STATE OF SOUTH CAROLINA)

COUNTY OF CHESTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

C.A.: 2015-CP-12-0179
2014CV1210400032

2016 AUG 31 P 3:15
FILED
CLERK OF COURT
CHESTER CO S.C.

Robert H. Breakfield, Esquire as attorney-in-fact for John D. Hinson John C. Hinson, Jerry Hinson, Kathy Huffstickle, Robert H. Hinson Darrell W. Hinson, Lois Hinson, Tina Jones, George Stanford as as Personal Representative of the Estate of Linda Stanford, William L. Hinson, Elaine H. Hensley, and William C. Hinson, Jr.,

Respondents,

vs.

Mell Woods,

Appellant.

ORDER DENYING APPELLANT's MOTION TO RECONSIDER, ALTER OR AMEND

RECEIVED
SEP 23 2016
SC Court of Appeals

After having thoughtfully considered Appellant's motion to reconsider, alter or amend, and after reviewing the Court's notes and considering the applicable statutory law, case law and evidence presented, I respectfully **deny** Appellant's motion. Pursuant to Rule 59(f) of the SCRCP, I also find that oral argument is not necessary. Both parties have provided the Court with enough material to make this ruling without the necessity of another hearing.

The Court's order entered on July 11, 2016 is the final order in this case.

AND IT IS SO ORDERED.

Chester, SC

August 31, 2016

Brian M. Gibbons
Circuit Court Judge

STATE OF SOUTH CAROLINA

COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS
On Appeal from Magistrate's Court
(2014CV1210400037)
2015-CP-12- 0179

Robert H. Breakfield, Esquire as attorney-in-fact for John D. Hinson, John C. Hinson, Jerry Hinson, Kathy Huffstickle, Robert H. Hinson, Darrell W. Hinson, Lois Hinson, Tina Jones, George Stanford as Personal Representative of the Estate of Linda Stanford, William L. Hinson, Elaine H. Hensley, and William C. Hinson, Jr.,

Applicant, Respondent on Appeal,

v.

Mell Woods,

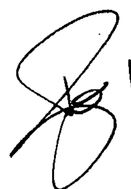
Appellant-Trespasser.

Order Affirming Magistrate's Court
Final Order and Judgment

FILED
2016 JUL 11 A 11: 54
CLERK OF COURT
CHESTER CO S.C.

This is an appeal from Magistrate's Court in a summary trespasser ejectment proceeding. The appeal was heard on June 1, 2016. Present were the Appellant, appearing pro se, and Respondent Robert Breakfield in his capacity as attorney-in-fact, and his attorney Mike Brackett. It was determined in case no. 2015-CP-12-0368, a related case, that the Magistrate's Court's Return for this appeal satisfied the requirements of the common law and applicable statutes.

The first matter considered was the Appellant's letter to the undersigned, dated May 28, 2016 and received May 31, 2016, calling attention to the fact that Appellant had been a client of the law firm where I worked before I became a circuit court judge, generally the period 2000 to 2005. However, Appellant admitted that he never saw me at the firm and that I had not personally represented him or provided legal advice to him. Appellant expressed on the record that his letter



was not a formal motion for recusal. The court is unsure how the situation described by Appellant would be a problem with respect to Appellant. If anyone might be concerned about the presiding judge having been in a law firm that in the past represented the Appellant, it would be the Respondent. The Respondent had no objection to going forward with the appeal hearing.

Davis v. Parkview Apartments, 762 S.E.2d 535 (S.C. 2014) addresses this issue.

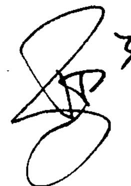
> Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR. The judicial canons provide direction as to when disqualification may be necessary, 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). (emphasis added.)
>
> Appellate courts "accord great weight to the trial judge's assurance of his own impartiality." Id. 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).

I have not met and do not know the Appellant. I have never worked on this case, and based on Appellant's showing, my former law firm did not work on this case at the time I worked there ten years ago. Appellant offered no evidence at the appeal hearing of the existence of judicial prejudice or bias or that I have personal knowledge of evidentiary facts in dispute. Further, Appellant's letter indicated that his communication with my former law firm included asking

questions about the Hinson family and what was going to happen if Mrs. Reba Hinson died. Those questions and/or issues were answered with finality by the South Carolina Court of Appeals, primarily in unpublished opinion no. 2014-UP-010 filed January 8, 2014, approximately 10 months before the trespass case herein was commenced. The appeal herein cannot affect the outcome of Appellant's prior cases and appeals. Accordingly, if Appellant's letter is merely a suggestion for recusal, for the reasons stated I decline the suggestion. Further, if Appellant's letter is deemed to be a formal motion for recusal, which Appellant expressly said is not the case, the motion is nevertheless denied.

Although Appellant filed a motion for continuance of the appeal hearing, the motion was waived when Appellant represented to the court that he was ready to proceed with the hearing and actually participated in the hearing without objection and without the court having acted on the motion. 17 C.J.S. Continuances §14 (1999). Well into the appeal arguments, Appellant first raised his motion for continuance and asked if the continuance would be granted. It was then too late; the hearing was underway, the motion had been waived, and the Court formally denied the motion. The appeal arguments continued.

From the record, the following history is noted: following a hearing on January 30, 2015, the Chester County Magistrate's Court issued an Order dated and filed March 27, 2015, finding Appellant to be a trespasser and announcing the intention of the court to issue a warrant of ejectment to the county sheriff to eject the Appellant from the subject premises. On April 15, 2015, Appellant herein, pro se, filed and served a Notice of Appeal to the circuit court (assigned the above-captioned case number). On April 24, 2015, Appellant, pro se, served a Rule 59(e), SCRCP, motion for



reconsideration[1] with respect to the March 27, 2015 Final Order and Judgment. Pursuant to Holmes v. E. Cooper Cmty. Hosp., Inc, 758 S.E.2d 483 (S.C. 2014) the appeal was dismissed without prejudice by Order dated May 1, 2015. Appellant then appealed the May 1, 2015 Order to the Court of Appeals. By Order dated June 25, 2015, the Court of Appeals dismissed Appellant's appeal because the order being appealed was not a final order. Appellant then filed a Petition for Rehearing. It was also denied. Appellant petitioned the South Carolina Supreme Court for a Writ of Certiorari. It was denied. While the appeal was pending, the Magistrate Court issued an Order denying Appellant's motion(s) for reconsideration.

What is Now Before the Court

1. The Magistrate's Court's March 27, 2015 Final Order and Judgment was appealed by Appellant's Notice of Appeal / Grounds of Appeal dated and served April 15, 2015.

2. On May 14, 2015 Appellant served an Amended Notice of Appeal setting out another nine grounds for appeal.

3. Additionally, while Appellant's appeal from the May 1, 2015 Order was being decided by the Court of Appeals and Supreme Court, the Magistrate's Court issued an Order dated July 15, 2015 denying Appellant's motion(s) for reconsideration. This was permitted because the pending appeal to the Circuit Court and to the Court of Appeals did not deprive the Magistrate's Court of jurisdiction to consider and rule upon the motion for reconsideration. See Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 119 (2d ed.2002), citing Hudson v. Hudson, 349 S.E.2d 341 (S.C. 1986). Appellant filed and served his "Restated Notice

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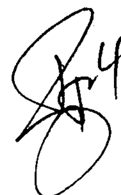
[1] Appellant actually filed and served four separate motions for reconsideration containing a total of 13 grounds or matters Appellant wanted reconsidered.



of Appeal" dated August 11, 2015, thereby consolidating his first appeal from the Magistrate's Court's March 27, 2015 Order and his appeal from the July 15, 2015 Order.

4. On or about August 4, 2015, Appellant filed and served, in the magistrate's court trespass case that is the subject of this appeal, an "Application for Change of Venue, and Two Days Notice to Adverse Party" and a Rule 12(b)(8) Motion to Dismiss. The application for change of venue was made pursuant to S.C. Code Ann. § 22-3-920 on the ground that Magistrate Judge Zamore was biased against him. By Order dated August 24, 2015, Appellant's motions were denied by the Magistrate's Court.

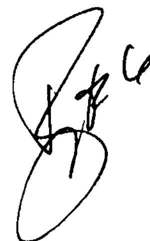
5. Appellant filed and served a Notice of Appeal on September 2, 2015, appealing from the Magistrate's Court's August 24, 2015 Order that denied Appellant's Rule 12(b)(8) motion and the motion for change of venue. The September 2, 2015 Notice of Appeal incorporates the original five grounds of appeal set out in Appellant's April 15, 2015 Notice of Appeal and purports to add two additional grounds related to the August 24, 2015 Order, specifically that it was error to deny Appellant's Rule 12(b)(8) motion and to deny Appellant's motion for change of venue. Appellant thereafter, on September 23, 2015, filed an Amended Notice of Appeal, amending the September 2, 2015 Notice of Appeal, to also appeal the August 24, 2015 Order on the grounds that it was error to strike the Appellant's Rule 12(b)(8) motion and to strike Appellant's motion for change of venue.

6. By Order dated February 10, 2016, the South Carolina Supreme Court denied Appellant's Petition for Writ of Certiorari. The Remittitur was issued February 22, 2016.

7. On or about February 29, 2016, Appellant filed and served his "Refiling of Appeal" in which he "restates, republishes, and incorporates by reference all of the grounds for appeal stated each [sic] of the notices of appeal from the magistrate court."

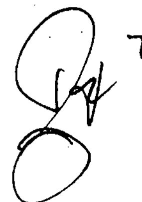
Accordingly, there are six Notices of Appeal filed subsequent to the March 27, 2015 Final Order and Judgment:

- April 15, 2015 Notice of Appeal/Grounds for Appeal to Circuit Court - this Notice includes five grounds for the appeal;
- May 14, 2015 Amended Notice of Appeal purporting to add nine new grounds for appeal to the April 15, 2015 Notice of Appeal;
- August 11, 2015 Restated Notice of Appeal - this Restated Notice of Appeal relates to the Order denying Appellant's Rule 59(e) Motion for Reconsideration, but it does not include any new grounds for the appeal in addition to those stated in the April 15, 2015 Notice of Appeal;
- September 2, 2015 Notice of Appeal and Grounds for Appeal - this appeal is from the Magistrate's Court's August 24, 2015 Order that denied Appellant's Rule 12(b)(8) motion and motion for change of venue. The one ground for the appeal is that "the one-time change of venue allowed by SC § 22-3-920 is not discretionary with a magistrate court, especially in view of the discovery of another action pending between the same parties concerning the same subject matter, Rule 12 (b)(8), SCRCP."
- September 23, 2015 Amended Notice of Appeal assigning error the magistrate's court's striking of the two motions.
- February 29, 2016 "Refiling of Appeal" - this "restates, republishes, and incorporates by reference all of the grounds for appeal stated each [sic] of the notices of appeal from the magistrate court."



Consequently, there are 18 grounds of appeal alleged by Appellant stemming from the Magistrate's Court's orders in the above-captioned trespass case: five (5) are set out in the April 15, 2015 Notice of Appeal and Grounds for Appeal, nine (9) are set out in the May 14, 2015 Amended Notice of Appeal, two are set out in the September 2, 2015 Notice of Appeal and Grounds for Appeal , and two are set out in the September 23, 2015 Amended Notice of Appeal. The issues on appeal are:

1. The case involves title to land and pursuant to S. C. Code Ann. § 22-3-20(2) the Magistrate's Court did not have subject matter jurisdiction to entertain the action.
2. The trespass case involved a defense of questionable title and that upon posting bond, the trespass case should have been discontinued until the matter of title was resolved, citing § 22-3-1110, 1120, and 1130.
3. Appellant assigns error because he was not allowed to cross examine Robert Breakfield at the trespass hearing.
4. Another issue on appeal raising "reasons that these proceedings involve land." It is merely another statement of the Appellant's assertion that the trespass case involved title to land, in particular because Appellant was arguing that Reba Hinson owned the fee simple estate in the land, and not only a life estate, or alternatively, that even if Reba Hinson owned only a life estate, the remaindermen to the life estate could nevertheless be compelled to deliver a deed to Appellant if he paid the purchase price. "Defendant [Appellant] assigns error on the fact that the magistrate failed to rule that these proceedings involve title to land."
5. The Magistrates' Court erred in failing to dismiss this action pursuant to S.C. Code Ann. § 15-67-20, on the ground that Respondents are limited to only one action to recover the subject property.



6. The summary trespass hearing was held without a jury.

7. Another claim of error on the Magistrate's Court's not having dismissed the trespass ejectment case pursuant to § 15-67-20.

8. The Magistrate's Court erred in its conclusion that Appellant is a trespasser within the terms of § 15-67-610.

9. Appellant complains about having been asked by the Court to execute an accounting for the monies Appellant paid into court pursuant to the Court's June 2011 Order.

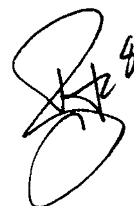
10. Appellant charges error based on the fact that the Magistrate Court is retaining money paid into the Court by Appellant since June 2011.

11. Appellant again assigns error on the Magistrate's Court's failure to comply with § 22-3-20, 22-3-1110, 22-3-1120 and 22-3-1130, by discontinuing the trespass case until his "questionable title" claim is resolved.

12. Appellant charges error on the Magistrate's Court's proceeding to the January 30, 2015 hearing after the Appellant had served a Notice of Appeal.

13. Appellant assigns error on the Magistrate's Court's inclusion in the Final Order and Judgment language that if the Appellant does not remove the structure on the land by the deadline set by the court, the Respondents, as the owners of the land, may remove the structure and Appellant shall have no recourse against Respondents so long as Respondents act in accordance with the law.

14. Appellant complains that the Magistrate's Court failed to consider the case of Eller v. Motley, 82 S.E.992 (S.C. 1914) and that the cited case requires that the court order the remaindermen to Reba Hinson's life estate to give a deed to Appellant.



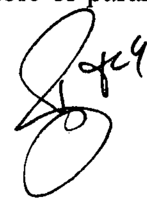
15, 16, 17 and 18. Appellant assigns error on the failure of the Magistrate's Court to grant Appellant's Motion for Change of Venue, and related Rule 12(b)(8) motion to dismiss, and for ordering that the two motions be stricken.

Scope of Review

Appellate review by the circuit court of an appeal from magistrate's court encompasses all the papers in the case including testimony in the lower court. The circuit court may affirm or reverse the judgment of the magistrate's court in whole or in part for errors of law or fact. See generally Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 26-27 (2d ed.2002). In this case, Respondent filed and served a full Respondent's Brief. Appellant did not file and serve a brief, although he filed at the hearing a memorandum of law on his issue on appeal no. 5, having to do with the operation of S.C. Code Ann. § 15-67-20. Appellant's presentation was almost exclusively oral.

Rulings on Issues on Appeal

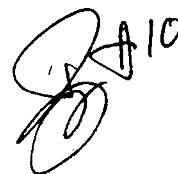
Appellant continues to claim, assert and allege that he holds some form of title or interest in the real property at issue, the property being occupied by Appellant as a trespasser as found by the Magistrate's Court, by virtue of an agreement between Appellant and Reba Hinson. That subject has already been decided adversely to Appellant by the Court of Appeals in its unpublished opinion no. 2014-UP-010. Whatever interest, if any, Appellant may have received from Reba Hinson terminated upon her death in 2007 because Reba Hinson owned only a life estate. The Magistrate's Court was correct in so finding. Consequently, issues on appeal nos. 1, 2, 4 and 11, in which Appellant claims that the trespass case involved a defense of questionable or paramount title are



without merit. This is not a case that attacks Appellant's title because it was judicially determined prior to the trespass proceeding that Appellant has no title.

With respect to issue on appeal no. 3, Appellant complains the he was not allowed to cross examine Mr. Breakfield at the trespass proceeding. The record reveals that Respondent (Breakfield) was required to make a prima facie showing of ownership of the property and that Appellant (Woods) was in possession without consent or permission. Richland Drug Co. v. Moorman, 71 S.C. 236, 50 S.E. 792 (1905). Respondent put into evidence the paper record of the past legal proceedings between the parties, including the case brought by Appellant in which he alleged and argued that he had a claim to title acquired from Reba Hinson who had acquired her title from her late husband's last will, a case that resulted in summary judgment in favor of Respondent's principals (2014-UP-010). Breakfield testified about the undivided interests held by his principals and that the Appellant did not have permission of any of the tenants in common to be on the subject property. Appellant asked "do I get to examine witnesses?" The court responded "this is a summary proceeding, you can not go through formal examinations." Appellant: "All right, well I mean he just had Mr. Breakfield testifying." The Court: "Well you're going to testify and you're not going to be questioned by anyone but me."

Respondent proceeded to testify/explain his case. During his case, Appellant again asked about being allowed to examine Breakfield.. The Court again would not allow that and would not allow Respondent's attorney to examine Appellant. Appellant represented to the court that Breakfield "has information that will be helpful to the court to decide." The Court asked what information Breakfield had that would be helpful to the court [in the pending case], thereby inviting a proffer of the evidence. Appellant answered "about that court order that they're basically - - -." The court immediately stated that the back story of the probate court order that determined which

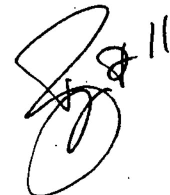


last will would be admitted to probate in the Reba Hinson estate was not relevant. Those matters related to the administration of the Reba Hinson probate estate had already been decided adversely to the Appellant by the South Carolina Court of Appeals in unpublished opinion no. 2013-UP-0256.

This issue is not preserved for appellate review because a sufficient proffer was not made by Appellant. Rule 103(b), SCRE, provides that

> (a) **Effect of Erroneous Ruling**. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
> (1) **Objection**. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> (2) **Offer of Proof**. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

To preserve the issue for appeal when a trial court excludes evidence, the party seeking its admission must show both error and prejudice. An appellate court need not address an issue regarding the exclusion of evidence where the proponent failed to make a proffer of the evidence that the witness would have given had he been allowed to testify. Greenville Memorial Auditorium v. Martin, 391 S.E.2d 546 (S.C. 1990); Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc., 450 S.E.2d 41 (S.C. 1994). The proffer must establish the relevance of the excluded evidence. State v. Hall, 439 S.E.2d 278 (S.C. 1994). The purpose of a proffer is to adequately develop the record in order to allow the appellate court a chance to determine whether the appellant was prejudiced by the trial court's refusal to admit the evidence. Love v. Gamble, 448 S.E.2d 876 (S.C.App. 1994). A proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice. When considering whether a proffer is sufficient to demonstrate error and prejudice "whatever doesn't make any difference, doesn't matter." Miles v. Miles, 397 S.E.2d 790 (S.C.App. 1990). Here, the Appellant made no effective proffer and cannot show error/relevance or prejudice, thereby



not preserving the issue for appeal.

With respect to issue on appeal no. 6, Appellant claims error in being denied a jury trial. The Magistrate's Court addressed this issue in its March 27, 2015 Final Order and Judgment. The purpose of S. C. Code Ann. § 15-67-610 is to give the real owner of land an "expeditious method of ejecting trespassers. " Richland Drug Co. v. Moorman, 71 S.C. 236, 50 S.E. 792 (1905). A jury trial is not provided for in proceedings under § 15-67-610 precisely because it is a proceeding for an expeditious "summary ejectment." See the heading for Title 15, Chapter 67, Article 7; Richland Drug Co. v. Moorman, 71 S.C. 236, 50 S.E. 792 (1905) ; Lynch v. Ball, 79 S.C. 243, 60 S.E. 691 (1908); Cotton v. Johnson, 71 S.C. 413, 51 S.E. 245 (1905). Neither § 15-67-610 nor § 15-67-620 mentions a right to a jury trial.[2] Additionally, § 15-67-620 provides that the Respondent (the person who is sought to be ejected from the premises) must appear before the magistrate and satisfy "him" [the magistrate], not a jury, of the bona fides of Respondent's possession.

The procedures to be utilized at a summary trespasser ejectment hearing are:

- The Plaintiff/Applicant "must bring himself within the statute by at least making before the magistrate prima facie showing that he is the owner of the premises and that defendant is a trespasser. "Richland Drug Co. v. Moorman, supra. Plaintiff must make such proof as should satisfy **the magistrate** that the case is one falling within the statute. Id.
- Once the plaintiff has made his showing of ownership and that the defendant is in possession without consent, the defendant, to avoid summary ejectment, must do two things: (a) satisfy **the magistrate** that Defendant "has a bona fide color of claim to the possession of such

[2] In Appellant's separate action for trespass to try title/quiet title (see South Carolina Court of Appeals unpublished opinion no. 2014-UP-010), he would have been entitled to a jury trial on the issue of his claim to paramount title had the action not been decided adversely to him on summary judgment. Therefore, he has not been denied the right to a jury trial on the issue of title.

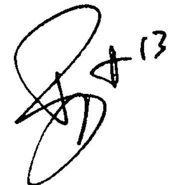
premises" <u>and</u> (b) "enter into bond to the person claiming the land, with good and sufficient security, to be approved by the magistrate." S.C. Code Ann. § 15-67-620.

- If the Respondent satisfies **the magistrate** that Respondent has a colorable claim of rightful possession, the summary proceeding should be dismissed, and the Plaintiff is left to the ordinary remedy for recovery of possession of the land. <u>Richland Drug Co. v. Moorman, supra</u>. (emphasis added.)

The Magistrate's Court was right that the law does not provide for jury trials in summary proceedings for ejectment of trespassers.

In his issue on appeal no 8, appellant claims that he does not fit the definition of a trespasser as that term is used in § 15-67-610. Appellant argues that the statute applies only to "squatters" and not to someone, like him, who purports to have a document giving him the right to possess the property. Appellant's "document" was rendered ineffective to give him any claim to possession or ownership by the Court of Appeals as explained above. An adult trespasser is a person whose presence is neither invited nor suffered. <u>Estate of Adair v. L-J, Inc.</u>, 641 S.E.2d 63 (S.C. App. 2007). Trespass is defined as "any intentional invasion of the plaintiff's interest in the exclusive possession of his property." <u>Hedgepath v. Am. Tel. & Tel. Co.</u>, 559 S.E.2d 327, 337 (S.C. App. 2001). The magistrate rightly found Appellant to be a trespasser.

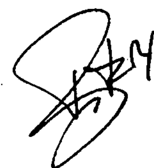
Issues on appeal 9 and 10 relate to the Magistrate's Court's requirement that Appellant sign an accounting to confirm his payment and the court's retention of monies being paid for rent /bond. This issue is not preserved for review because the Appellant does not claim that the accounting was inaccurate in any way. His only complaint is that the Magistrate Court was pushy in insisting that it be signed. In June, 2011, in an order on preliminary matters in the tenant eviction proceeding, Appellant was ordered to pay a fair rent into the court pending the outcome of the proceeding, to also



be held as bond. If Appellant did not prevail in his defense, the money would be paid over to the Respondents, as owners of the property, for Appellant's occupancy of property he does not own. Appellant has continued to make the ordered payments, and the magistrate court continues to receive and hold the funds. Based on the March 27, 2015 Final Order and Judgment, the funds being paid into and retained by the magistrate court will be paid over to Respondents when Appellant's appeal is concluded. At the appeal hearing, Magistrate Zamore delivered to the circuit court the funds that had theretofore been paid into the magistrate's court. Respondent moved that the funds be held by the circuit court clerk of court pending future order of the court. Appellant did not object. Accordingly, there is no error with regard to the accounting or the holding of the money by the court that requires a reversal of the Final Order and Judgment.

Issue on appeal no. 12 asserts error on proceeding with the summary trespass hearing notwithstanding that a notice of appeal had been filed previously. Appellant's argument is that once he learned that the Magistrate's Court would hold a non-jury summary ejectment proceeding, he filed a Notice of Appeal on January 21, 2015 that should have stopped the summary ejectment proceeding. At that time, there had been no hearing in the trespass matter, and no order or judgment had been issued from which to appeal. Appellant's's stated ground of appeal was that in his Answer he demanded a jury trial in this proceeding, and in the Magistrate Summons the Court indicated that the proceeding will be a "bench trial." Appellant argued that the Magistrate Summons was an Order denying him a mode to trial to which he has a right, thereby making the "order" immediately appealable. Appellant misreads the law.

First, the Summons is not a final judgment or order. Additionally, if the Summons operates as an order in this instance, it is not the type of order that is immediately appealable. "An order denying a jury trial is not immediately appealable unless it deprives the party of a mode of trial **to**



which he is entitled as a matter of right." Jean Hoefer Toal, Shahin Vafai & Robert A Muckenfuss, Appellate Practice in South Carolina 95 (2d ed.2002), (emphasis added.)

Appellant was not entitled to jury trial herein as a matter or right for two reasons: (1) as addressed hereinabove, the governing statute, § 15-67-610, does not provide for a jury trial in this proceeding. This is a proceeding for an expeditious "summary ejectment." See the heading for Title 15, Chapter 67, Article 7; Richland Drug Co. v. Moorman, supra.; Lynch v. Ball, supra.; Cotton v. Johnson, 71 S.C. 413, 51 S.E. 245 (1905). Neither § 15-67-610 nor § 15-67-620 mentions a right to a jury trial.[3] Additionally, § 15-67-620 provides that the Appellant, as the person who is sought to be ejected from the premises, must appear before the magistrate and satisfy "him" [the magistrate], not a jury, of the bona fides of Appellant's possession.

(2) Appellant argued in his notice of appeal that the subject before the magistrate court in this proceeding is the "issue of paramount title" to the land in question, and that the nature of the "issue" entitles him to a jury trial. As addressed hereinabove, Appellant had already litigated his claim to title to the land at issue and had lost that battle. What was before the Magistrate's Court in January, 2015 was the issue of Appellant's right, if any, to possession of the land separate and apart from his already failed claim to title.

When an order is not immediately appealable, the service and filing of a notice of appeal does not transfer jurisdiction to the appellate court, nor does it stay further proceedings in the lower court. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in Sout hCarolina 149. (2d ed.2002). The Magistrate Court continued to have jurisdiction over this matter notwithstanding

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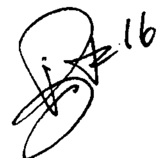
[3] As addressed above, in Appellant's separate action for trespass to try title, he would have been entitled to a jury trial on the issue of his claim to paramount title had the action not been decided adversely to him on summary judgment. Therefore, he has not been denied the right to a jury trial.

Appellant's erroneous notice of appeal. The Magistrate's Court did not err in proceeding with the hearing.

In his issue on appeal 13, Appellant complains that the Magistrate's Court's Judgment Order provides that he may have no recourse against the Respondent's principals for the removal of the Appellant's structure. This is brought about by the unusual situation of the Respondents' owning the land, with the Appellant owning the mobile home, and additions built onto the mobile home. Respondents have consistently acknowledged that Appellant is entitled to take his mobile home and improvements, but he must do so within a reasonable time. The content of the Order on this subject is not objectionable because it merely states the obvious. Respondent may not claim damages for Respondents' ultimate removal of the structure, if such becomes necessary, and if Respondents do what the law requires.

In his issue on appeal no. 14, Appellant complains that the Magistrate's Court failed to consider the case of <u>Eller v. Motley</u>, 82 S.E.992 (S.C. 1914) and that the cited case requires that the court order the remaindermen to Reba Hinson's life estate to give a deed to Appellant. Appellant interprets the <u>Eller</u> opinion to say that if a vendee (Appellant) enters into an installment land sale agreement with a vendor who holds only a life estate (Reba Hinson), and if payments are made to the vendor prior to her death, and if the vendor dies before the contract is fully performed then the vendee has the right to finish out the sales contract by paying to the remaindermen whatever is owed on the sales contract and the remaindermen can be ordered in specific performance to give the vendee a deed. That is not the law, and that is not what <u>Eller</u> says. The portion of the case quoted in Appellant's issue on appeal 14 addresses the question of a vendor who has fee simple title who dies before the full purchase price under the sales contract is paid. It confirms that the "heirs at law of the vendor" (not remaindermen to a life estate) can be compelled to carry out the contract that the



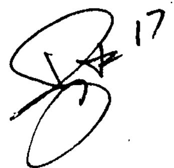
vendee had with the deceased vendor. It has been established, as addressed above, that Appellant has had no title or interest in the real property since Reba Hinson's death.

Issues on appeal 15, 16, 17 and 18. Appellant assigns error on the failure of the Magistrate's Court to grant Appellant's Motion for Change of Venue, and related Rule 12(b)(8) motion to dismiss, and for ordering that the two motions be stricken. On their face, the motions are without merit. A Rule 12(b)(8), SCRCP motion to dismiss (another action is pending between the same parties for the same claim) is waived if not included in a pre-answer motion or in a responsive pleading. Appellant did not include the objection in a responsive pleading or in a pre-responsive pleading motion. The motion was made not only after trial, and after entry of a final order and judgment but also after an appeal had been taken. It was untimely and waived.

The motion to change venue was made pursuant to S.C. Code Ann. § 22-3-920. Just as with the motion to dismiss, this motion is wholly without merit. The statute reads:

> Whenever in a case in the court of a magistrate (a) either party in a civil case, after giving to the adverse party two days' notice that he intends to apply for a change of venue or (b) the prosecutor or accused in a criminal case shall file with the magistrate issuing the warrant or summons an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate and setting forth the grounds of such belief, the papers shall be turned over to the nearest magistrate not disqualified from hearing the cause in the county, who shall proceed to try the case as if he had issued the warrant or summons. But in counties in which magistrates have separate and exclusive territorial jurisdiction the change of venue shall be to another magistrate's district in the same county. One such transfer only shall be allowed each party in any case.

The motion was made too late and was supported by an affidavit that was based on Appellant's complaint that Judge Zamore was not giving credence to Appellant's claim of ownership to the subject property. The statute obviously envisions that the motion be made before trial because it must be based on the good faith belief that he cannot get a fair trial. The trial had taken place, and the case had been appealed <u>before</u> the motion to change venue was made. See the S. C. Courts



website, Trial Courts, Magistrate's Courts, Summary Court Judges Benchbook , Section D.1 (Change of Venue), which reads:

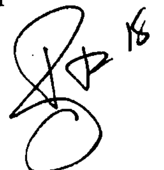
> S.C. Code Ann. § 22-3-920 provides that either party in a civil case, or the prosecutor or the accused in a criminal case, may apply for a change of venue. In civil cases, the party seeking the change of venue must give the adverse party at least two (2) days notice of his/her intent to seek a change of venue prior to applying for such, unless the affidavit shows that the necessary facts were not discovered until it was too late to give such notice. In criminal cases the request for a change of venue should be made prior to trial, unless in view of all the circumstances the person requesting the change did not have a reasonable opportunity to make such a request previously. Op. Att'y Gen. No. 1733, dated 1963-64.
>
> **In either a civil or criminal case, the person requesting the change of venue must file with the magistrate an affidavit stating that the individual does not believe he/she can receive a fair trial.** The affidavit must also state the grounds supporting the belief of the requesting party. If the affidavit sets forth grounds for a belief that the party cannot obtain a fair trial, then the grant of a change of venue is mandatory. (emphasis added).

Based on the forward-looking language of the statute, a tardy motion for change of venue cannot be made after trial as a substitute for an appeal.

Issues on appeal nos. 5 and 7 each assert error to the Magistrate's Court in not dismissing the trespass case pursuant to § 15-67-20. Section 15-67-20 reads: "The plaintiff in actions for recovery of real property or the recovery of the possession of real property is limited to one action for recovery."

The record shows that in 2010 a property management company on behalf of the Reba Hinson remaindermen and who were then the owners of the real property at issue brought an action in Magistrate's Court to have Mr. Woods, then alleged to be a tenant, removed from the property. The Magistrate entered an Order dated June 14, 2010 that read:

> **Dismissed Without Prejudice on June 14, 2010.** There was no clear ownership of the property or clear right to collect or receive rent. Reba Hinson had a life estate in the property, which, on her death, was inherited by her children or their heirs. As to the Counterclaim filed by the defendant, there is no Counterclaim in an



Eviction and the $160,000 is over the jurisdiction of this Court. Therefore: the Order and Rule to Show Cause, the Application for Ejectment and the Counterclaim are **Dismissed without Prejudice**.
(Emphasis added.)

In March, 2011, Breakfield, as attorney-in-fact for the Reba Hinson remaindermen, commenced an action in the magistrate's court to have Mr. Woods, alleged to be a hold-over tenant, removed from the property. As initially filed, it was also a tenant eviction proceeding. The Magistrate's Court's Order on Motions, deciding various pre-trial matters, was issued on June 2, 2011. Appellant appealed that Order to the Circuit Court, and to the Court of Appeals, eventually resulting in unpublished opinion no. 2014-UP-076 filed February 26, 2014. Appellant's petition for certiorari to the Supreme Court was dismissed by Order dated June 27, 2014. Appellant's Motion to Reinstate Appeal was denied by Order dated September 24, 2014.

On June 22, 2011, Appellant herein filed an action in the Circuit Court against the Reba Hinson remaindermen alleging that Appellant had acquired fee simple title to the real property at issue from Reba Hinson who, in turn, had received fee simple title from her late husband by and through his last will. Appellant labeled his action as trespass to try title. Respondent labeled it an action to quiet title or to construe the last will of Levie Hinson. The Circuit Court granted summary judgment in favor of the Reba Hinson remaindermen. Appellant appealed the summary judgment Order, which was eventually affirmed by the Court of Appeals in its unpublished opinion no. 2014-UP-010. More time passed while Appellant unsuccessfully petitioned the Supreme Court for a writ of certiorari. Consequently, by his own legal action, Appellant established that he held no title or interest in the property and that he was therefore a trespasser.

In November, 2014, on the basis of unpublished opinion no. 2014-UP-010, Breakfield, as attorney-in-fact for the Reba Hinson remaindermen, commenced a summary ejectment of trespasser

proceeding based on Appellant's claim of being an owner and not a tenant. At the first merits hearing held in Magistrate's Court, the Respondent elected to proceed with the summary trespass remedy in lieu of the tenant eviction remedy because of Appellant's claims of ownership and the fact that the issue of his alleged ownership had by then been judicially decided adversely to him in unpublished opinion no. 2014-UP-010. This was effectively an amendment of the pleadings to allege alternate causes of action, one for trespass if Appellant claimed title and one for eviction of tenant if Appellant claimed to be a tenant. Although the Magistrate Court assigned another case no. to the trespass action, it was in effect the addition of a new and alternate cause of action allowing the decision to pursue one and not the other at the hearing. This was consistent with the rules governing magistrate court proceedings: the rules are to be construed to secure the just, speedy and inexpensive determination of every civil case, Rule 1, South Carolina Rules of Magistrates Court; the court shall be lenient in the allowance of changes or amendments to pleadings, Rule 14, South Carolina Rules of Magistrates Court; trials are to be conducted in an informal manner, Rule 13, South Carolina Rules of Magistrates Court. In magistrate's court, substantial justice cannot be sacrificed on the alter of technical procedure. As of November, 2014, Respondent's principals (the Hinson remaindermen) had not received an adjudication from a court with respect to requiring Appellant to vacate the property.

On January 30, 2015 the Magistrate's Court held the trespass hearing that is the subject of this appeal; Respondent Breakfield elected to proceed on the trespass case and not on the eviction of tenant case. The resulting Final Order and Judgment dated March 27, 2015 (the order being appealed herein) was the first dispositive order or judgment in any proceeding for the recovery of the subject real property.

Appellant argues that this history runs afoul of S.C. Code Ann. § 15-67-20 in that Respondent (and his principals) have commenced more than one action to recover the property and that the Magistrate's Court erred in not dismissing the trespass case. Relying on Carr v. Mouzon, 76 S.E. 201 (S.C. 1912), Appellant argues that the Hinson remaindermen's actions to evict Appellant as a tenant, and/or to eject Appellant as a trespasser, were all actions for recovery of the land at issue and that the § 15-67-20 limitation of one action to recover the property or its possession applies without regard to the disposition of the prior actions. According to Appellant, when the first tenant eviction case resulted in an order of dismissal without prejudice, Respondent's principals were then foreclosed from any other action to establish their ownership and to recover the property. And, when Respondent elected to pursue the summary trespass remedy and to forgo the tenant eviction remedy, that was an additional action in violation of § 15-67-20. The Court disagrees.

The statute in Carr,[4] a predecessor version to § 15-67-20, expressly provided that a second action was permitted within two years of the verdict, judgment, non-suit or discontinuance in the first action. Appellant argues that according to Carr a nonsuit or discontinuance for any reason counts as an action to recover real property for the purpose of applying the limitation in §15-67-20. However, the statute construed in Carr is not the statute now in effect. Section 15-67-20 no longer permits more than one action and no longer contains the non-suit and discontinuance provision found in earlier versions of the statute. Obviously, the non-suit and discontinuance provision operated only in the two-action exception to res judicata found in earlier versions of § 15-67-20.

Appellant cites Stewart-Jones Co. v. Hankins, 152 S.E. 430 (S.C. 1930) in which three eviction actions against the Defendant, and the failure to pay costs of the first action, required a dismissal of the third action. However, Stewart-Jones is factually distinguishable from the case now

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[4] Subdivision 2 of section 98 of the Code of Procedure.

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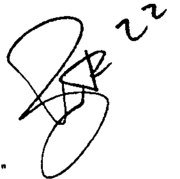
before the court in significant respects. It was decided on the content of Section 317, Code of Civil Procedure (1922), now amended and codified as S.C. Code Ann. § 15-67-20. Section 317 then provided:

> "The plaintiff in all actions for recovery of real property, or the recovery of the possession thereof, is hereby limited to two actions for the same, and no more: Provided, that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a non-suit or discontinuance therein."

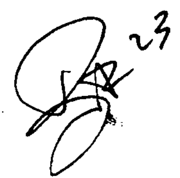
The opinion in Stewart-Jones rested on the defense that the action on appeal "was commenced by the plaintiff without the payment of the costs in the said former action, which was a condition precedent to its right to bring this action." Id. at 437. The expressly stated basis for the opinion (the payment of costs in the former action) was removed from the statute in 1988, now § 15-67-20, when the provision for a second action subject to the payment of costs in the former action was removed from the statute.

Further distinguishing the opinion is the fact that the Defendant in Stewart-Jones had a deed to the property, as did the Plaintiff, and that each persistently claimed title. Herein, by the time the tenant eviction case had become a trespass case, it had been definitively established by the Court of Appeals, confirmed by denial of certiorari by the Supreme Court, that Appellant never had a deed and has no valid, enforceable claim to title whether by adverse possession or by acquisition from Reba Hinson. Nevertheless, Appellant argues that he is entitled to a deed or a declaration of title notwithstanding that the courts have determined that he has not held title in any possible form since Reba Hinson's death in 2006. That would be a truly unconscionable result.

The underlying policies of the 1922 statute and the post-1988 revised statute guide the court in determining the operation of § 15-67-20 in this case. There are no reported cases addressing the application of the post-1988 §15-67-20. The pre-1988 two-action limitation was considered in Ladd



v. DuPre, 147 S.E.2d 253 (S.C. 1966). In that case P1 brought an action against D1 for possession of land. It resulted in a final judgment awarding possession and damages to P1. D1 then instituted an action against P1 to regain possession of the land, arguing that S.C. Code Ann. § 10-2402 (1962) permitted a second action to determine possession. P1, who was the plaintiff in the first action and the defendant in the second action, pled res judicata and argued that the final judgment in the first action was a bar to the second action. The circuit court dismissed the complaint in the second action claiming that res judicata operated as a bar to the second action. The Supreme Court construed the statute thus: "The statute must be construed in the light of the common law rule, recognized in this State, which permitted a plaintiff to bring any number of actions for the recovery of the same real property." Citing Carr v. Mouzon, 76 S.E. 201 (S.C. 1912) the court in Ladd continued: "the courts refused to apply the general principles of res judicata to such actions . . . because title and right to possession of real property was regarded with special favor, and it was thought that such important rights should not be finally determined by one action." It follows that the two-action limitation was enacted to preserve the exception to res judicata but to limit the right of a person to two actions for the recovery of real estate and also to protect "a person in possession of, and claiming title to, real estate." (Emphasis added.) Such person has a right to be "relieved of continued attacks on his title." (Emphasis added.) The pre-1988 statute was construed to mean that "a party out of possession, who loses his first action, shall have a second action, but was never intended to modify the doctrine of res judicata otherwise." (Emphasis added). The policy of the former statute gleaned from the language of the Ladd v. DuPre opinion negates Appellant's arguments herein. In the eviction/ejectment proceeding Appellant was not legitimately claiming title to the land, and Respondent was not attacking Appellant's title, because the Court of Appeals had already decided the question of title. And, the Hinson remaindermen did not "lose" the first action because it did



not proceed to a ruling or judgment. Dismissal of a case "without prejudice" means a plaintiff may reassert the complaint by curing defects that led to the dismissal, in contrast to a dismissal of a complaint "with prejudice" which is intended to bar relitigation of the same claim. Spence v. Spence, 628 S.E.2d 869 (S.C. 2006).

The change in policy effectuated by the 1988 amendment of the statute appears to be that by amending the statute to allow only one action, the common law res judicata doctrine is now codified with respect to actions to recover real property. Under modern law and procedure real property disputes are no longer viewed as needing a special exception to res judicata. For the common law res judicata doctrine, and/or its equivalent statutory limitation in § 15-67-20 to apply, Appellant must show that (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication (final judgment) of the issue by a court of competent jurisdiction. Catawba Indian Nation v. State, 756 S.E.2d 900 (S.C. 2014). A "final judgment" for purposes of res judicata must finally dispose of some matter which under substantive law to be applied and procedural law of forum can be, and has been, finally disposed of. McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich, 482 S.E.2d 564 (S.C.App. 1997).

Nothing was decided or disposed of by court action in the first tenant eviction proceeding. It was dismissed without prejudice. The second tenant eviction proceeding was discontinued without proceeding to trial when the Respondent elected to proceed on the trespasser theory of the case. The summary ejectment of trespasser proceeding did go to a hearing and produced the trial court's only order, adjudication or judgment that finally disposed of the dispute between these parties. Accordingly, § 15-67-20 is not a bar to the trespass case.

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Injunction

2015-CP-12-0368, a companion case to this appeal, has been dismissed by separate order, but only after transferring Appellant's cause of action for injunction to this case. On or about August 10, 2015, Appellant commenced case no. 2015-CP-12-0368 by filing a complaint alleging two causes of action. First, he sought a writ of mandamus to compel the Magistrate to file a Return of the magistrate's court proceedings in 2015-CP-12-0179 (the trespass case); and second, he sought an injunction to enjoin the Magistrate from issuing a warrant or writ of ejectment in the trespass case. In effect, Appellant seeks a preliminary injunction to enjoin a future action pending the outcome of his appeal. Respondent Breakfield, as attorney-in-fact for the Hinson remaindermen, moved to intervene and the motion was granted. Respondent Breakfield in his representative capacity opposes the cause of action for preliminary injunction.

A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief he will suffer irreparable harm, that he has a likelihood of success on the merits, and that there is no adequate remedy at law. Poynter Invs. Inc. v. Century Builders of Piedmont, Inc., 694 S.E.2d 15 (S.C. 2010).

This court denies the Appellant's request for a preliminary injunction. First, the action for injunction is untimely pursuant to the terms of S.C. Code Ann. § 15-67-640. Additionally, on the merits, Appellant has not satisfied the requirements for preliminary injunctive relief. Paragraph 10 of his complaint in case no. 2015-CP-12-0368, the cause of action for an injunction, alleges that "the aim of the magistrate action is to evict plaintiff [Appellant] from land that plaintiff Mell Woods acquired through ten years adverse possession ." He does not allege another source for his purported title apart from adverse possession. Appellant further alleges that he therefore holds an ownership interest in the land and is entitled to participate in a separate partition action in which the Hinson

remaindermen are partitioning the land.

Appellant had an adequate remedy at law, and he sought it in his action to construe the Levie Hinson last will. That action resulted in Court of Appeals unpublished opinion no. 2014-UP-010 which expressly ruled that Appellant acquired no ownership by adverse possession. Appellant cannot show a likelihood of success on the merits of his appeal. His claim to right of possession of the real property at issue is based on either adverse possession, as alleged in case no. 2015-CP-12-0368, or having acquired title from Reba Hinson. The Court of Appeals' unpublished opinion no. 2014-UP-010 decided both of those claims adversely to the Appellant. Accordingly, Appellant is not entitled to injunctive relief, and his action/motion for such is denied. The magistrate is free to issue a warrant or writ of ejectment.

On the basis of the rulings herinabove, it is the Order of this Court, sitting as an appellate court, that:

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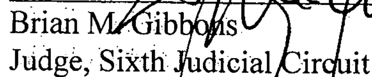
1. The Magistrate's Court's Final Order and Judgment dated March 27, 2015 is affirmed.
2. The Magistrate's Court's July 15, 2015 Order denying Appellant's Motions for Reconsideration is affirmed.
3. The Magistrate's Court's August 24, 2015 Order denying Appellant's motion to change venue and motion to dismiss is affirmed.
4. Appellant's cause of action or motion for injunction to enjoin the magistrate from issuing a warrant or writ of ejectment is denied.

IT IS SO ORDERED.



Brian M. Gibbons
Judge, Sixth Judicial Circuit

~~June~~ July 7, 2016