THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No.:2015-001754

James and Marietta Chaffin.....Appellants,

v.

Richland County Sheriff's Department, Deputy Brian Metz, Investigator Roy Livingston, Tallie and Devra Lackey, Individually and as the Parents to The Minor Child.....Respondents.

REPLY BRIEF OF APPELLANTS

Aimee J. Zmroczek, Esq. SC Bar No.:77193
A.J.Z. Law Firm, LLC
2003 Lincoln Street (29201)
P.O. Box 11961
Columbia, South Carolina 29211
(803) 400-1918 (telephone)
(803) 403-8005 (fax)
aimee@ajzlawfirm@gmail.com
Attorney for Appellants

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INTRODUCTION

The Lackey Respondents argues in its brief a number of facts that are not supported by the record. The dismissal in this case should be reversed.

The Appellants are not asking this Court to note the lack of support for the Appellants' dismissal. A critical review of the procedure of this case reveals the weaknesses in the Lackey Respondents' case, both factually and legally. As a matter for determination, the civil suit was filed timely from the dismissal of the action.

1. THE TRIAL COURT HAD A DUTY TO ADVISE PLAINTIFFS OF THE POTENTIONAL CONFLICT AND NOTIFY THE PARTIES AT BEST AND RECUSE HIMSELF AS A MATTER OF DUE PROCESS.

The Lackey Respondents claim in its first argument that there is no evidence to support the recusal. Appellants first learned of this issue after the motion to reconsider had been ruled upon and counsel was preparing the brief for the Court of Appeals. It is after discovered evidence by the Appellants however, was information known to both the Lackey Respondents and more importantly the trial court. Here, appellants are asking the Court of Appeals to deny the motion to dismiss to allow the Appellants to raise and argue this issue properly, although it should have been done so by the trial court. Appellants cannot properly present

evidence of bias regarding an issue they were not aware of until after the trial court had ruled and Appellants had exhausted all the proper procedures.

The appellate jurisdiction of the circuit court, in cases originating in a trial justice's court, does not embrace the hearing of a motion for a new trial in the latter court upon the ground of after-discovered evidence, for an appeal necessarily involves the idea of reviewing some action of the court below, alleged to be erroneous, and a motion for a new trial upon the ground of after-discovered evidence does not involve such an idea. It does not allege any error in the action of the court from which the appeal is taken, but is designed solely to supply a supposed deficiency in the evidence upon which the court below acted. It has none of the features of an appeal, but it is a purely original matter for the first time brought to the attention of the court, and hence the circuit court, exercising only appellate jurisdiction, had no authority to entertain such motion. It is upon this principle that this court, having only appellate jurisdiction, except in a certain class of cases, has invariably declined to entertain a motion for a new trial in the circuit court, upon the ground of after-discovered evidence, but has only gone so far as to suspend the appeal, so that the appellant may make the motion before the circuit court, provided a proper prima facie showing is made here to warrant such a course.

A revision made in 1974 to the statute prohibiting judge's participation in case which he has an interest or relationship to a party brought into the statute elements of general bias and prejudice recusal that had previously been addressed only in statute dealing with recusal of a district judge for bias in general; it entirely duplicated the grounds of recusal set forth in the latter statute but made them applicable to all justices, judges, and magistrates, not just district judges, and placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party's affidavit. 28 U.S.C.A. §§ 144, 455(b)(1). In lieu of exclusive reliance on personal inquiry by judge, or on appellate review of judge's determination respecting actual bias, the Due Process Clause is implemented, in area of judicial recusal, by objective standards which do not require proof of actual bias; in defining these standards, court asks whether, under a realistic appraisal of psychological tendencies and human weakness, the interest in question poses such a risk of actual bias or prejudgment that practice must be forbidden if guarantee of due process is to be adequately implemented. U.S.C.A. Const. Amend. 14.

(a) The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749, but this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable," Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712.

Appellants argue that the circuit judge was not legally qualified to accept or retain his assignment to preside over these cases at the time the cases were assigned to him. Specifically, Appellants contend that the judge violated his duty to fully disclose the full nature of his and his family's long-term relationships with Lackey Respondents family, specifically with the mother in this case. Moreover, Appellants argue that the circuit judge violated his continuing duty to fully disclose relationships between him and members of Appellants family. Thus, Appellants contend, this Court should vacate the order of dismissal and allow this relationship to be examined or be assigned to a different circuit judge to preside over these cases, and reassign them to a fair and impartial judge. Appellants contend that because a judge must disqualify himself and recusal motions are rare and unlikely to be overturned on appeal, an atmosphere exists whereby, as in the present appeal judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal.

Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR. The judicial canons provide direction as to when disqualification may be necessary, including but not limited to, instances where: (1) the judge holds personal bias or prejudice

towards a litigant or counsel or has personal knowledge of evidentiary facts in dispute in the proceeding; (2) the judge either worked on the case as a lawyer, a lawyer with whom the judge previously practiced law worked on the case while the judge was associated with the lawyer's firm, or the judge has been a material witness concerning the case; (3) the judge "knows" that he or a member of his family (spouse, parent, or child) has more than a de minimus economic interest in the litigation and the litigation will "substantially affect[ ]" that interest; or (4) the judge or his spouse or a person within the third degree of relationship to them (or the spouse of such a person) is either a party or the officer, director, or trustee of a party, is a lawyer in the case, known to have more than a de minimus interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(a)-(d). "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); Simpson v. Simpson, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct.App.2008); see also Ellis v. Procter & Gamble Distrib. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) ("In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.") (Citations omitted). It is the movant's responsibility to provide some evidence of the existence of the judge's

impartiality. Lyvers v. Lyvers, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct.App.1984) (citation omitted). Appellants have not had an opportunity to do this since the late knowledge.

2. THE DISTRICT COURT ERRED IN CONVERTING THE 12(b)(6) MOTION INTO A SUMMARY JUDGEMENT MOTION BECAUSE APPELLANTS WERE NOT AFFORDED THE OPPORTUNITY TO PRODUCE AFFIDAVITS FOR THE COURT TO CONSIDER.

In their brief, Lackey Respondents argue that since there were no affidavits considered, there was no harm. In the hearing transcript there were several instances of specific questions of fact addressed as well as the ones outlined in the Appellants memorandum in opposition.

3. THE TRIAL COURT ERRED IN FAILING TO HOLD THE LACKEY RESPONDENTS IN DEFAULT.

The Lackey Respondents argue that this issue is not ripe because the trial court did not rule on it. It is Appellants position that by granting the Motion to Dismiss the claims the court did, in fact, rule against the default motion. By granting the Lackey Respondents' motions the trial court ruled that there were not out of time in doing so as argued in Appellants' initial brief.

CONCLUSION

For the reasons stated above, as well as all of the reasons in the opening brief, this Court should reverse the dismissal of Appellants claims and reinstate the case.

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Livingston, Tallie and Devra Lackey,
Individually and as the Parents to
The Minor Child.....Respondents.

PROOF OF SERVICE

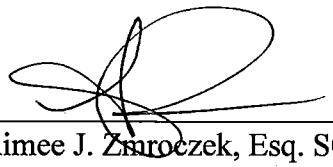
I certify that I have served the Reply Brief of Appellants upon the persons listed below by depositing a copy of it in the United States Mail, postage prepaid, on March 2, 2016.

Derek Shoemake
John Warren, III
John S. Simmons
Simmons Law Firm
1711 Pickens Street
Columbia, SC 29201

Roy Livingston
c/o Richland County Sheriff's Department
5623 Two Notch Road
Columbia, SC 29223

Robert Garfield
Andrew F. Lindemann
Davidson & Lindeman
PO Box 8568
Columbia, SC 29202

March 2, 2016



Aimee J. Zmroczek, Esq. SC Bar No.:77193
A.J.Z. Law Firm, LLC
2003 Lincoln Street (29201)
P.O. Box 11961
Columbia, South Carolina 29211
(803) 400-1918 (telephone)
(803) 403-8005 (fax)
aimee@ajzlawfirm@gmail.com
Attorney for Appellants

A. J. Z. Law Firm, LLC

Mailing Address
P.O. Box 11961
Columbia, SC 29211

Phone: (803) 400-1918
Toll Free: (844)-501-1661
Fax: (803) 403-8005

Physical Address
2003 Lincoln Street
Columbia, South Carolina 29201

Aimee J. Zmroczek, Attorney
aimee@ajzlawfirm.com

Christina Metze, paralegal
christina@ajzlawfirm.com

March 2, 2016

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

RE: James Chaffin and Marietta Chaffin v. Richland County Sheriff's Department, et al.
Appellate Case #: 2015-001754

Dear Madam Clerk:

Enclosed please find an original and two copies of a Reply Brief regarding the above referenced matter. Please file stamp the original and return the clocked copies to my clerk.

Sincerely,

Christina Metze

Christina Metze
Paralegal

Enclosures

cc: Derek Shoemake
John Warren, III
John S. Simmons
Robert Garfield
Andrew F. Lindemann
Roy Livingston