THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

---

Case No. 06-CP-10-1772

---



Leon Chisolm, James Roosevelt Chisolm, Doris G. Fladger, Robert Chisolm, Florence Chisolm, Alice C. Jenkins, Sadie Y. McDonald, Martha Pryor, Patricia Millian, Margaret E. Warren, Andrew K. Chisolm, Edrina L. Wilson, Carl Chisolm, Lawrence Chisolm, Roosevelt Chisolm, II, Louis Chisolm, Eddie Chisolm, Leroy Chisolm, and Tommy Chisolm, Respondents

v.

Mary Frances S. Chisolm, William Chisolm, Emily C. Campbell, Debra C. Murphy, Alice C. Frazier, Cora C. Brown, Cordell Chisolm, Charles Chisolm, Jr., Phillip Chisolm, Anthony Chisolm, David Chisolm, Leonard Chisolm, and Levy Chisolm, Appellants

---

# FINAL BRIEF OF RESPONDENTS

---

Harold A. Oberman
OBERMAN & OBERMAN, LLC
60 Markfield Drive, Suite 2
Charleston, SC 29407
(843) 577-7010
Kyle T. Varner
Barry I. Baker
One Carriage Lane, Building H
Charleston, SC 29407
(843) 766-9007

Attorneys for Respondents

Other Counsel of Record:

Willie B. Heyward, Esquire
Heirs' Property Law Center, LLC
27 Gamecock Avenue, Suite 200
Charleston, SC 29407
(843) 745-7055

Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases



Statutes

## STATEMENT OF THE ISSUES ON APPEAL

I. WHEN THERE IS NO EVIDENCE OF JUDICIAL PREJUDICE, AND WHEN APPELLANTS CONCEDE THERE IS NO JUDICIAL PREJUDICE, SHOULD THE MASTER'S FAILURE TO DISQUALIFY HIMSELF BE REVERSED ON APPEAL?

II. CAN A PARTY APPEAL ISSUES RULED ON IN A PREVIOUS ORDER THAT WAS NOT APPEALED WHERE SUCH ISSUES WHERE NOT RAISED NOR RULED ON IN THE ORDER CURRENTLY ON APPEAL?

## STATEMENT OF THE CASE

The Respondents filed suit on May 4, 2006 to enforce an Order issued by the late Louis E. Condon, Master-In-Equity for Charleston County dated September 28, 1982. They requested the current Master issue a deed in accordance with a 1982 Order. The Appellants belatedly answered with a general denial. After an appeal dismissed as interlocutory (Unpublished Opinion No. 2011-UP011), Appellants answered and counterclaimed claiming adverse possession as to the parcel and claiming laches. Respondents replied denying those counterclaims.

The Master held a hearing on August 21, 2012 and August 22, 2012. The Master issued a Final Order of September 17, 2014 (R. pp. 4-23), finding for the Respondents.

After issuing the Final Order, the Appellants filed a Rule 59(e), SCRCP Motion (Supplemental Record hereinafter S.R. pp. 1-10) which the Master heard on January 8, 2015 (S.R. pp. 12-41). He issued an Order dated January 20, 2015 denying the Motion for Reconsideration (R. pp. 2-3).

Thereafter, Appellant Cora Chisolm Brown, filed a *pro se* Notice of Appeal to the South Carolina Court of Appeals, which the attorneys stipulated was never perfected. Appellants admit

in their brief that the appeal of the Final Order of September 17, 2014, was never perfected and is therefore not before this Court (Initial Brief of Appellant, pp. 3-4) . .

After this, Appellants filed a Motion for Recusal and to Set Aside Order on January 6, 2016 (R. pp. 24-27). The Master held a hearing on March 10, 2016 (S.R. pp. 42-64), and subsequently denied Appellants' Motion by an Order dated April 18, 2016 (R. pp. 28-30).

Appellants timely filed their Notice of Appeal on June 6, 2016. Appellants appealed only Judge Scarborough's Order dated April 18, 2016. This Order denied Appellants' 60(b), SCRCP Motion for Recusal and denied its Motion to Set Aside an Order due to the fact there was no transcript of record (R. pp. 28-30). Appellants subsequently admitted there was a transcript of record and does not argue this point on appeal (S.R. p. 47, line 18-p. 48, line 9; p. 56, line 22-p. 57, line 20). Therefore, the sole issue on this appeal is whether Judge Scarborough's failure to recuse himself was reversible error.

## FACTS

The facts in the underlying case in this matter are set forth in Judge Scarborough's unappealed Orders of September 17, 2014 (R. pp. 4-23) and January 20, 2015 (R. pp. 2-3). Those facts are the law of the case and are not the subject of this appeal. However, to summarize the underlying case, Judge Scarborough found that the failure to issue a Master's Deed pursuant to the Final Order of September 28, 1982 was a clerical error. It was not an error involving the exercise of judicial function because the 1982 Order shows on its face that the judicial decision had been rendered and a plot of land designated "Parcel 5" was to go to Respondents. He corrected that error using both Rule 60(a), SCRCP, and the nunc pro tunc powers of the court. He found the court may

correct these clerical errors at any time. Further, he found the 1982 Order had the same effect as a deed with the parties involved in his lawsuit. Therefore, he found legal title vested in Respondents or their successors at the time of the Order. Further he found Appellants had not proved their affirmative defense of adverse possession by clear and convincing evidence, and they had not proved their defense of laches.

The Master gave six separate reasons as to why Appellants had not proved adverse possession. The headings to those reasons were: A) Permissive; B) Tolling; C) Committee; D) Exclusive; E) Open, Notorious, and Continuos; and F) Color of Title. This Order is the unappealed law of this case.

The facts relevant to the current appeal follow. On January 6, 2016, Appellants filed a Motion for Recusal and to Set Aside Order (R. pp. 24-27). This Motion was filed almost ten years after Respondents commenced this case and almost a year after the Master issued his last Order denying Appellants' Motion for Reconsideration on the merits of the underlying case. The basis for Appellants' Motion for Recusal was that the Master once represented the Charleston County Election Commission of which John "Big John" Chisolm was a member (Initial Brief of Appellants, p.7). There is no dispute that John Chisolm was not a party to this action, not a witness, and that he died in 2004, before this case commenced (Initial Brief of Appellants, p. 7; S.R. p. 46, line 21-p. 47, line 2).

## STANDARD OF REVIEW

"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." Davis v. Parkview Apartments, 409 S.C. 266,

762 S.E.2d 535 (2014) citing among other cases Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004).

> Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed. See Greenville County v. Kenwood Enters., Inc., 353 S.C. 157, 577 S.E.2d 428 (2003); Douglass v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001); National Grange Mut. Ins. Co. v. Firemen's Ins. Co., 310 S.C. 116, 425 S.E.2d 754 (Ct.App.1992); see also MLee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (emphasizing that unappealed rulings become law of case and should not be reconsidered by this Court)

Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183 (Ct. App.2004)(Citations included).

Here, Appellants failed to appeal the Master's Final Order of September 17, 2014 (R. pp. 4-23) and his Order denying their Motion for Reconsideration of January 20, 2015 (R. pp. 2-3). Thus, these Orders are the law of the case.

## ARGUMENT

### I. BECAUSE THERE IS NO EVIDENCE OF JUDICIAL PREJUDICE, AND BECAUSE APPELLANTS CONCEDED THERE IS NO JUDICIAL PREJUDICE, THE MASTER'S FAILURE TO DISQUALIFY HIMSELF SHOULD NOT BE REVERSED ON APPEAL.

"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." Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) citing among other cases Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004).

Appellants readily admit there is no judicial prejudice. Appellants state on page 7 of their Initial Brief:

> Appellants do not know whether the Master has, as section a) states in part, "a personal bias or prejudice against a party or has personal knowledge of disputed evidentiary facts; but Appellants assert that the Judge's impartiality might be reasonably questioned because the nondisclosure as to the relationship between himself and John Chisolm would give the appearance of impartiality, to the detriment of the Appellants."

The Master found that there was no evidence of prejudice or bias as required by the case law. (R. pp. 29-30).

Counsel for Appellants, at the March 10, 2016, motion hearing states:

> Our contention, Your Honor, just to be clear, is not that Your Honor is prejudiced in this matter, but the appearance of impropriety is one that we ask Your Honor for the recusal simply because there's an appearance of impropriety . . . .

(S.R. p. 46, lines 7-11).

Appellants do not and cannot claim prejudice. Further, there is no evidence of impropriety inasmuch as John "Big John" Chisolm was not a party to the within proceeding. John "Big John" Chisolm was merely a member of the Charleston County Election Commission, which the Master represented for several years while in private practice. (S.R. p. 45, line 25-p. 46, line 6). John "Big John" Chisolm died in 2004 prior to the commencement of the proceeding and therefore was not a witness at the trial (S.R. p. 46, line 21-p. 47, line 2).

Because there was no judicial prejudice and because Appellants offered no evidence of judicial prejudice, Appellants' appeal fails.

Furthermore, Appellants' Motion for Recusal was improper in addition to not being timely. Appellants filed their Motion for Recusal on January 6, 2016 (R. p. 24), almost a year after the Master heard Appellants' Motion for Reconsideration on January 8, 2015. January 8, 2015, is the latest possible date that Appellants can allege they were aware of a reason for recusal (Appellants wrongly state in their Initial Brief, p.7, that they learned of the Master's association with Big John Chisolm on March 10, 2016. It was, rather January 8, 2015). (S.R. p. 45, lines 17-24). Appellants filed their Motion for Recusal almost ten years after this case was commenced. Appellants failed to properly raise the recusal issue at the January 8, 2015 hearing. Further, Appellants did not file another Rule 59(e) Motion after the Court issued its Order on January 20, 2015. Therefore, the issue of the recusal was not properly preserved for appellate review. Ness v. Eckerd Corp. 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002).

Appellants Motion was filed pursuant to Rule 60(b), SCRCP (R. pp. 24-27). The Motion is for recusal and to vacate a prior Order. The recusal issue does not fall within the purview of Rule 60(b), SCRCP and the set aside portion of the Motion was later abandoned by Appellants at the Motion hearing held on March 10, 2016. Assuming *arguendo* that the Motion falls within the scope of Rule 60(b), SCRCP, it was certainly untimely. Motions under Rule 60(b), SCRCP, must be made within a reasonable time. If Appellants truly believed the merits of their Motion, they would have filed their Motion immediately after the January 8th hearing. Instead, they unsuccessfully attempted to appeal on the merits and waited almost a year to confront the Master as to recusal. Therefore, Appellants' Rule 60(b), SCRCP Motion was not filed within a reasonable time.

## II. APPELLANTS' OTHER ISSUES ARE UNAPPEALABLE, NOT PRESERVED FOR APPEAL, OR OTHERWISE IMPROPER.

Appellants' appeal only the Order of April 18, 2016 (R. pp. 28-30). That Order made two rulings: one as to recusal, the other as to preservation of the transcript which Appellants have conceded and not argued in their brief.

The Issue in Appellants' Brief "I. Did the Master Fail to Properly Evaluate The Testimony Given at Trial?" was not argued before the Master nor ruled on by the Master (R. pp. 28-30). The first step in preserving an issue for appellate review is to actually raise it to the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995). The idea is to give the lower court a chance to resolve the issue before it is presented to the appellate court. Thus, the lower court must also rule upon the issue for it to be preserved for review. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

The Final Order of September 17, 2014 was not appealed by Appellants and is the law of the case. The Master gave six separate reasons why Appellants had not adequately proved adverse possession and he reiterated those reasons in his Order Denying Appellants' Motion for Reconsideration dated January 20, 2015. Appellants did not appeal those orders

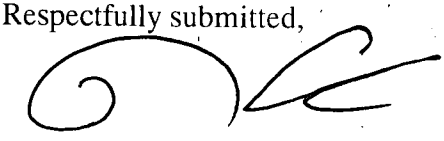
Appellants apparently only take issue with the Master's ruling that John "Big John" Chisolm gave permission to use the property. The Master stated this permissive use was one of the six reasons he denied Appellants' claim for adverse possession. Even if this wasn't the unappealed law of the case, there is sufficient evidence to support this ruling. Gary Chisolm testified that Charles Chisolm (the alleged adverse possessor) farmed the property in question with the permission of Big John Chisolm. He testified that was accurate. (R. p. 50, lines 16-22). Additionally, Appellants take

no issue with the other five reasons the Master gave for denying Appellants' claim of adverse possession. Generally, when the decision of the lower court is based upon more than one ground, the appellate court will automatically affirm that lower court decision if the appellant fails to appeal all of the grounds. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970).

## CONCLUSION

For the reasons stated, this Court should affirm the Master's Order of April 18, 2016.

Respectfully submitted,



January 24, 2018

Harold A. Oberman
OBERMAN & OBERMAN, LLC
60 Markfield Drive, Suite 2
Charleston, SC 29407
(843) 577-7010

S/ BIB

Barry I. Baker
One Carriage Lane, Building H
Charleston, SC 29407
(843) 766-9007

S/KTV

Kyle T. Varner
One Carriage Lane, Building H
Charleston, SC 29407
(843) 766-9007

Attorneys for Respondents

f:\ob\chisolm802\appeal\2017\pleading\brief.f

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

---

Case No. 06-CP-10-1772

---



Leon Chisolm, James Roosevelt Chisolm, Doris G. Fladger, Robert Chisolm, Florence Chisolm, Alice C. Jenkins, Sadie Y. McDonald, Martha Pryor, Patricia Millian, Margaret E. Warren, Andrew K. Chisolm, Edrina L. Wilson, Carl Chisolm, Lawrence Chisolm, Roosevelt Chisolm, II, Louis Chisolm, Eddie Chisolm, Leroy Chisolm, and Tommy Chisolm, Respondents

v.

Mary Frances S. Chisolm, William Chisolm, Emily C. Campbell, Debra C. Murphy, Alice C. Frazier, Cora C. Brown, Cordell Chisolm, Charles Chisolm, Jr., Phillip Chisolm, Anthony Chisolm, David Chisolm, Leonard Chisolm, and Levy Chisolm, Appellants

---

## CERTIFICATE OF COUNSEL

---

The undersigned hereby certifies that the Respondents' Final Brief complies with Rule 211(b) SCACR.

January 24, 2018

Harold A. Oberman
OBERMAN & OBERMAN, LLC
60 Markfield Drive, Suite 2
Charleston, SC 29407
(843) 577-7010