

THE STATE OF SOUTH CAROLINA
IN THE COURT COMMON PLEAS

APPEAL FROM LEE COUNTY
Common Pleas Courthouse

R. Ferrell Cothran, Jr., Circuit Judge

Case Number: **CASE NO: 3:13-CV-03481**

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SC Court of Appeals

United States of America, acting
through the Farmers Home Administration, United States
Department of Agriculture.....**Respondent,**

V.

Maxie Lee Thomas, Jr. a/k/a Maxie Lee
Thomas, deceased, and all other heirs at
Law and/or distributes of Maxie Lee
Thomas, deceased, his heirs, Personal
Representatives, executors,
Administrators, successors and assigns
And spouses if any he has and all
Person entitled to claim under or
Through him or any of them; all persons
Unknown claiming any right, title
Estate, interest in or lien upon the real
Estate described in the complaint
Herein; also any persons who may be in
The military service of the United States
Of America, being a class designated as
John Doe; and any unknown minors or
Persons under a disability being a class
Designated as Richard Doe, Laura Ann
Toney, and Brittany Nicole Thomas, Defendants,

Of Whom Laura Ann Toney is the **Appellant.**

APPELLANT'S INITIAL BRIEF

Laura Toney
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL JUDGE VIOLATE THE APPELLANT'S DUE PROCESS?
- II. DID THE TRIAL JUDGE VIOLATE SOUTH CAROLINA CODE 14-5-950?
- III. DID THE TRIAL COURT VIOLATED RULES: **Rule 5(b)(3); Rule 65(b) and Rule 3.3(d) OF THE SCRPC?**
- IV. DID THE TRIAL JUDGE VIOLATED CANONS **3(b)(7)(a)** and 3(g) of the South Carolina Code of Judicial Conduct?

STATEMENT OF THE CASE

The Respondents filed a Summons and Complaint with the Lee County Clerk of Court office on June 24, 2009. The Appellant answered the Complaint timely with counterclaims demanding a trial by jury. The Respondents filed an amended complaint on August 17, 2009, without leave of court. The Appellant filed an amended answer on September 11, 2009.

The Appellant filed an Amended Answer and counterclaim and an Amended Return to Motion on January 4, 2010, where the Appellant claimed the Respondents violated the Fair Debt Collection Act, the Appellant's Due Process by not providing a "Letter of Acceleration" or "Letter of Demand" Unauthorized practice of Law(Third Counterclaim) Committed Burglary and violated S.C. Ann 27-5-100 (Fourth Counterclaim) Committed Fraud(Fifth Counterclaim)

Participated in an improper notarization (sixth Counterclaim) and Constructive Fraud (Seventh Counterclaim).

The Respondents were granted a Motion to bifurcate by Judge Young on January 18, 2010. Summary Judgment on all of the Appellant's Counterclaims was granted and filed on March 26, 2015.

The Respondents prepared a Proposed Order and did not provide the Appellant a copy. The Appellant did not learn about the Proposed Order until after it was filed with the Lee County Clerk of Clerk. The Respondents agreed via emails after the fact that the Appellant was not provided a copy of the Proposed Order. The Appellant filed Objections to Proposed Order to Deny Amended Notice of Notice of Exparte Application and Application to Vacate Order.

A hearing was held October 1, 2015, in the Lee County Courthouse without proper notice to the Appellant. The Appellant did not receive written notice of the hearing until days after the hearing was held. An Order was issued deny the Appellant's Application for Exparte Communication and Deny the Appellant Motion to vacate judgment. The Appellant filed Objections To Proposed Order to Deny Amended Notice of Exparte Application and Exparte Application to Vacate Order.

STANDARD OF REVIEW

SECTION 14-5-950.Cause will be tried at special session of common pleas only if previously docketed; exception.

“At any special session of the court of common pleas provided for and held under the provisions of this article no cause shall be tried unless the same shall have been previously docketed upon some one of the calendars of the last preceding regular term of court; provided, that any cause may be docketed and tried by mutual consent of attorneys of record of such cause. This case was not previously docketed and the court did not get the Appellant's consent to proceed with this hearing which is in violation of South Carolina Code 14-5-950.”

Canon 3(g) of the South Carolina Code of Judicial Conduct states that:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that: (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. This canon creates the following directives for judges in considering ex-parte requests: 1) judges cannot have ex-parte communications that deal with substantive issues; 2) judges can have ex-parte communications that deal with scheduling administrative issues or

emergencies that are not substantive; 3) judges can only have ex-parte communications that deal with scheduling or administrative issues or emergencies that are not substantive if the judge **a)** reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex-parte communication; **b)** makes provision promptly to notify all other parties of the substance of the ex-parte communication and; **c)** allows an opportunity to respond.

Rule 5(b)(3), sets forth requirements that must be met in submitting proposed orders (including ex-parte orders) to the court. Rule 65(b), SCRCPP, sets forth the standards the court must apply in considering requests for ex-parte restraining orders. The Appellant was not provided with the Proposed Order until days after it was signed and filed. The Respondents admitted to not providing the Proposed Order (r.) The Appellant filed an Application for Exparte Order which is violation of SCRCPP 5(b)(3) requires that "[a]ny party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means." This rule would not appear to apply to exparte requests filed at the beginning of the case, as there is no opposing counsel. However, once counsel appears, proposed orders must be served on opposing counsel at the same time and by the same means that they are provided to the court. This rule encompasses not only ex-parte requests involving substantive relief but also includes proposed exparte order requesting expedited or emergency hearings.

ARGUMENTS

I. THE RESPONDENTS FAILED TO ADHERE TO THE SOUTH CAROLINA RULE OF CIVIL PROCEDURES AND THE RESPONDENTS ENGAGED IN EXPARTE COMMUNICATIONS

The Appellant was not provided with the Proposed Order until days after it was signed and filed. (r.) The Respondents admitted to not providing the Proposed Order (r.) The Appellant filed a Notice of Exparte Application and ExParte Application to Vacate Order (r.) The Appellant's Application was denied (r.). The Appellant also filed an Objections To Proposed Order to Deny Amended Notice of Exparte Application and Exparte Application to Vacate Order. (r.) Exparte Order which is a violation of SCRCP 5(b)(3) requires that "[a]ny party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means." This rule would not appear to apply to exparte requests filed at the beginning of the case, as there is no opposing counsel. However, once counsel appears, proposed orders must be served on opposing counsel at the same time and by the same means that they are provided to the court. This rule encompasses not only ex-parte requests involving substantive relief but also includes proposed exparte order requesting expedited or emergency hearings. The Respondents activities involves also violation of the Code of Professional Conduct. Please see **IN RE: John E. Cheatham.**

The Respondents participated in another Exparte communication on October 1, 2015, without providing proper written notice to the Appellant (r.). The

Respondent's letter was dated September 28, 2015, but not mailed until October 3, 2015. (r.) Also, this hearing was in violation of South Carolina Code of Laws **SECTION 14-5-950**. The Appellant did not consent to this hearing (r.) South Carolina Code of Law **14-5-950 States: Cause will be tried at special session of common pleas only if previously docketed; exception.**

“At any special session of the court of common pleas provided for and held under the provisions of this article no cause shall be tried unless the same shall have been previously docketed upon some one of the calendars of the last preceding regular term of court; provided, that any cause may be docketed and tried by mutual consent of attorneys of record of such cause. This case was not previously docketed and the court did not get the Appellant's consent to proceed with this hearing which is in violation of South Carolina Code 14-5-950.”

II. THE TRIAL JUDGE FAILED TO ADHERE TO SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT.

Canon 3(g) of the South Carolina Code of Judicial Conduct states that:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that: (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i)

the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. This canon creates the following directives for judges in considering ex-parte requests: 1) judges cannot have ex-parte communications that deal with substantive issues; 2) judges can have ex-parte communications that deal with scheduling administrative issues or emergencies that are not substantive; 3) judges can only have ex-parte communications that deal with scheduling or administrative issues or emergencies that are not substantive if the judge a) reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex-parte communication; b) makes provision promptly to notify all other parties of the substance of the ex-parte communication and; c) allows an opportunity to respond. (r.)

III. THE RESPONDENTS VIOLATED THE APPELLANT'S DUE PROCESS

The Appellant feels that her due process was violated because "The purpose of the hearing was to take testimony, finding of facts and conclusions of law and to enter final judgment. The Appellant received written notice of the hearing, but days after the hearing (r.). The notice was dated September 28, 2015, but the envelope was postmarked October 5, 2015.(r.)

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of

government power. Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be deprived of his property by an adverse result. ***Marchant v.***

Pennsylvania R.R. 153 U.S. 380, 386 (1894).

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. ***Carey v. Piphus, 435 U.S. 247, 259 (1978).*** "Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases. "***Mathew v. Eldridge 424 U.S. 319, 344 (1976).*** Thus the required el ***Carey v. Piphus, 435U.S. 247, 266-67(1978); Marshall v. Jerrico, Inc. 446 U.S. 238, 242 (1980); Nelson v. Adams, 120 S. Ct. 1579 (2000)*** ements of due process are those that minimize substantively unfair or mistaken deprivations by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests ***Fuentes v. Shevin, 407U.S. 67,81 (1972).*** At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result.)(amendment of judgment to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity of dispute).

Some form of hearing is required before an individual is finally deprived of a property interest. ***Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v.***

Hanrahan, 409 U.S. 38 (1974); Greene v. Lindsey, 456 U.S. 444 (1982). This right is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions.

The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment. **Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).** Thus, the notice of hearing and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. **Armstrong v. Manzo 380 U.S. 545, 552 (1965).**

Just as in criminal and quasi-criminal cases, and impartial decision maker is an essential right in civil proceedings as well. **Tumey v. Ohio, 273 U.S. 510 (1927); In re Murchison, 349 U.S. 133 (1955). Goldberg v. Kelly, 397 U.S. 254, 271 (1970).** The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. **Marshall v. Jerrico 446b U.S. 238, 242 (1980) Schweiker v. McClure, 456 U.S. 188, 196 (1982).** Thus a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would

redound to the benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them. **Gibson v. Berryhill, 411 U.S. 564 (1973)**. Or, the conduct of deportation hearings by a person who while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his raised a substantial problem which was resolved through statutory construction.

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). Handi v. Rumsfeld 03-6696, U.S. Supreme Court June 28, 2004; ("Procedural due process rules are meant to protect persons not from the deprivation but from the mistaken or unjustified deprivation of life, liberty, or property") see also id at 266 (noting the importance to organized society that procedural due process be observed emphasizing that the right to procedural due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions"). In **Boddie v. Connecticut 401 U.S. 371 (1971)**" These due process decisions, representing over a hundred years of effort by this court to give concrete embodiment to this concept, provide, complete vindication for appellant's contentions. In particular, precedent has firmly embedded in our due process jurisprudence important principles upon whose application we rest our decisions in the case before us. Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims on right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that Wherever one is assailed in his

person or his property, there he may defend." *Windsonr v. Mc Veigh* 93 U.S. 274, 277 (1876); *Baldwin v. Hale* 1Wall 223 (1864); *Hover v. Elliott* 167 U.S. 409 (1897). "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."Id, at 313.

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power. Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved. One of the basic criteria used to establish if due process is satisfied is whether such procedure was historically required in like circumstance.

The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country. In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."Fortunately, the States are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.

A passing reference by Justice O'Connor in a concurring opinion in *Glucksberg* and its companion case ***Vacco v. Quill*** may, however, portend a liberty interest in seeking pain relief, or "palliative" care. ***Glucksberg and Vacco, 521 U.S. at 736-37*** (Justice O'Connor, concurring). Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result.

Marchant v. Pennsylvania R.R., 153 U.S. 380, 386(1894).***Hagar v. Reclamation Dist., 111 U.S. 701, (1884).*** "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." Id. At 708; ***Accord, Hurtado v. California, 110 U.S.***

516, 537(1884).***Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175(1899).*** "A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." ***Hurtado v. California, 110 U.S. at 529.******Twining, 211 U.S. at 101.******687 Hurtado v. California, 110 U.S. 516,***

529 (1884); *Brown v. New Jersey*, 175 U.S. 172, 175 (1899); *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 244 1944).

"[P]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel. ***Ballard v. Hunter*, 204 U.S. 241, 255 (1907); *Palmer v. McMahon*, 133 U.S. 660, 668 (1890).**

"[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." ***Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).** At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. ***Carey v. Piphus*, 435 U.S. 247, 66-67 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Nelson v. Adams*, 120 S. Ct. 1579 (2000)** (amendment of judgement to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

Notice. "An elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available. The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.

Hearing. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment ..." Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." ***Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).** See also ***Richards v. Jefferson County*, 517 U.S. 793 (1996)** (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

***Jones v. Flowers*, 547 U.S. 220, 235 (2006)** (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.) "Parties whose rights are to be affected are entitled to be heard." ***Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).**

***Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-71 (1951) (Justice Frankfurter concurring). *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)**

Impartial Tribunal. Just as in criminal and quasi-criminal cases, an impartial decision maker is an essential right in civil proceedings as well. "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.

There is, however, a "presumption of honesty and integrity in those serving as

adjudicators," so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process. The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of state law was not such so as to disqualify them. Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In **Caperton v. A. T. Massey Coal Co., Inc.**, the Court noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion." The Court added, however, that "[t]he early and leading case on the subject" had "concluded that the

Confrontation and Cross-Examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all

types of cases where administrative actions were under scrutiny."

CONCLUSION

The record in this case will prove that the Respondents violated the South Carolina Rules of Civil Procedures and Rules of Professional Conduct. The record will also prove that the Respondents violated South Carolina Code of Laws. The Appellant respectfully requests that because of the behavior of the Respondents that this court will vacate the judgment in this case and award her damages that were requested in her counterclaims. The Appellant is also requesting any other damages that the Court deems proper and just.


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