

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Knox McMahon, Circuit Court Judge

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Case No.: 2018-000887

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Erick George Johnson,

Appellant,

vs.

Abigail Marie Williams,

Respondent.

**RECEIVED**

DEC 11 2018

SC Court of Appeals

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**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF THE ISSUES ON APPEAL**

1. Did the Trial Court err in converting Respondent's Motion to Dismiss to a Motion for Summary Judgment?
2. Did the Trial Court err in granting summary judgment for lack of subject matter jurisdiction?

## STATEMENT OF THE CASE

The Appellant, Erick Johnson, and the Respondent, Abigail Williams, were involved in a relationship and have two children together. The parties cohabitated for approximately four (4) years. While residing together, they purchased a residence located at 2019 San Sus Drive, West Columbia, South Carolina. The Appellant made extensive repairs and remodeling to the home for the use and benefit of his family. The Respondent filed an action in the Family Court for Lexington County on August 16, 2016. Williams v Johnson, 2016-DR-32-1847 (Complaint pp. \_\_\_\_). The Respondent sought an award of custody of the parties' minor children, child support, a visitation schedule and attorneys fees. The Appellant filed an Answer and Counterclaim (Answer pp. \_\_\_\_ ) which raised the issue of a common law marriage with the Respondent, and sought equitable division of property and debt, custody, child support, visitation and attorneys fees. The parties subsequently entered into an agreement which was approved by the Family Court by Order dated June 15, 2017 which resolved the issues of custody, child support, visitation, and attorneys fees. Final Order and Approval of Agreement (Order pp. \_\_\_\_). Prior to the commencement of the final hearing in the Family Court, the Appellant, voluntarily withdrew his claim of common law marriage, and this claim was dismissed with prejudice by the Family Court (Order pp. \_\_\_\_). The Appellant filed the instant action on April 20, 2017 by filing a Lis pendens, Summons and Complaint in the Court of Common Pleas asserting claims of an equitable interest in the real estate titled in the Respondent's name located at 2019 San Sus Drive, West Columbia, South Carolina (Complaint pp. \_\_\_\_). Appellant claimed an interest in the real estate pursuant to the establishment of a constructive trust, resulting trust, unjust enrichment, and quantum meruit for the cost of labor and supplies, and for the costs of repairs and remodeling work he performed on the residence in which the parties had cohabitated for

four years while raising their children. The Respondent, through counsel, filed an Answer on June 6, 2017. (Answer pp. \_\_\_\_). The Respondent filed a Motion to Dismiss pursuant to SCRCP 12(b)(1) and (6) on August 23, 2017 on the grounds that the claims pled by the Appellant were barred by the Doctrines of Res Judicata, collateral estoppel, and judicial estoppel because the parties had resolved all issues in the litigation in the Family Court in Williams v Johnson, 2016-DR-32-1847 (June 15, 2017) and by the Final Order and Approval of Agreement (Order pp. \_\_\_\_). The Circuit Court heard argument of counsel on October 26, 2017. The Respondent argued that the Circuit Court lacked subject matter jurisdiction as the issues had been resolved in the Family Court and the Respondent was entitled to Summary Judgment (Order pp. \_\_\_\_). The Appellant argued that the Family Court had lacked subject matter jurisdiction to determine equitable division of property since no marital litigation existed between the parties since Appellant had voluntarily dismissed with prejudice his Counterclaim alleging common law marriage. This dismissal was made prior to the commencement of the final hearing, and prior to the presentation of any evidence or testimony, and prior to the approval of the parties' agreement on the issues of custody, child support, visitation and attorneys fees. (TR. pp. \_\_\_\_)

The Circuit Court granted the Respondent's Motion pursuant to SCRCP 56 and dismissed the action pursuant to the doctrine of collateral estoppel on April 26, 2018 (Order pp. \_\_\_\_). The Appellant timely filed a Notice of Appeal on May 11, 2018 (R. pp. \_\_\_\_).

## STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRPC. Lanham v Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that... no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. When determining whether triable issues of material facts exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Fleming v Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). “Summary judgment is not appropriate whe[n] further inquiry into the facts of the case is desirable to clarify the application of the law.” Lanham, 349 S.C. at 362, 563 S.E.2d at 333.

In an appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and (6), SCRPC. “The question of subject matter jurisdiction is a question of law for the court.” Capital City Inc., Co., v BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 528 (Ct. App. 2009). “We are free to decide questions of law with no deference to the [circuit] court.” *Id.*

## ARGUMENT

The circuit court improperly granted the Respondent's Motion to Dismiss/Motion for Summary Judgment. "[S]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." Lanham v Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.*

Moreover, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock, supra, 381 S.C. at 330, 673 S.E.2d at 803. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." Lord v D & J Enterprises, Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014).

Pursuant to SCRCP 12(b)(1) and (6) the Trial Court must base its ruling solely upon allegations set forth on the face of the Complaint. The 12(b)(6) Motion to Dismiss may not be sustained if the facts alleged and the inferences therefrom would entitle the Plaintiff to any relief on any theory. Baird v Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

The question is whether in the light most favorable to the Plaintiff, and with every doubt resolved in his behalf, the Complaint states any valid claim for relief. Mr. G. v Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1999); Dye v Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995); Woodell v Marion County School Dist., 307 S.C. 297, 414 S.E.2d 794 (Ct. App. 1992); Bergstrum v Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (2004).

Before the commencement of the final hearing in the Family Court, Appellant voluntarily withdrew his claim of a common law marriage, and that claim was dismissed with prejudice. The dismissal of Mr. Johnson's claim of a common law marriage with prejudice at the commencement of the final hearing, before any evidence or testimony was presented, terminated the Family Court's authority to apportion any property or debt pursuant to the Family Court's limited statutory authority. See § 63-3-530 (A)(2) S.C. Code of Laws of 1976, as amended. The apportionment of property could not have been raised in the Family Court case. The Family Court lacked subject matter jurisdiction since the Family Court action did not involve issues of divorce, separate support and maintenance, legal separation, or marital litigation as defined in the statute. § 63-3-530 (A)(2).

In Brown v Brown, 368 S.E.2d 475 (Ct. App. 1988) the Court of Appeals found that the Family Court lacked subject matter jurisdiction where the Appellant did not plead for divorce or separate support and maintenance. The Court found that Section 20-7-472 of the SC Code of Laws, as amended, authorizes a Family Court to apportion the marital property:

[i]n a proceeding for divorce a vinculo matrimonii, or separate support and maintenance, or in a proceeding for disposition of property following a prior decree of dissolution of a marriage by a court which lacked personal jurisdiction over an absent spouse, or which lacked jurisdiction to dispose of the property, and in other marital litigation between the parties....

Therefore, a Family Court lacks subject matter jurisdiction to apportion marital property between the parties unless the apportionment is incident to : (1) a divorce a vinculo matrimonii, (2) an action for separate support and maintenance, (3) a proceeding to dispose of marital property after a prior decree of dissolution of a marriage by a Court which lacked personal jurisdiction over the other spouse or which lacked jurisdiction to dispose of the property, or (4) other marital litigation between parties. Cf. Sims v Sims, 290 S.C. 190, 348 S.E.2d 835 (1986) (Section 20-7-420 (2), Code of Laws of South Carolina, 1976, authorizes the Family Courts to settle parties' property rights incident to "marital litigation" between them). 368 S.E. 2d at 358.

Ms. Williams and Mr. Johnson were not involved in marital litigation in the Family Court once the Appellant voluntarily dismissed his Counterclaim with prejudice. Ms. Williams had filed an action for custody, support, visitation, and attorneys fees. Mr. Johnson initially claimed a common law marriage, and prior to the final hearing voluntarily withdrew the cause of action which was then dismissed with prejudice. Thus, the Family Court case did not involve marital litigation, and the Court lacked jurisdiction to apportion any property.

Marital litigation is litigation which seeks to alter or terminate the marital status of the parties. Sims v Sims, 348 S.E.2d 835 (1986). As the Court of Appeals stated in sims, supra:

Marital litigation is litigation between spouses or former spouses to determine their respective interests in property. Id. A family court lacks subject matter jurisdiction to settle a dispute between spouses involving their respective interests in property, unless the determination is incident to an action requesting an alteration of their marital status. Id.

See also, Eichor v Eichor, 290 S.C. 484, 351 S.E.2d 353 (Ct. App. 1986).

In Mr. T v Ms. T, 662 S 413 (Ct. App. 2008) the Court of Appeals reversed the Family Court determination that it lacked subject matter jurisdiction and was barred by res judicata and collateral estoppel to overturn a prior Divorce Order establishing paternity and child support.

The Court concluded:

However, the application of res judicata and collateral estoppel principles are not matters of subject matter jurisdiction. Subject matter jurisdiction refers to a court's power to hear and determine cases of the general class or category to which proceedings in question belong. Dove v Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E. 2d 598, 600 (1994) (citation omitted). Preclusive concepts such as res judicata and collateral estoppel are not jurisdictional matters. Weston v Margaret J. Weston Med. Indus. Corp., 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)). 378 S.C. at 130.

The Respondent in the instant case incorrectly raised principles of preclusion: res judicata, collateral etoppel and judicial estoppel as a bar to this action. The Family Court lacked subject matter jurisdiction to enter any ruling regarding equitable title to the real property involved in the current action because the Family Court case did not involve marital litigation.

The issue of subject matter jurisdiction may be raised at any time. It can be raised for the first time on Appeal, and can be raised sua sponte by the Court even if not presented to the Trial Court. State v Downs, 604 S.E. 2d 377 (2004); Arnal v Fraser, 641 S.E. 2d 419 (2007); Harden v South Carolina State Highway Dept., 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976), quoting Lake v Reeder Const. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998). Badeaux v Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999); Knight Publishing Co. v Univ. of South Carolina, 295 S.C. 31, 33 n.3, 367 S.E.2d 20, 21 n.3 (1988); Langford v State Bd. of Fisheries, 217 S.C. 118, 60 S.E.2d 59 (1950). Rule 12(h)(3), SCRPC provides that... “whenever it appears by suggestion of the

parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the case.”

Subject matter jurisdiction refers to the court’s “power to hear and determine cases of the general class to which the proceedings in question belong.” Watson v Watson, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995), quoting from Dove v Gold Kist, Inc., 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994).

The Family Court is a court of limited jurisdiction. Sims v Sims, 290 S.C. 190, 348 S.E.2d 835 (1986). The Family Court cannot exceed jurisdiction conferred by statute: As a statutory court, its jurisdiction is limited to that expressly or by necessary implication conferred by statute. South Carolina Dept. of Mental Health v. State, 301 S.C. 75, 390 S.E.2d 185 (1990).

The Family Court has exclusive jurisdiction pursuant to Section 63-3-530 S.C. Code of Laws of 1976, as amended, of over forty six (46) different matters, however it can only apportion property if marital litigation is involved, and at the time of the final hearing in this case there was no marital litigation involved in the case.

The Family Court has exclusive jurisdiction pursuant to Section 63-3-530 (A)(2): ...

to hear and determine actions for divorce, a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorneys fee if requested by either party in the pleadings.

Since the Family Court’s subject matter jurisdiction does not extend to actions involving contracts, constructive trusts, resulting trusts, unjust enrichment and quantum meruit, the Family Court Order attempting to affect an interest in the real property is void for lack of subject matter jurisdiction. Peterson v Peterson, supra. The Family Court did

not have subject matter jurisdiction to apportion real property between two (2) individuals who cohabited together and where no marital litigation, no action for divorce, a Vinculo Matrimonii, separate support and maintenance, legal separation or other marital litigation was pending.

If a court does not have subject matter jurisdiction, it cannot obtain it. Lack of subject matter jurisdiction cannot be waived, even by consent or stipulation of the parties. Badeaux v Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999); Peterson v Peterson, 333 S.C. 538, 510 S.E.2d 426 (1998); State v Richburg, 304 S.C. 102, 105, 303 S.E.2d 315, 317 (1991); Anderson v Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989); Cox v Lundsford, 272 S.C. 527, 252 S.E.2d 918 (1979); Austelle v Austelle, 294 S.C. 19, 21, 362 S.E.2d 181, 183 (1987) (stating that “[o]f course, it is axiomatic that subject matter jurisdiction cannot be waived”).

As the Court of Appeals stated in Peterson v Peterson, 510 S.E.2d 426 (1998), that when the Family Court lacks subject matter jurisdiction, an Order issued by the Court is VOID.

“The jurisdiction of a Court over a proceeding is determined by the Constitution, the laws of the State, and is fundamental. Lack of subject matter jurisdiction may not be waived even by consent of the parties...”  
Anderson v Anderson, 382 S.E.2d 897 (1989).

The acts of a Court without subject matter jurisdiction are void. Cox v Lundsford, 272 S.C. 527, 252 S.E.2d 918 (1979); Swentor v Swentor, 336 S.C. 412, 530 S.E.2d 330 (Ct. App. 1999); State v Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972); Peake v Peake, 328 S.E.2d 375 (Ct. App. 1985) and any Orders entered when the Court lacks subject matter jurisdiction will be vacated. Zwerling v Zwerling, 255 S.E.2d 851 (1979); Bryant v Varat, 292 S.E.2d 298 (1982)

It is clear that the Family Court case, Williams v Johnson, 2016-DR-32-1847, (R. pp.\_\_\_\_) did not involve marital litigation according to the statute, therefore, the Family Court lacked subject matter jurisdiction to apportion property or issue any Order which affected the parties interest in the real estate. Any Order of the Family Court which purported to make an apportionment of the real property in question is void.

The Appellant herein, could not have waived, or even consented to subject matter jurisdiction. Nor could he have waived his equitable claims to the real property since the Family Court lacked subject matter jurisdiction to resolve the question.

It is also clear that any questions involving the validity of a release or waiver depends upon all of the facts and circumstances and are questions for a jury to decide. Gomillion v Forsythe, 62 S.E.2d 297 (1950). The construction of a release as to the actual intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances construed with reference to the amount of consideration paid and the language of the release. Hilton v Duke Power, 254 F2d 118 (4<sup>th</sup> Cir. 1958). The intent of the parties is a question of fact for a jury to determine, Balham v U.S., 747 F2d 915. The contents of a written release being disputed would be a jury question. Lucas v Southern Rwy, 135 S.E. 568 (1930). Validity of release for liability for injuries held for jury, Medlin v Vanderbilt, 130 S.E. 893 (1925); Floyd v N.Y. Life, 96 S.E. 912 (1918). Mistake, fraud or duress are issues for jury, Thompson v Bass, 166 S.E. 346 (1932). The question whether release by a Plaintiff to a Defendant from a pending lawsuit is based upon valuable consideration is for the jury, Hawkins v Collins, 39 S.E. 768 (1901).

The Circuit Court improperly converted the Respondent's Motion to Dismiss pursuant to SCRCF Rule 12(b)(1) and (6) into a Motion for Summary Judgment pursuant to SCRCF Rule 56 and considered matters outside the pleadings and matters which were never presented in the record. The Court failed to give the Appellant reasonable opportunity to present all material pertinent to such motion as required by Rule 56.

The South Carolina Supreme Court has held that the notice provisions of SCRCF Rule 56 are incorporated in SCRCF Rule 12(b)(6), and must be observed before the motion could be converted to one for summary judgment. Brown v Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987), Crosswell Enterprises v Arnold, 309 S.C. 276, 422 S.E.2d 697 (Ct. App. 1992). The Rule specifically provides for conversion, provided the parties, upon compliance with the notice provisions of Rule 56, are afforded a reasonable opportunity to introduce evidentiary matters. Bowen & Smoot v Plumlee, 301 S.C. 262, 391 S.E.2d 558 (1990). There is nothing in the record providing the Appellant with notice that Respondent's Motion to Dismiss would be converted into a SCRCF Rule 56 Motion for Summary Judgment. The Court improperly considered matters outside of the record, and relied upon the argument of Respondent's counsel contained in Respondent's proposed Order to the Court, regarding collateral issues in Magistrate Court eviction proceedings. These issues were never presented as stipulations, evidence or exhibits, and were contained solely in Respondent's proposed Order. The record is devoid of any evidence regarding proceedings in Magistrate Court and the Court improperly considered and used counsel's written argument as a basis for its decision. Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment. Trivelis v SC Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271 (Ct.

App. 2001). As this Court has held in Cobb v Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997): “[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the Court where it is unsupported by the record.”

The Circuit Court’s reliance upon Hammer v Hammer, 399 S.C. 100, 730 S.E.2d 874 (Ct. App. 2012) and Rodman v Rodman, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004) is misplaced, and each case is distinguishable from the instant case. In Rodman, *supra*, the Husband appealed the denial of a Rule 60, SCRCP, Motion to Vacate a previous Order of the Family Court. The Court held that the Family Court had subject matter jurisdiction where the parties entered into a written settlement agreement which constituted a “final permanent settlement agreement between them with respect to the division of all their property, both real and personal, and with respect to any and all rights of support, and all other rights and obligations..” 361 S.C. at 293. The property agreement was adopted and merged by the Family Court pursuant to the Wife’s Petition for Annulment, and Decree of Separate Support and Maintenance. The Court of Appeals concluded that since the Family Court had exclusive jurisdiction over annulment proceedings, pursuant to §20-2-420(6) of the South Carolina Code of Laws of 1976, as amended, it properly had subject matter jurisdiction to approve the agreement even though the Husband argued that the marriage was void Ab initio. Rodman involved marital litigation as the Wife requested an annulment and Decree of Separate Support and Maintenance. The instant case did not involve marital litigation, or a request for Divorce, A Vinculo Matrimonii, separate support and maintenance, legal separation or other marital litigation. §63-3-530(A)(2).

Hammer, supra, involved a married couple with children where the Wife filed a Complaint for an Order for Separate Maintenance and Support, and later a Complaint for a divorce. The Court held that the Family Court had subject matter jurisdiction when it adopted two (2) separate written settlement agreements. The first written agreement settled issues regarding the marital home and retirement accounts. The second written agreement resolved issues related to custody and visitation. Hammer had later challenged these agreements on four (4) separate occasions in the Family Court.

The Court of Appeals held that pursuant to §63-3-530(A)(2) that the Family Court had subject matter jurisdiction since it had exclusive jurisdiction..”to hear and determine actions for Divorce, A Vinculo Matrimonii, separate support and maintenance, and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorneys fees if requested by either party in the pleadings.” (emphasis added) The Court found that the written contracts approved and merged by the Family Court in Hammer were part of the parties divorce proceedings and the Family Court had subject matter jurisdiction. In the instant case, Respondent’s Family Court Complaint requested child custody, visitation, child support and attorneys fees (Complaint pp. \_\_\_\_). The Appellant filed a Counterclaim alleging a common law marriage (Counterclaim pp.\_\_\_\_). This Counterclaim was dismissed with prejudice before the final hearing (Order pp.\_\_\_\_) and before any evidence or testimony was presented to the Family Court (TR. pp.\_\_\_\_). At the time of the final hearing, there was no martial litigation pending before the Family Court, and the Court discussed and approved an agreement resolving only the issues of child custody, child support, visitation and attorneys fees at the final hearing (TR.

pp.\_\_\_\_). The parties were not granted a Divorce, A Vinculo Matrimonii, or Decree of Separate Support and Maintenance, nor granted a Legal Separation, and no marital litigation existed between the parties and no marriage existed. The Family Court lacked subject matter jurisdiction to render any Order affecting the property rights of the parties where no marital litigation was involved. There was no ruling, nor could there have been on ownership of the real property and personal property acquired by the parties during their period of cohabitation.

Significantly there was no discussion at the final hearing in the Family Court concerning the dismissal of the instant action which had been filed on April 20, 2017 and was pending at the time of the final hearing before the Family Court on June 12, 2017 (R. pp.\_\_\_\_). There were absolutely no discussions regarding division of property and/or debt, or waiver or relinquishment of property claims by the parties (R. pp.\_\_\_\_) The Family Court approved a custody, child support, visitation and attorneys fees agreement. Agreements concerning real or personal property are required to be in writing. There was no written agreement presented at the hearing with specific documentation of the property conveyed or surrendered as required by §20-5-50 of the South Carolina Code of Laws of 1976, as amended.

§20-5-50 requires that:

“all marriage contracts, deeds, settlements shall therein describe, specify and particularize the real and personal estate thereby intended to be included, comprehended, conveyed and passed or shall have a schedule thereto annexed containing a description and the particulars and articles of the real and personal estate intended to be conveyed and passed by such marriage contracts, deeds and settlements... (emphasis added)

When approving a Settlement Agreement, a Family Court Judge must, first, determine if assent to the agreement is voluntarily given, and second, determine if the

agreement is “within the bounds of reasonableness from both procedural and substantive perspective.” Blejski v Blejski, 325 S.C. 491, 489, S.E.2d 462 (Ct. App. 1997); Burnett v Burnett, 290 S.C. 28, 347 S.E.2d 908 (Ct. App. 1986).

Family Court Judge Joseph C. Smithdeal commenced the final hearing by stating:

“This is an action for the parties to talk about the care and maintenance, love and support of two minor children.” (TR. pp.\_\_\_\_)

Plaintiff’s counsel, James O’Connor, then read the agreement into the record in open Court:

“First off, there was an Answer and Counterclaim which addressed common-law marriage allegation. The Defendant is hear (sic) by dismissing that with prejudice. So that resolves that matter.. Also not addressed in this specific agreement is protection of the Guardians fees.” (TR. pp.\_\_\_\_)

Plaintiff’s attorney thereupon recited an agreement into the record that dealt only with the issues of child custody, child support and visitation. (TR. pp.\_\_\_\_)

Judge Smithdeal carefully questioned the parties about their understanding of the agreement, whether it was freely and voluntarily entered into, without coercion or duress, whether the parties believed the agreement was fair and equitable, and in their best interests and in the best interests of their children. (TR. pp.\_\_\_\_)

The Family Court then approved the parties’ agreement regarding child custody, child support, and visitation. There was absolutely no mention of a property settlement agreement or apportionment of property by the Court, by any of the parties, or by their counsel. It is crystal clear that there was absolutely no apportionment of real or personal property by the Family Court because the issue was never before the Court, either by written agreement, or by being read into the record in open Court.

Not even Judge Smithdeal believed that the parties were apportioning property at the hearing. As he specifically stated at the commencement of the hearing: ...this is an action for the care and maintenance, love, and support of two minor children... (TR. pp. \_\_\_)

The Family Court did not apportion the parties property, and did not have subject matter jurisdiction to apportion the property of the parties since Erick Johnson's Counterclaim was dismissed with prejudice prior to the final hearing, and there was no marital litigation pending between the parties at the time of the final hearing, and the Family Court lacked subject matter jurisdiction to apportion the parties property.

### CONCLUSION

The Circuit Court erred in finding that the Family Court had subject matter jurisdiction to apportion real and personal property of the parties when no marital litigation was pending before the Family Court, and no agreement addressing apportionment of property was ever presented to or approved by the Family Court. The Trial Court erred in granting summary judgment pursuant to Respondent's Motion to Dismiss. Appellant is entitled to an Order reversing the grant of summary judgment, and remanding this case for Trial.

Columbia, South Carolina

December 11, 2018

Respectfully submitted,



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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Knox McMahon, Circuit Court Judge

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Case No.: 2018-000887

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Erick George Johnson,

Appellant,

vs.

Abigail Marie Williams,

Respondent.

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**CERTIFICATE OF SERVICE**

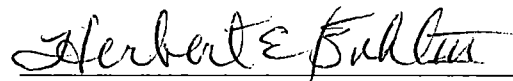
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I, Herbert E. Buhl, III, attorney for Appellant, do certify that I have this day served a copy of the attached Initial Brief of Appellant on Respondent below by causing same to be deposited in the United States mail, postage prepaid, and addressed as follows:

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December 11, 2018



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