of the case so they lack jurisdiction to appeal.

Critical to the determination of this appeal is the issue of standing, for if Usher lacks the power to move to quash the subpoena, all of the grounds urged by him in support of the application are irrelevant. Bank records, although they may reflect transactions between the bank and its customers, belong to the bank. The customer has no proprietary or possessory interests in them. Hence, he cannot preclude their production (United States v Miller, 425 U.S. 435).

The Master-in-Equity also chose to rely on an Order issued November 6, 2014 to the effect discovery matters between 1715, 1810 and 3179 shall proceed before that court despite no Order of Reference having been issued in 1810.

A quick review of that order finds the Court was aware two of the three cases involved in the October hearings and at the time the order was issued were before a U.S. District Court. U.S.C. §1446 (d) provides, “Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.” Thus, the Order from November 6, 2014 is also unlawful.

MOTION TO QUASH SUBPOENA TO GREER STATE BANK (1715)

The Motion to Quash in 1715 is quite specific in seeking to quash a subpoena issued to a financial institution related to a specific party during a specific time frame and who was under contract

to perform work for the defendants during the events in question. Plaintiff's counsel is relying on the doctrine of respondeat superior, asserting that defendants are responsible for the acts of others. Obviously their position being the defendants are ultimately responsible so the fact others may be responsible is not germane to the litigation.

While U.S. v. Miller, 425 U.S. 435 (1976) clearly dictates the lower court lacks jurisdiction to act on the motion of the individual(s) financial records sought, the State of South Carolina has their own spin on the activity in question.

RESPONDEAT SUPERIOR

The doctrine of *respondeat superior* rests upon the relation of master and servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. *Id.* An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. *Id.* These general principles govern in determining whether an employer is liable for the acts of his servant. *Id.*

The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Lane, supra. Under these circumstances the servant alone is liable for the injuries inflicted. *Id.* If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time. *Id.*

Consistent with this is the South Carolina Contribution Among Tortfeasors Act. At S.C. Code §15-38-15, A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party. Followed by South Carolina Rules of Civil Procedure, Rule 26(b)(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject

matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.¹

DUTY TO PERFORM DISCOVERY

Based on the records before the lower court the facts are clear: Plaintiff Stehney asserts property damage as a result of construction activity by defendants Ferguson. Defendants have a statutory right as well as a duty to investigate the actions of those for whom they alleged to be accountable - a South Carolina licensed homebuilder who was working pursuant to contract (Defendants in 3179). Equitable relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable; relief is granted for extrinsic fraud on the theory that by reason of the fraud preventing a party from fully exhibiting and trying his case, there never has been a real contest before the court of the subject matter of the action. Bryan v. Bryan, 220 S.C. at 168, S.E.2d at 610.

“Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments.” Mr. G. v. Mrs. G., 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995).

The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. In the Matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983) (attorney has an ethical duty not to perpetrate a fraud upon the court by

¹ Placing cognizance on the fact that allegations in 3179 involve Unfair Trade Violations, Constructive Fraud, and Negligent Misrepresentation, where discovery requires the full costs associated with performance of the contract including, but not limited to, labor, materials and profits the it would be tantamount to breach of duty for the Plaintiff(s) and/or counsel for them not to seek the same information in the subpoena for use in that case as well as the original records from any such employee, laborer or supplier as a matter of detecting fraudulent responses.

knowingly presenting perjured testimony). These actions by an attorney constitute extrinsic fraud.

Moreover, we note that, while their analysis does not turn on the categorization of fraud as intrinsic or extrinsic, numerous jurisdictions hold an attorney's subornation of perjury and/or the intentional concealment of documents constitute fraud upon the court. See Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072 (2d Cir. 1972) (institution of action by attorney who knew that there was complete defense to action might be fraud upon the court); Great Coastal Express, Inc., v. Int'l Brotherhood of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982) ("[I]nvolvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court."); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) ("A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony."); Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (fabrication of evidence where attorney is implicated is fraud upon the court); H.K. Porter Co. v. Goodyear Tire & Rubber, 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court."); Dixon v. Comm'n of Internal Revenue, 2003 WL 1216290 (9th Cir. 2003) (fraud on the court occurred where attorneys entered into secret settlement agreements with taxpayers in exchange for false testimony); Synanon Found., Inc., v. Bernstein, 503 A.2d 1254 (D.C. 1986) (attorney subornation of perjury and false statements to trial court constitute fraud upon the court); Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499 (E.D. Wis. 1978) (noting distinction between perjury involving officers of the court and witness or party); see 12 James Wm. Moore et al., Moore's Federal Practice ¶ 60-21[4][b] (3d ed. 2002).

JURISDICTION

SECTION 14-3-330. Appellate jurisdiction in law cases.

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

CONCLUSION

The United States Supreme Court has ruled that a bank's customers (i.e.-Usher, Addison Homes, LLC and Addison Corporation) do not have possessory or property interest in the financial institution's records and lacks standing to move for preclusion of their compliance with a subpoena, nor is there is notice requirement to the customer.

Moreover, the record clearly shows that the same parties seeking to preclude the material were engaged in a contract with the Fergusons during the time frame Stehney alleges he sustained damages and seeks to hold the Ferguson's liable under respondeat superior. Due to the fact Usher was acting as a licensed homebuilder and employed staff, subcontractors and suppliers on his own accord without Fergusons' knowledge or input and may be further subject to liability pursuant to South Carolina law for damages to Stehney, it is a breach of law and duty to limit the Ferguson's discovery to only records or information which may be obtained from Usher – effectively precluding a defense of third party liability when the court prevents any meaningful investigation of the parties as well as ability to ferret out fraud by those who have an interest and less than inclined to be forthcoming.

Existing law and statute fully supports Appellant moving for correction of an interlocutory order based on the misapplication of law that causes further damages, precludes employing a meaningful defense, and in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.

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Ronald E. Ferguson and Susan M. Ferguson,Plaintiffs,

v.

Christopher Todd Usher, Addison Corporation, and Addison Homes, LLC,.....Defendants.

CERTIFICATE OF SERVICE

I certify, that on this date, I served a copy of the Appellant's Opposition to Motion to Dismiss Appeal, dated 09/28/2015 on Plaintiff's Attorney of record by

_____ delivering it to him/her personally; or,

_____ mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows; or,

X mailing it to the address indicted by their counsel of record as follows:


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This the 28 day of September, 2015.



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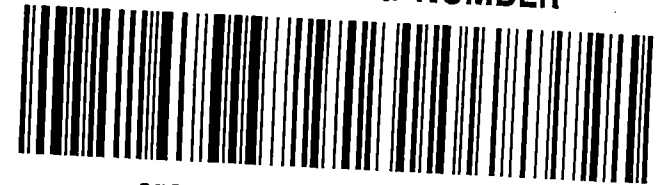
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