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SC Court of Appeals

**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. 2018-000142

Ronald J. Ferguson

Appellant,

v.

**John D. Hatcher, Rachel Shaluly, James F. Gilbert,
Molly A. Miller, and Michael Stehney, individually
and as members of the Architectural Committee of
Mill Creek Estates,**

Respondents.

REPLY BRIEF OF APPELLANT

**Ronald J. Ferguson
103 Mill Creek Rd
Piedmont, SC 29673
(864) 509-0169
Appellant pro-se**

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Respondent's brief truncates the timeline omitting substantial facts that would likely mislead a tribunal.

WRIT OF MANDAMUS

Respondent's claim "[t]he appeal was originally filed as a Petition for Original Jurisdiction of the State of South Carolina Supreme Court seeking a Writ of Mandamus". Initially, the Writ was filed prior to the Miller adjudication, when the lower court had knowledge of pending motions by Appellant which address conduct of Respondent's and the administrative judge himself said the matter must be addressed by a specific judge and then refused to assign the matter over a period of more than six (6) months and proceeded to assign additional motions for adjudication. (Exhibit Email ___)

Whereas this was not the first example of the administrative judge failing to docket motions which implicate the court's jurisdiction, while allowing other motions to proceed, a determination was made to involve the state's highest court charged with overseeing the administrative and judiciary.

Due to Court of Appeals Judge D. Garrison Hill being implicated in the government investigation of these matters and Appellant being under judicial instruction those are about the limits on what can be disclosed in the matter.

RULE 12(h)

Respondent's bring up Rule 12, SCRCP, in their Statement of the Case and again at pages four (4) and five (5). Only hours before Respondent's filed their on the afternoon of June 14, 2017, there was a hearing was heard On the morning of June 14, 2017. Judge Robin Stilwell addressed Respondent's Motion to Vacate Default Judgment and explicitly told them they lacked any standing vacating the Order against Mill Creek, LP.

MR. BROWN: I don't think I can get the Rule 19 motion before Your Honor. And I also think there's a Rule 12(b)(8) motion you can't have multiple actions with the same cause of action pending in multiple cases, which is a restrict offense. But I don't think I can bring the Rule 12(b)(8) or the Rule 19

before the vacate. (Simmons Hearing Transcript June 14, 2017 P22, L2-8)

RONALD J. FERGUSON: If we're gonna start discussing the restricted covenants and who brought which case first, that would have been another party that's not present today in 2013-CP-23-01715, which is a client represented by Mr. Brown that's actually represented by another attorney, who was the first to bring a restricted covenants case. (P22, L11-17)

RONALD J. FERGUSON: We're gonna move that Mr. Brown doesn't have standing to bring the motion today. (P22, L18-19) Under Rule 24 they were required to serve a responsive pleading that had to be filed with the court. As of today they've not filed it, they've not served it. (P22, L23-25) And under Rule 5 it's subject to dismissal. (P23, L1)

THE COURT: Mr. Brown, have you filed an answer? (P23, L17)

MR. BROWN: I have not filed an answer, Your Honor. (P23, L20-21)

THE COURT: ...even if the default judgment isn't vacated against Mill Creek, LP, the merits are going to be heard anyway. (P28, L5-6)

MR. BROWN: But that could be argued that by the default judgment being granted that their pleadings are – the relief they requested is granted, which would be abolishing the restrictive covenants. (P28, L11-14)

MR. BROWN: ...the default judgment be granted because it could be held against my clients as res judicata law of the case or any of those kinds of things, collateral estoppel, then I need to try to get that vacated. (P29, L17-22)

THE COURT: Mr. Ferguson has always brought a salient point that you don't have standing to make that for Mill Creek, LP, I don't know how to get around it. (P31, L14-16)

MR. BROWN: I see the point as procedural. And this is a quagmire, Your Honor, because I'm just wondering some judge could say from a procedural stand point once the default judgment's been granted that I can't raise a 12(b)(8) or Rule 19 motion because the default judgment's already been

granted. (P32, L17-25)

THE COURT: The remedy is to get rid of Mill Creek, LP, as a defendant. That's the remedy. (P34, L7-8).

MR. BROWN. Right (P34, L9)

THE COURT: But the problem is if you just vacate it, again, you're not going to make an appearance for them, ...they're going to go back into default again because we can't waive the Rules of Civil Procedure for the entity. I think the remedy is to get rid of them as a Defendant. (P34, L10-15)

MR. BROWN: I understand. (P34, L16)

Before that order was even filed at 4:51 PM, Respondent's counsel had already filed yet another Motion to Dismiss (pursuant to Rule 12 and 19).

This in itself is a violation of Rule 12, SCRCP, which provides:

“(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.” (quoting Rule 12, SCRCP)

Respondent's never asserted any claim related to pending litigation before Judge Leticia Verdin despite knowing of the hearing for default against Mill Creek, LP some six weeks prior to it being held. They never complied with Rule 24(c) in the Motion for Joinder filed December 24, 2015. Just as Respondent's never disclosed their ex-parte communications with Master-in-Equity [Defendant] Simmons to Judge Maddox during the proceedings on February 19, 2016, a relevant fact which would have been fatal to granting intervention, there was no mention of Rule 12(b)(8) at that proceeding. Rule 12(b)(8) was not brought up in Respondent's Motion to Vacate Default Judgment filed May 2, 2017, and denied by Judge Robin Stilwell on June 14, 2017. It was only brought up in a third successive motion following the explicit judicial exchange between Respondent's counsel and Judge Stilwell

informing them they lack standing to move for vacating the Order against Mill Creek, LP. "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Craft, 372 S.C. at 21, 640 S.E.2d at 497 (citing Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)).

South Carolina apparently took Rule 12, SCRCF, verbatim, from the Federal Rules of Civil Procedure and one can easily go to state and federal courts across the United States where the results are the same, where a party had knowledge of a pending action and did not timely raise the specific Rule 12(b) defenses in a pleading, the defenses were waived, the trial court erred in allowing them to assert same and the order is reversed and remanded for further proceedings. Parrish v. Allison, 656 S.E.2d 382 (S.C. Ct. App. 2007) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."); *Adams v. B & D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)

DEFENDANT MILL CREEK, LP

Respondent's allege the appeal is interlocutory and Appellant was given thirty (30) days to file a new Complaint and file it under a different case number. An interlocutory appeal is actionable pursuant to S.C. Code Ann. § 14-3-330(2)(a) (2017) (2) An order affecting a substantial right made in an action when such order *(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action*, (b) grants or refuses a new trial or *(c) strikes out an answer or any part thereof or any pleading in any action*. (Emphasis added) Per Clerk of Court records, Civil Action Number 2013-CP-23-05102 was "Dismissed" and the Order dismissing such directs Appellant be given thirty (30) days to file a new Complaint; to be filed under 2013-CP-23-01810. Judge Miller's Order does not preserve the Default Judgment against Mill Creek, LP, Respondent's lack authority to seek vacatur and Miller lacks authority to vacate an Order by Judge Leticia Verdin.

There is no dispute that Judge Miller:

A) Improperly entertained a motion under Rule 12 and effectively decided that Respondent's

should be named Defendant's instead of Mill Creek, LP;

B) Second guessed Judge Verdin and in dismissing 5102 vacated the Order of Default against Mill Creek, LP; an act devoid of authority;

C) That action effectively ended the Court reviewing the conduct of the Defendant Mill Creek, LP, in drafting, signing and filing the contract in question consistent with state statutes and any appeal that may come as a result; and,

D) Directed Respondent's Complaint [pleading] be amended to name Respondent's or others. Thus, striking out the named Defendant who actually was responsible for the actions in question and against whom there is already an Order of Default.

SUMMARY

Respondent's, who willfully admit they are not Mill Creek, LP, and had no part in drafting, signing or filing the contract in question, claim they are entitled to argue the validity of the contract yet not liable for any damages created by same. Despite speaking about this case to Master-in-Equity Simmons in October 2015 about upcoming hearings in the matter, they failed to timely engage the court during the more than six (6) weeks prior to that hearing. More than a week later they filed a Motion pursuant to Rule 24(c), yet failed to comply with the Rules of Civil Procedure in the process and did not bring up any Rule 12 defense. A motion to vacate the default judgment followed, with no mention of Rule 12 in that pleading but admitted multiple times he knew of the option and did not believe he could file such motion. Upon being told by the Court that Respondent's lacked standing to seek vacatur of a judgment against Mill Creek, LP. Respondent's counsel remarked to the Court he needs to try get that default judgment vacated, The Court and Respondent's counsel engaged in a discussion that Mill Creek, LP, needs to be removed as a defendant, Respondent's walked out of the court room and within hours filed yet another motion – this time arguing Rule 12 and 19. Despite other

motions pending, Respondent's motion was heard and in minutes granted -- dismissing the case, directing a new complaint be filed naming different parties; the very definition of S.C. Code Ann. § 14-3-330(2)(a).

Respectfully submitted,



Ronald J. Ferguson
103 Mill Creek Road
Piedmont, SC 29673
(864) 509-0169