THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Hon. J.C. Nicholson, Jr., Circuit Court Judge

ROOSEVELT SIMMONS	)
Plaintiff, Appellant	)
	)
Vs.	)
	)
HATTIE BAILUM, RUBY BAILUM,	)
VERDONE BAILUM,	)
JULIE B. JOHNSON,	)
MONICA MIDDLETON,	)
MARIE SMITH, MELVIN SINGLETON,	)
FRANKLIN SMITH, LMC, LLC,	)
JOHN MARTIN, ESQ. as TRUSTEE	)
Defendants, Respondents	)

REPLY BRIEF OF APPELLANT

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REPLY TO STATEMENT OF FACTS

Respondents have omitted or misstated facts which are not subject to dispute and which are relevant to this appeal, as set forth herein. In discussing the Second Amended Complaint in Bailum v. Simmons, respondents mischaracterize that pleading as simply naming additional heirs and aligning the parties. Resp. Brief at 5. The Second Amended Complaint specifically recognized the interest of Hester Singleton who was married to "Sam Bailum I" and that her heirs, including appellant, Roosevelt Simmons, were entitled to a statutory 1/3 interest in "the property" consisting of the two parcels acquired by Sam Balaam in 1904 and 1910. R pp. 455, para. 22 to 456, para. 29. In the original complaint Simmons was alleged to have no interest. R p. 425, para. 12. Respondents also fail to mention that in the

Second Amended Complaint, Monica Middleton was still named as a defendant and the Bailum heirs did not allege that she had any interest as an heir of Sam Bailum. See R p. 453, para. 6. Therefore, the statement that the purpose of the Second Amended Complaint was to "align the parties", Resp. Brief at 5, is incorrect. Monica Middleton remained a defendant and the Hester Singleton were still recognized as having a 1/3 interest in all of the properties at issue until the hearing. The respondents allege that Hester Singleton was Sam Balaam's third wife, Resp. Brief at 8, but the Special Referee found that Hester Singleton was the second wife of Samuel Balaam. R pp. 362-363.

In referring to appointment of a special referee, Resp. Brief at 5, respondents do not deny that on February 14, 2006, attorney Martin filed a motion to refer the case to a special referee (Mendelsohn) which included a Consent Order previously signed by attorney Cupp although she had been discharged the year before; or that when the motion was filed, Simmons was pro se, did not consent and was not served with a copy of the motion. Appellant's Brief at 12. See R pp. 29, 461,462. Respondents do not deny that the Consent Order does not state the basis for the reference to a Special Referee in lieu of the Master in Equity. Appellant's Brief at 12.

With respect to the June 6, 2007 hearing for a stay of the sale of parcel 1, respondents assert that Simmons consented to denial of his stay and distribution of the sale proceeds of parcels 2, 3 and 4 according to prior orders ; and to proceed on a appeal as to parcel 1 on the issue of adverse possession. Resp. Brief at 13. Respondents cite 42 pages of transcript. Id. However, the referenced transcript does not support the contention that Simmons consented to denial of his stay and to proceed on a appeal as to parcel 1 on the issue of adverse possession. According to the June 6th transcript,

Simmons only consented to the sale of parcels 2, 3 and 4th and the escrow of 1/3 of the sale proceeds pending his appeal from the denial of his interest as an heir of Hester Singleton. That is the extent of his consent as the following excerpts establish:

> THE COURT: Well, if he wants the money, then we just need to go forward and sell the property and pay the money and either divide it up and be done with it, which is what I asked you, and you got me the answer. Because --
> MR. HOUSTON: Let me do this, Your Honor. Is that correct, Mr. Simmons?
> MR. SIMMONS: That's correct. Parcels 2, 3, and 4.

Transcript of June 6th, page 55, line 12 -20. Attorneys Martin and Berlinsky concurred. Transcript of June 6th, page 74, line 16 to page 75 line 2; page 76, line 6 to 77, line 3 However, Simmons made it clear that he wished to protect his right to buy parcel 1.

> THE COURT: Make sure I understand what I'm talking about here. If we go forward, if I deny your motion to stay and appeal, go forward and sell all property.
> MR. BERLINSKY: Well, let me back up, because they're only talking about Parcels 2, 3, and 4. So what are they talking about on Parcel 1?
> THE COURT: You're not talking about Parcel 1?
> MR. HOUSTON: Well, what we understand on Parcel 1, Parcel 1 he wants to buy.
> MR. SIMMONS: I want to buy, just like the judge give me the benefit for $161,111.11, that's what I want to do.
> MR. HOUSTON: But on two, three, and four he's willing to go along with the sale.

Transcript of June 6th, page 55, line 22 to page 56, line 12. Later in the hearing, the special referee stated: "I'm not trying to get him to give up anything, except two, three, and four." Id., page 79, line 3-5. When the issue came up again, it was addressed by the special referee: "And Mr. Simmons would agree to waive those rights to appeal on [the adverse possession] issue, two, three, four. It's got nothing to do with one." Id., page 8,

line 1- 3. Later at the hearing, the issue of adverse possession was discussed in the context of Simmons claims to parcels 2, 3and 4. Id., page 74, line 15 to page 75 line 2. Simmons did not consent to the sale of parcel 1 but could not post a bond demanded by Attorney Martin equal to twice the sale price of the 4 parcels, in excess of 1 million. Id., page 41, lines 14-22. Therefore, only the sale of parcels 2.3 and 4 had been resolved by consent.

> THE COURT: All right. That's fine.
> Consent order signed by everybody, the lawyers and Mr. Simmons. I want to make sure. Okay. Make sure he has his say-so. Now, what do we do about **number one**?

Id., page 86, lines 5-9. (emphasis added). The balance of the discussion at the June 6th hearing dealt with the reasons for the special referee's denial of Simmons tender of financing to purchase parcel 1. See Id., page 86, line 10 to page 94, line 6. The Order entered on June 28th is not titled as a consent order and was not signed by Simmons attorney, Houston. As the transcript reflects, Simmons never consented to denial of a stay of the sale of parcel 1 or to limit his appeal.

Following entry of the June 28th order denying a stay of the sale of parcel 1, Simmons appellate attorney Houston filed a motion for Supersedeas to stay the sale of parcel 1 on various grounds including that the Special Referee's order improperly attempted to limit the appeal. R 489, Ninth. This motion contradicts respondents' assertion that Simmons waived the denial of a stay and limited his appeal.

REPLY ARGUMENT

I. SIMMONS DID NOT WAIVE HIS RIGHT TO APPEAL IN THE EARLIER CASE

Respondents claim that Simmons consented to waiving his right to appeal in the earlier case at the June 6th hearing. Resp. Brief at 17. Appellant denies that the original appeal he filed or the amended notice of appeal filed by Charles Houston was waived by consent. In the transcript of the June 6, 2007 hearing, there are many references to the sale of parcels 2,3 and 4 and the fact that Simmons was concerned only about his share of the sale proceeds and not about acquiring those properties. See Reply to Statement of Facts above. In the June 6th transcript, the court also discusses the preservation of Simmons claims to assert a right to an heirs interest in those properties on his pending appeal. The June 28th Order is not a "Consent Order" because it was never executed by attorney Houston. Further, in his supersedeas motion, he specifically objected to the language in the order by which the special referee attempted to limit the scope of the appeal. R p. 489, para. Ninth. Consequently, there is nothing in the record of the June 6th motion to support the contention of a knowing and deliberate waiver of appeal rights by Simmons. Respondents have not cited to a single statement made by Simmons at that hearing which can be interpreted as a voluntary waiver. The language in the order does not operate as consent but was entered in error and prompted the objections contained in the motion for supersedeas relief. Therefore, the record in Bailum v Simmons does not support respondents' contention of a waiver of any right to appeal the special referee's Amended Order Quiet Title Partition and Sale for which a timely Notice of Appeal was filed. R pp. 470,471.

Although respondents also contend that Simmons "abandoned" the prior appeal and therefore this appeal should be dismissed, Resp. Brief at 17-18, they do not provide any legal authority to support this argument. Appellant contended that the trial court's decision below dismissing this case because of the dismissal of the prior appeal is not supported by case law. Appellant's Brief at 34-35.

In addition, it is not disputed that Simmons was not aware of the contradictory testimony of Monica Middleton in Middleton v Doe, until after the appeal was dismissed. The abandonment of the appeal by attorney Houston together with the evidence of fraud on the court supports Simmons contention of exceptional circumstances for relief under R 60(b). See below.

II. FAILURE TO APPEAL DOES NOT PRECLUDE A COLLATERAL ATTACK ON THE JUDGMENT

Respondents also contend that Simmons should not be permitted to collaterally attack the special referee's June 6th rulings because he failed to appeal them. Resp. Brief at 18. This is a variation of the respondents' argument above that abandonment of the appeal prevents collateral attack on the judgment. Simmons contends that the failure to appeal a prior decision is not per se a bar to an independent action pursuant to R 60(b). Neither the trial court nor respondents have cited a single authority to support that conclusion. Moreover if this court accepts that interpretation as a matter to judicial policy, no independent action could ever be brought under R 60(b). A per se bar to a R 60(b) action based upon the failure to appeal or dismissal of the appeal would preclude all R 60(b) actions. Simmons contends that the court should recognize that the discovery of fraud on the court or other exceptional circumstances after the appeal period does not

per se preclude a R 60(b) independent action; that the most appropriate application of R 60(b) is for the court to review the entire circumstances before it determines whether relief should be granted. This is did not occur below and that the trial court erred.

III. THERE WAS EVIDENCE OF EXTRINSIC FRAUD

It is not disputed that R 60(b), SCRCP which provides for relief from a judgment due to "fraud on the court" refers to extrinsic fraud. Chewning v. Ford Motor Co., 354 SC 72, 579 S.E. 2d 605 (2003). Simmons contends that he has established sufficient evidence and inferences therefrom to meet this standard. Respondents claim that there was no evidence of extrinsic fraud, Resp. Brief at 22, but the burden was upon the Bailum heirs to establish the lack of material issues of disputed fact and they failed to do so.

The record below includes the Order Quieting Title containing the transcript of the Middleton v Doe case and portions of the May 15th transcript in Bailum v. Simmons case. In Middleton v Doe, Monica Middleton did not join any Bailum heirs in her quiet title action. R pp. 110, para. 3 to 111, para.11. In her testimony, Monica Middleton did not mention any ancestry with the Bailum heirs. The reasonable inference absent evidence to the contrary, is that Monica Middleton testified truthfully about her ancestry to Fannie Middleton and that there was no relationship to the Bailum heirs. In Bailum v Simmons, the testimony of Verdone Gray about the ancestry of Monica Middleton is directly contrary to Monica Middleton's testimony about her own ancestry. Appellant's Brief at p. 24-25. Respondents claim that "Dissimilar testimony in different actions is not . . . evidence of . . . fraud or perjury." Resp. Brief at 24. However, Verdone Gray's version of Monica Middleton's ancestry was not just dissimilar but completely different.

If Verdone Gray was Monica Middleton's cousin, why wasn't Verdone Gray named in the Monica Middleton case as an heir of Fannie Middleton. Monica Middleton didn't bring Verdone Gray into her quiet title action presumably because there was no ancestral connection. Consequently, if there was no ancestral connection, Verdone Gray's testimony is false. Respondents assert that Verdone Gray "believed" that Monica Middleton was her cousin. Based upon her testimony , the special referee awarded Monica Middleton ¼ of the proceeds from the sale of parcels 2,3 and 4 ($337,000) and 1/6 of the proceeds from the sale of parcel 1($220,000). R p. 375, para. 7 & 11. However, why would anyone assert that there was another claimant to heirs property having such a substantial claim (approximately $120,000.) to the proceeds as Monica Middleton was given, based upon a belief? The reasonable inference is that she fabricated the relationship with Monica Middleton to establish a lineage that supported their claim of two Sam Bailums , enabling the Bailum heirs to claim 100% of the proceeds from the sale of parcels 2,3 and 4 and eliminate Hester Singleton Balaam's heirs from receiving their statutory 1/3 interest.

Apart from the fraud against Simmons and the Hester Singleton heirs by the Bailum heirs, Monica Middleton obtained approximately $120,000. in the Bailum case to which she was not entitled or defrauded the Bailum and Hester Singleton heirs of their interest in the 5 acres to which she claimed a sole interest. The combination of inconsistent judgments in two related cases represents an example of "that species of fraud which does, or attempts to, subvert the integrity of the Court itself." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E. 2d 44 (Ct. App.1988). Therefore, there was ample evidence of extrinsic fraud.

It cannot be disputed that Monica Middleton's ancestry as a descendant of Fannie Bailum was critical to the Bailum heirs case. There was no documentary evidence of their claim that two different Sam Bailum acquired the 54 acres in 1904 and the 20 acres in 1910. The birth certificates that they submitted did not establish the existence of another Sam Bailum who was alive and of age who could have acquired the 54 acres in 1904. The Bailum heirs testimony that Monica Middleton was their cousin and that she was the daughter of Fannie Bailum made their testimony that there were two different Sam Bailums plausible. Appellant has demonstrated that the special referee relied on this testimony. Therefore, based upon the transcript testimony and reasonable inferences, the Bailum heirs testimony about Monica Middleton was false, knowingly false, material and intended to deceive and did deceive the special referee who relied upon it.

Respondent also asserts that there is no evidence that the Bailum heirs changed their position at trial. Resp. Brief at 25. This is simply untrue. The Second Amended Complaint alleges that the Sam Bailum who acquired the 54 acres in 1904 is the same person who acquired the 20 acres in 1901. See R p. 455, para. 22 & 24. The Second Amended Complaint alleges that Sam Bailum was married to Hester Bailum who was entitled to a statutory 1/3 share of his estate. R p. 456, para. 25, 26 and 27. The Second Amended Complaint does not allege what interest Monica Middleton is entitled to. See R p. 453, para. 6. At trial, as demonstrated, their testimony was entirely different.

The argument that Simmons was represented by counsel at the hearing and could have cross examined the witnesses, Resp. Brief at 26, is another way of asserting that this was intrinsic versus extrinsic fraud. Respondent relies upon Bryan v Bryan, 220 S.C.

164, 66 S.E.2d 609 (1951) to support its contention of intrinsic fraud. Resp. Brief at 20, 24, 28. Bryan is distinguishable because it involved only false testimony. Simmons contends that in the Bailum case the Bailum heirs conspired to deprive him of an heirs interest in the 54 acres by fabricating the relationship with Monica Middleton who did not appear at the hearing to be cross examined. Her earlier testimony in Middleton v Doe was thus concealed. Simmons contends that there is a material issue of disputed fact as to whether he could have found out about the Middleton v Doe case earlier . The existence of that dispute of fact prevents the court from determining that there was extrinsic fraud. Therefore respondents contention of a lack of evidence, Resp. Brief at 29, ignores the record.

Moreover, Respondents cite to Ray v. Ray, 374 S.C.79, 647 S.E.2d 237(2007), for the proposition that the fraud must be extrinsic. Resp. Brief at 20. However, the holding supports Simmons position that there was prima facie evidence of extrinsic fraud on the record below. In Ray v. Ray the Supreme Court held that "an act or perjury or concealment . . . coupled with an intentional scheme to defraud the court justifies the setting aside of a judgment pursuant to R 60(b) due to extrinsic fraud." Id. at 85-86. These facts are not subject to dispute: the Bailum heirs initially recognized Simmons as an heir to all of the property and then changed their position and created a fictitious relationship between them and Monica Middleton, which was contrary to her testimony in a prior case; and Monica Middleton did not appear at the hearing but nonetheless received a substantial portion of the sale proceeds. Simmons contends that there was prima facie evidence that Bailum heirs committed an act of perjury and concealment with the intent to defraud.

Respondents assert that Simmons own family tree indicates three Sam Bailums, Resp. Brief at 26, apparently to support their contention below of no fraud. However, Simmons family tree shows Sam Balaam married to Hester Singleton and that Sam Balaam had a son named "Sam" who had a son named "Sam." It does not support the claim of two different Sam Balaams acquiring the different parcels in 1904 and 1910.

Respondents also assert that Simmons raises misconduct by his first attorney McFarland as part of the fraud on the court for the first time on appeal. However, the facts surrounding McFarland's representation and his reprimand for delay are part of the record below. Simmons asserted before the trial court that McFarland intentionally delayed his case while prosecuting Middleton v Doe. R p. 167, para. 2. Therefore, this issue was presented below.

Finally, Simmons contends that the court should not have granted summary judgment on the issue of extrinsic fraud due to the need for discovery on this issue. None of the parties central to the earlier case were deposed. Monica Middleton resides out of state. The trial court was aware of the lack of discovery and asked counsel to address only what the Bailum heirs submitted to support their contention of two Monica Middletons. See below. Therefore, the Court should find that summary judgment as to extrinsic should not have been granted.

IV. THERE WAS EVIDENCE OF EXCEPTIONAL CIRCUMSTANCES

Respondents contend that appellant failed to produce evidence of the elements cited in T v. T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008) and thus his case was properly dismissed. Resp. Brief at 29-32. However, respondents misstate what this court said:

> "the rule [in Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903)] merely reflects many of the considerations attendant to an equitable analysis. Further, since the independent action referenced in the rule is one in equity, the court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists. . . we do not suggest this list is exclusive. However, what we do suggest is that equity only intervenes when the circumstances so require, but to do so, a **court must be aware of all of the circumstances before it acts.**"

662 S.E.2d at 417-418(emphasis added).Therefore, appellant's position that T v T required the court below to consider all of the circumstances correctly interprets the holding and respondents do not.

Respondents' contention that the circumstances of this case are different than T v. T, Resp. Brief at 31-32, is also unconvincing. Respondents appear to argue that T v T is limited to a child paternity case where the putative father failed to promptly determine paternity. Nothing in the language of the case supports the conclusion that the case is limited to its facts. Therefore, the state of the record or the nature of the rights involved do not alter the principle that exceptional circumstances justify equitable relief and that each case is to be judged on its own.

Despite the language in T v T that the 5 elements quoted from Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903) were merely part of an equitable analysis, respondents try to evaluate this case solely within those 5 elements. Appellant contends that this case satisfies those elements nonetheless.

A. Judgment should not be enforced in equity and good conscience

Respondents contend that the proceedings in Bailum v Simmons were correct and that it would be inequitable to the other heirs if the judgment were vacated. Resp. Brief at 32-33. There is no evidence in the record to support this and none is cited. The evidence overwhelmingly favors Simmons.

The special referee found that Simmons had maintained the River Road property and awarded him an additional $10,000 from the sale proceeds which he could use to purchase parcel 1. R p. 23 at 15. Simmons was denied the right to complete the purchase a property where he was raised because the special referee claimed that the two parties providing financing were straw purchasers. The violation if any, of the special referee's order to file the documentation was not significant and Simmons contended that he did deliver copies to the special referee and the other parties. The equities clearly favor Simmons .

B. Defense to Bailum heirs claims

Respondents claim that Simmons has no defense to the cause of action since his claim was only for adverse possession. Respondents has again misstated the pleadings. The original Bailum complaint alleged that Simmons claimed an adverse interest and that he has no interest in the title to the property. R p. 437, para. 12. In his Answer and Counterclaim, Simmons denied these allegations and asserted that he is the grandson of Lucinda Hester Sargent Balaam widow of Sam Balaam, the owner of the two properties at issue. R pp. 447, para. 1, 448, para. 4. Therefore, Simmons clearly alleged an heirs interest in the subject property. As noted above, the Second Amended Complaint admitted that Hester Singleton was the widow of Sam Bailum and that her heirs entitled to 1/3 statutory interest. Simmons did not file any further pleadings and the Bailum heirs are bound by theirs. Finally, the special referee's Order Quiet Title Partition and Sale addresses the claims of the Hester Singleton heirs to the subject property and determined that there were two different Sam Bailums who acquired the 54 acres in 1904 and the 20 acres in 1910 and that Hester Bailum was married to the one who acquired the 20 acres in

1910. In spite of his ruling that Simmons was not an heir of the Sam Bailum who acquired the 54 acres, the special referee denied Simmons claims for adverse possession on the remainder of the 54 acres on the basis that he could not oust another heir. R pp. 367-370. The transcript of the June 6th motion for a new trial is replete with references to Simmons appeal of the denial of his right to an interest in parcels 2, 3 and 4 representing the remainder of the 54 acres. Respondents cannot support their contention of a waiver based upon the record . Therefore, this court should find that there was no waiver of an heirs interest to all of the property at issue.

Respondents speculate that the Court of Appeals was well aware of these claims and failed to reinstate the appeal. However, the record is clear that dismissal of the appeal was due to attorney Houston's failure to file the Initial Brief . The orders entered by this court do not indicate any other reason for the decision. See R pp. 399,414,418. This court's refusal to reinstate the appeal is a determination only that the reasons given for the delay were not acceptable. It is not a decision on the merits.

C. Simmons defense was negated by the fraud on the court

Another of the 5 elements that respondents claim Simmons must satisfy is accident, fraud or mistake which prevented him from having a defense in the Bailum v Simmons case. Resp. Brief at 34-35. However, it is indisputable that the Bailum heirs admitted in their Second Amended Complaint that Hester Singleton was the widow of Sam Bailum and that her heirs were entitled to 1/3 interest in all of the property. As demonstrated above, the Bailum heirs testified at trial that there were two different Sam Bailums who acquired the property in the 1904 and 1910. It is undisputed that the Bailum heirs testified that they were related to Monica Middleton and that her ancestry

supported their claim of two different Sam Bailums. As demonstrated above, the reasonable inference is that the Bailum heirs lied about the lineage of Monica Middleton in order to support their claim that there were different Sam Bailums. The reasonable inference is that they acted in concert with Monica Middleton whose failure to appear is unexplained. The record before the trial court was incomplete due because discovery about the circumstances of the Bailums change in position had not occurred.

D. There was absence of fault

Respondents contend that Simmons trial and appellate attorneys were responsible to protect Simmons' interest and that their failure to do so is attributable to him. Resp. Brief at 35-38. As Simmons has argued in his appellant's Brief, whether Simmons attorneys should have found the decision in the Middelton v Doe case before the Bailum trial is a disputed fact.

Respondents also argue that Simmons appellate attorney was a fault for dismissal of the appeal and his fault is attributable to Simmons. Reps. Brief at 36. They cite several cases which are distinguishable. Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552 (2010) involved a R 60(b),SCRCP motion made after default was entered against defendant. The Supreme Court found that Rice had been denied due process because of her attorney was suspended when he failed to act on notices regarding the case. Id. at page 311. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) also arises from a R 60(b),SCRCP motion made after default was entered against defendant. The issue was whether an attorney's failure to answer was " excusable neglect". Id at 341-343. Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391

(1957) cited by respondents, involved a motion to vacate a default due to the attorney's failure to obtain an extension of time to answer. Id at 550-551. As the cited cases demonstrate, the general rule that attorney neglect will be imputed to the client is applied when there has been a single failure to protect the client's interest.

Simmons contends that the record of the Bailum appeal represents an example of attorney abandonment, not mere neglect. Respondents claim there is no evidence of abandonment. Resp. Brief at 45. However, the appeal record in Bailum v Simmons contains at least 3 dismissals of the appeal plus a final denial of a motion for reinstatement. R pp. 399, 414, 418, 420. The record indicates that Houston was given three opportunities to file the Initial Brief. R 400, 416. Houston's actions did not constitute mere neglect but represent his abandonment of Simmons appeal because it is outrageous and in violation of his duty to devote reasonable efforts to his client. 7A C.J.S. Attorney & Client Section 181 at 285. As the Supreme Court stated in Graham v. Loris, 272 S.C.442, 452-453(1978): "Conscience requires this court to charge the attorney alone with his gross dereliction of duty and not to visit the consequences upon an innocent client."

E. There was no adequate remedy

Respondents assert that Simmons has an adequate remedy in the form of a malpractice action against his former attorneys. Resp. Brief at 39. However, as Simmons has already argued, money damages are inadequate because Simmons was denied the right to complete the purchase of the 20 acres which he was raised and never had his case reviewed by this court. The loss of an interest in the real estate has always been considered an irreparable injury. Riley v. Charleston Union Station Co., 67 S.C. 84, 45

S.E. 149, 152 (1903). "Real estate has long been thought unique, and thus, injuries to real estate interests frequently come within the ken of the chancellor." HHHunt Corp. v. Town of Lexington, 389 S.C. 623,641, 699 S.E.2d 699, 707 (S.C. App. 2010) (quotation omitted). Therefore, the inadequacy of money damages has been established.

F. Effect of procedural irregularities

Simmons has asserted that the procedural irregularities also represent part of the exceptional circumstances justifying relief. These irregularities include Simmons objection to appointment of a special referee, evidence of racial bias by the referee appointed and the jurisdictional defect in the appointment of the special referee. None of these were reviewed because of the dismissal of the appeal.

Respondents contend that there is no evidence that Simmons ever objected to the appointment of a special referee. Resp. Brief at 40. As far as objecting to appointment of the special referee, Simmons submitted an affidavit in this case that he did object. R p. 94, para. 3. It is undisputed that when the Bailum heirs filed a motion for appointment of the special referee, Simmons was pro se and was not served with this motion. Respondents claim that Simmons' basis for a new trial was based on "Simmons not agreeing" and this is different than objecting. The difference is semantic. The consent was signed by his former attorney, Ruth Cupp, Esq. not Simmons who was pro se when the motion was filed. Furthermore, Simmons' motion for a new trial was based in part on his objection to the appointment of Mendelsohn as special referee. R. p. 465, para. 4. Simmons later filed a judicial ethics complaint against Mendelsohn for among other things, making a racially disparaging remark. R pp. 169, para. 6, 206-207.Simmons asserted that he realized that Mendelsohn was biased against him when Mendelsohn

denied him the right to complete the purchase of the 20 acres. R p. 169, para. 6. Simmons previously asserted that Mendelsohn conducted a proceeding on January 26, 2005 at which the racially disparaging remark was made. Respondents assert that attorney Martin "testified that he never heard the Special Referee make any disparaging remark to anyone." Resp. Brief at 42. However, Martin was never sworn at the March 1, 2010 motion hearing when this statement was made. R p. 298, lines 16-24. Martin's denial does not erase the claim of racial bias made by Simmons. This issue was never addressed due to dismissal of the appeal.

The jurisdictional defect in the appointment of the special referee is apparent on the face of the order appointing him. R p. 357. South Carolina Code Ann. 14-11-60 requires that a special referee can only be appointed where the Master in Equity is unavailable or there is just cause shown. Since the Order appointing him does not establish any just cause and there was a Master in Equity sitting in Charleston County, his appointment is void ab initio. In Bunkum v. Manor Properties, 321 S.C. 95, 99-100, 467 S.E.2d 758 (S.C. App. 1996), the plaintiff commenced an action pursuant to R60 (b) to vacate an earlier judgment. This court noted: "We are mindful of Bunkum's failure to appear before the master at the hearing on the motion, and her failure to directly appeal the master's order. Ordinarily, she would have been procedurally barred from challenging the order. However, issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." Therefore, a jurisdictional defect can be raised at any time even if raised for the first time on appeal.

Respondents argue that the procedural irregularities were raised by Simmons appellate attorney but that this court declined to provide relief. Resp. Brief at 41,42. However, there is nothing in the prior appeal record which indicates a ruling on the merits. The denial of Houston's petition for supersedeas and stay of the sale of parcel 1 was endorsed on the motion and did not contain any findings and does not represent a ruling on other issues in the petition. R p. 411. The remainder of the appellate proceedings was administrative and concerned with the ordering of the transcript and filing of the Initial Brief. See R. pp. 399, 400, 412, 414, 416, 417, 420. Therefore, there is no factual basis to find that there was a determination of the merits before the appeal was dismissed.

Appellant also rejects respondents' position, Resp. Brief at 31, that Simmons right to due process including the right to appellate review is not a fundamental right. It is too well established to require citation that the right to due process including the right of appeal is fundamental.

G. Existence of Other Circumstances

Respondents also contend that false testimony even if given by the Bailum heirs does not rise to the level of exceptional circumstances. Resp. Brief at page 43. However, in T v T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008) the Court of Appeals noted: "Even if we were to assume based on precedent that any fraud is intrinsic, the judgment is nonetheless vulnerable to attack outside the fraud context . . . and through an independent action if the appropriate circumstances are present." Id at 136. Consequently, false testimony which is intrinsic may be the basis for an independent action based upon exceptional circumstances.

Respondents claim that Simmons' trial attorney should have discovered it at the time of trial, Resp. Brief at page 44, but that is not established in the record and is in dispute. It is not disputed that the Bailum heirs changed their position at trial from what they had alleged in their Second Amended Complaint. It is not disputed that Monica Middleton did not testify at the Bailum trial. It is not disputed that the property which was the subject of the quiet title action did not include the 5 acres acquired by Fannie Middleton in 1904. It is not disputed that Simmons did not discover the Monica Middleton case until after the appeal was dismissed. The trial court below found that the Monica Middleton testimony was irrelevant to the claims in the Bailum case but then found that Simmons should have uncovered it before hand. However, the Monica Middleton testimony became relevant when the Bailum heirs made Monica Middleton's ancestry an issue at trial.

Where as here Monica Middleton's prior testimony never came to light until after Simmons appeal was dismissed, Simmons contends that the trial court erred in dismissing the case without considering all of the circumstances and allowing discovery to proceed.

Finally, respondents make the preposterous claim that even if the Bailum heirs gave false testimony and conspired to conceal their acts, that did not deprive Simmons of the opportunity to be heard because he was represented by counsel. Resp. Brief at page 44-45. Chewning and T v T amply refute that claim since both plaintiffs were represented by counsel at the trial of the first case.

Respondents raise the issue of the "newly discovered evidence" which attorney Houston presented to the special referee at the June 6th hearing to stay the sale of parcel

1. Resp. Brief at page 46.They assert that the census data was available to him in discovery or could have been found prior to trial. Id. That argument is another version of the argument rebutted above that the false testimony was intrinsic fraud and not a basis to vacate judgment under a separate action. Therefore even if the census data could have been discovered, that per se does not result in a summary dismissal of this action.

V. SUMMARY JUDGMENT WAS PREMATURE

Respondents assert that the trial court did not prematurely grant summary judgment, Resp. Brief at 47, and rely upon Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765 (S.C. App. 1995). However, the facts in Middleborough H.P.R.C. are significantly different, as is the basis for the court's ruling. Therefore a detailed review of the facts is in order. The plaintiff condominium association sued the manufacturer of roofing materials installed on its condominiums for products liability, breach of warranty and negligence. Plaintiff moved for partial summary judgment as to liability. The motion was premised on the fact that the " 'underlying issues regarding the role, responsibility, and liability for the development, production, and marketing of the roofing material which failed [had] been previously adjudicated against [Montedison]' who was collaterally estopped from relitigating those issues. . . . by the Minnesota Supreme Court's holding and findings of fact in Church of the Nativity of Our Lord v. WatPro, Inc., Montedison S.p.A. and Montedison U.S.A. Inc., et al., 491 N.W.2d 1 (Minn.1992), aff'g 474 N.W.2d 605 (Minn. Ct. App.1991) wherein Montedison was found liable for damages resulting from a failed Flagon roof." 320 S.C. at 474. The trial court granted the Regime's motion for partial summary judgment as to liability against Montedison on the ground of non-mutual

offensive collateral estoppel. The Court of Appeals held that defendant was estopped from relitigating the issue of product liability and agency. Id at 476. The Court of Appeals found that Montedison had been a party to other suits involving Flagon roofs that addressed most of the same issues involved in this case and affirmed the lowers court's decision. Id. at 479-480. However, the Court of Appeals reversed on the negligence claim for further development of the record. Id at 479.Therefore, the effect of the holding is limited since the allegations upon which summary judgment had been granted were addressed in an earlier case by which the defendant was bound.

This case is significantly different. Simmons filed this action to vacate the prior judgment because of a fraud on the court and exceptional circumstances. The fraud on the court was discovered after Simmons appeal was dismissed. Simmons was denied appellate review because his attorney abandoned the appeal. Unlike Middleborough, there was no earlier final judicial determination on the same issues raised in second case.

Respondents contended that the plaintiff failed to conduct discovery during the pendency of the motion to dismiss. However Simmons counsel made the court aware of his desire to conduct discovery in his opposition to the respondents 12(b) (8), SCRCP motion to dismiss in September 2009. R pp. 91-92. The motion was heard on March 1, 2010. During oral argument, Simmons counsel asserted that the court should not grant the motion until there was a development of the record.

> "MR. BERTELE : We need to find out some of the things that happened here and why they happened. The complaint is not complete with respect to all of the events that went on because obviously we've had—
> THE COURT: Well, I understand that .
> MR. BERTELE: --- no discovery.

R. p. 289, lines 11 -16. The court continued argument on the motion to dismiss which was finally heard on August 27th. During the course of the argument concerning the alleged fraud on the court, attorney Martin asserted: "There are two Monica Middletons." R. p. 338, line 9-12. Whereupon the court stated:

> "THE COURT: The only thing that I was concerned about was the argument that the 2004 Monica Middleton , the results of that and the testimony of that were different than she testified to in the trial that we are here for today argument."

R p. 340, line 9-14. After Simmons counsel objected to the lack of a factual basis for the contention, R pp. 340, line 21 to 341, line 18, the court stated that it would convert the motion to dismiss to summary judgment. R p. 342, line 1-4.

> "THE COURT: If he is correct, then that's—if there are two Monica Middleton and that –lets get some affidavits and let's find out. because if he—if Mr. martin is correct, you don't have claim."

R p. 342, line 6-10. Simmons counsel responded:

> " MR. BERTELE: I may not have as much of a case. I believe that I still have case on the other claim of exceptional circumstances."

R p. 342, line 11-14. The court responded:

> "THE COURT: So instead of me—and you'all taking depositions and you'all continue to litigate this thing, let's convert it to summary judgment motion. I give you so much time to substantiate what Mr. Martin is saying, if that is true or not."
>
> . . .
>
> I'll give you as much time as possible to submit the proper affidavits and whatever excerpts from the transcripts are necessary on any testimony."

R p. 342, line 18-20, R 343, line 6-9. Therefore, it is clear that the court preempted discovery in order to address the contention that there were two Monica Middletons.

Simmons attorney agreed to this limitation of what was to be submitted, not to forego any discovery on the allegations in the complaint. R p. 342, line 5, 25.

The record is clear that there was no period of discovery and that the court was aware of it and decided to proceed on summary judgment to dispose of the allegation of two Monica Middletons. Consequently, Simmons has a factual basis to assert that the granting of summary judgment as to the entire complaint was premature, due to a lack of discovery. The trial court acknowledged that it was at fault for prolonging decision on the motion to dismiss. R p. 343, line 20-24. Since the motion was based upon res judicata, the only concern was what was on the record below. The court granted respondents 45 days to submit the appropriate affidavits, R p. 346, line 14-15 and Simmons 30 days. R p. 346, line 2-3.

In summary, the procedure used by the court below was intended to address the limited issue of two Monica Middletons. Simmons' counsel followed the court's directive to submit affidavits in response to that issue. However, the trial court's decision was broader than it indicated at the motion hearing. Consequently, Simmons was not afforded an opportunity to conduct discovery on all of the issues raised in the pleadings.

VI. THE TRIAL COURT ERRED BY FAILING TO DISQUALIFY BERLINSKY

Respondents do not provide any support for their contention that there was no attorney client relationship established between Simmons and Berlinsky after Simmons consulted Berlinsky about representation in an heirs property case involving the 54 acres acquired by Sam Bailum in 1904. Resp. Brief at 51. The law is to the contrary. An

attorney client relationship is established if a person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice. whether or not actual employment results. Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44 (Ct. App.1984). The trial court erred by not disqualifying Berlinsky. See Spence v. Wingate, 385 S.C. 316, 684 S.E.2d 188 (S.C. App. 2009) (trial court erred as a matter of law by dismissing claim of breach of fiduciary duty where facts in dispute as to representation)

The corollary to Berlinsky's disqualification is that the motion he prepared and filed should have been dismissed. It is contrary to the nature of the attorney client relationship to allow an attorney to act against the interests of a former client. In this case, that action consists of the filing of the motion to dismiss. Therefore, the motion to dismiss should have been dismissed.

VII. THE PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED

Respondents assert that failure to appeal the denial of a temporary injunction is waived if not appealed within 30 days citing Roberts v. Union County Bd. of School Trustees, 284 S.C. 299, 326 S.E.2d 163 (S.C. App. 1985). However, that case does not hold what respondents assert, rather it dealt with the trial court's decision to turn a hearing on a TRO into a decision on the merits. S.C. Code Ann. Section 14-3-330 only provides appellate jurisdiction to the Supreme Court from the denial of a TRO. Since the denial of a TRO was not a final order, R 203 SCACR does not prohibit a notice of appeal when it becomes a final order.

In addition, appellant filed a motion for a TRO in December 2010 which was never addressed by the trial judge. R pp. 208-211. Since the order granting summary judgment had the effect of dismissing the TRO, this court should consider it if it determines to reverse on the merits.

CONCLUSION

The record supports appellant's position that the trial court erred by granting summary judgment. Evidence of extrinsic fraud consisted of contradictory testimony in 2 heirs' property cases involving Monica Middleton, the approval by the Bailum heirs of her receipt of a substantial interest in the proceeds and her unexplained non appearance. There was a dispute of fact as to whether Simmons should have known about the earlier case based upon the respondents pleadings prior to trial. Even if false testimony by multiple Bailum heirs and the failure of Monica Middleton to appear is only evidence of intrinsic fraud, these circumstances together with the alleged bias by the special referee and abandonment of Simmons appeal by his appellate attorney evidence satisfy the requirements of exceptional circumstances

For the reasons set forth above, Simmons respectfully requests this court to reverse the Order dated January 21, 2011 granting summary judgment and remand for further proceedings below.

Respectfully submitted,

By: _____
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July 23, 2012