

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-3665

Appellate Case No. 2013-002676

RECEIVED

FEB 12 2018

SC Court of Appeals

William. F. Tomz and Francis W. Tomz, Individually and as Class Representatives,
Respondents.

v.

Capital Investment Funding, LLC, and Arthur M. Field, Defendants
Of Whom Arthur M. Field is the Appellant,
And Capital Investment Funding, LLC is a Respondent.

**REPLY TO RESPONDENTS' RETURN REGARDING THE
MOTION AND MEMORANDUM TO LIFT THE ORDER OF ABEYANCE**

The undersigned, as attorneys for Appellant, hereby files this Reply to Respondents' Return to the Motion for an Order Lifting the Order of Abeyance.

Appellant's Brief raised the issue of recusal of the lower court starting on page 40 of its Final Brief and on page 18 of his Reply Brief. Regarding recusal: "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances in which he has a personal bias or prejudice against a party." *Koon v. Fares*, 379 S.C. 150, 156, 666, S.E. 2d, 230, 234 (2008). Nevertheless, the parties attempted to bring this matter to an end when they entered into the 16-page Global Settlement Agreement printed on February

24, 2017¹. This pending Appeal would have been dismissed if the terms of the Agreement were followed.

A. The Global Settlement Agreement

Respondents' own Return, quoting paragraph 14 (I)(ii) of the GSA proves the point:

Upon approval by the Court, this settlement will be full and final as to all parties identified herein, with the sole exception if it is later demonstrated Arthur Field has made a material misrepresentation to the Court regarding this verified financial disclosure set forth in sub-part i (above).

Respondents are not claiming that Appellant has made a material misrepresentation in his financial disclosure; rather, Respondents are seeking sanctions and attorney's fees regarding the handling of insurance proceeds from hail damage on the Thornblade property (*See* Miller Order of December 1, 2017, pp. 1-2)². The sole exception to requiring the settlement to be "full and final" only deals with Appellant's representations regarding his verified financial disclosure, not insurance proceeds.³ The fact that Respondents continue to seek sanctions against Appellant, while requiring Appellant to comply with the portions of the Agreement that benefit them is an obvious breach of the Agreement⁴. The fact that the lower court is willing to do so highlights the need for the recusal issue to be resolved.⁵

¹ The Motion to Recuse was raised and preserved in all subsequent hearings before the lower court.

² It is important to note that the pending sanctions/fee award motion filed by Respondents has to do with alleged violations of the GSA during the time period before the lower court approved it. Since it cannot reasonably be characterized as "enforcing" the GSA, the GSA release bars consideration of such claims.

³ ¶10 of the GSA requires the lower court not to impose sanctions or penalties upon the Appellant. ¶10 does allow the lower court to compel Appellant to fulfill his obligations under the Agreement, but not sanction or penalize him.

⁴ If it was true that the only issues left relate to the enforcement of the GSA, the proper course would be to dismiss the underlying case in the lower court, and bring a separate proceeding to enforce the GSA; but neither of the pending cases have been dismissed, contrary to the language of the GSA.

⁵ The lower court in its email has expressed displeasure with the Chief Justice's Order protecting members of the legislature when Appellant's counsel below was unable to attend one of the hearings. The lower court stated "I find it inexcusable that the notice of assertion of the blanket protection provided to "Lawyer -Legislators" by the SC Supreme Court administrative order dated May 19, 2017 was not provided until 7:50 a.m. on today's date...I will monitor the Legislative schedule and I will set this hearing during the first week that the legislature is not called to Columbia."

A primary reason for Appellant to settle all matters in February of 2017 was to insulate himself from any adverse action by the lower court against him. The sole exception reserved to the lower court was whether there were misrepresentations in his financial disclosures. It is clear that this is not in play, and that the Global Settlement Agreement has not been complied with by the Respondents. Therefore, it is entirely appropriate for this Court to review whether the lower court judge should disqualify himself in this proceeding in which his impartiality might reasonably be questioned.

B. The Interlocutory Nature of the December 1, 2017 Order

Respondents claim on page 2 of their Return that the December 1, 2017 Order has not been appealed. While this is a correct statement of fact, the Order cannot be appealed due to its interlocutory nature.

The Supreme Court of South Carolina has defined what constitutes an interlocutory order:

South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. *Adickes v. Allison & Bratton*, 21 S.C. 245, (1884). If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment. *Good v. Hartford Accident and Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942).

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d. 777 (1993).

Respondents freely admit that the December 1, 2017 Order is not final by referring to the second order of the lower court dated December 21, 2017. Further, the December 1st Order itself shows that that there are further acts which must be done:

This Court shall not rule on this matter at this time, but rather will continue this matter until a hearing to be held by this Court on December 7, 2017, at which time this Court shall allow the parties to present information, testimony and evidence thereof.

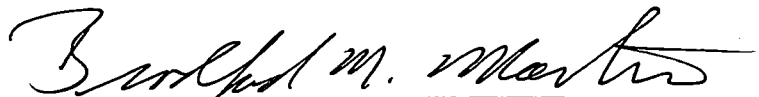
December 1, Order, p. 6

Conclusion

Appellant has attempted in good faith to bring this matter to an end. Unfortunately, Respondents continue to file motions seeking sanctions and penalties against Appellant in violation of the terms of the Global Settlement Agreement. The lower court has made it clear that it intends to have another hearing which it stated in its email: "I will monitor the Legislative schedule and I will set this hearing during the first week that the legislature is not called to Columbia." Appellant respectfully requests that the abeyance be lifted and that his appeal move forward including a ruling on the issue of recusal.

Respectfully submitted,

Date 8 February 2018



Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
201 West McBee Avenue, Suite 302
Post Office Box 10410
Greenville, SC 29603
864.552.9990

**ATTORNEYS FOR APPELLANT ARTHUR M.
FIELD**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-3665

RECEIVED

FEB 12 2018

SC Court of Appeals

William. F. Tomz and Francis W. Tomz, Individually and as Class Representatives,
Respondents.

v.

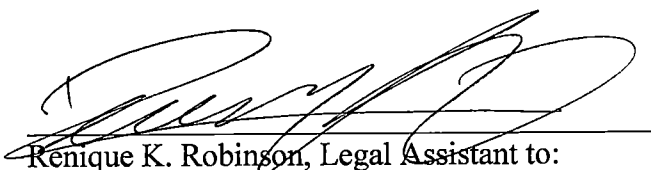
Capital Investment Funding, LLC, and Arthur M. Field, Defendants
Of Whom Arthur M. Field is the Appellant,
And Capital Investment Funding, LLC is a Respondent.

Appellate Case No. 2013-002676

PROOF OF SERVICE

I, Renique K. Robinson, assistant to attorney for Appellant, certify that I have served a copy of Appellant's Reply to Respondent's Return Regarding the Motion and Memorandum to Lift the Abeyance, by depositing a copy in the U.S. Mail, sufficient first class postage prepaid, on February 8, 2018, addressed to Respondents' attorneys, Stanley T. Case, Esq., P.O. Drawer 451, Spartanburg, SC 29304 and George Brandt, III, Esq., Henderson Brandt & Vieth, P.A., 360 E. Henry Street, Spartanburg, SC 29302

February 8, 2018



Renique K. Robinson, Legal Assistant to:
Bradford N. Martin, SC Bar #3658
Laura W. H. Teer, SC Bar #16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
Attorneys for Appellant Arthur M. Field

BRADFORD NEAL MARTIN & ASSOCIATES, PA

ATTORNEYS AT LAW

201 WEST McBEE AVENUE, SUITE 302
POST OFFICE BOX 10410 (29603)
GREENVILLE, SOUTH CAROLINA 29601

BMARTIN@BNMLAW.COM
PHONE: (864) 552-9990
FAX: (864) 552-9992

February 8, 2018

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
FEB 12 2018
SC Court of Appeals

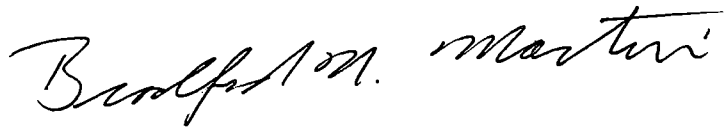
Re: *William F. Tomz v. Capital Funding, et al*
C/A No.: 2008-CP-23-3665
Appellate Case No. 2013-002676

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of copy of the Reply to Respondents' Return to the Motion and Memorandum to Lift the Abeyance and a Proof of Service in the above matter.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

/pm
Enclosures

cc: George Brandt, Esq.
Stan Case, Esq.