

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon

Civil Action No. 2012-CP-32-00541
Appellate Case No.: 2012-212587

David Randolph Whitt.....Appellant,

v.

Clonta M. Fox.....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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Section 15-19-30, S.C. Code Ann., (1976, as amended).....8

ARGUMENT IN REPLY

Appellant responds *seriatim*, to the argument provided by Respondent, in Respondent's Brief. Appellant's issue number "I." in Appellant's Brief was:

"I. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE RELIEF SOUGHT IN APPELLANT'S MOTION TO ATTACH PROPERTY, GIVEN THE DISJUNCTIVE NATURE OF THE CONTROLLING PROVISIONS OF SECTION 15-19-10?"

Argument in Respondent's Brief Doesn't Address Appellant's Argument.

Respondent's Brief, failed to address Appellant's issue number "I", repeated hereinabove, concerning **the disjunctive nature** of *Section 15-19-10*, S.C. Code Ann., (1976, as amended). Respondent's Brief does not even mention the disjunctive portion of *Section 15-19-10*. Therefore, Respondent's Brief did not refute Appellant's argument on page "7" of Appellant's Brief. "Given the disjunctive nature of *Section 15-19-10*, the Trial Court erred in applying only one provision of *Section 15-19-10*. Factually, *Section 15-19-10*, also contains a second provision, "(8) When any person or corporation... **or** is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors as mentioned in this chapter;" (emphasis not in original). The Trial Court failed to grant relief under the second¹ disjunctive provision of *Section 15-19-10* described hereinabove, which violates South Carolina case law." Garris v. Governing Bd. of South Carolina Reassurance Facility 511 S.E. 2d 48, 52 (1998).

¹ The "second" provision of *Section 15-19-10*, which was not properly applied by the Trial Judge, was set forth as the sole basis for Appellant's Motion, in Appellant's Motion to Attach Property, (*R. p. 7*), (The first provision of *Section 15-19-10*, addressed and relied on by the Trial Court, was not addressed in Appellant's Motion to Attach Property), (*R. 7*).

ARGUMENT IN REPLY (Cont.)

Respondent Mischaracterizes Appellant's Argument.

On page "2" of Respondent's Brief, Respondent states that, "[Appellant's] counsel argued that [Appellant] is entitled to an attachment of [Respondent's] property because [Appellant] is 'afraid that he's [the Defendant] about to dispose of assets.'" Factually, Appellant provided a comprehensive, sworn Affidavit to the Trial Judge, satisfying the requirements of *Section 15-19-10, (Affidavit of David Randolph Whitt, filed April 23, 2012, R. p. 10)*. Additionally, Appellant also relied on four admissions of the Respondent, (*Four Admissions by Defendant/Respondent, R. p. 27*), which were provided to the Trial Judge.

Attachment Statute Does Not Contemplate a Response by a Defendant.

Nothing in the Attachment Statute, *Section 15-19-10, et seq.*, S.C. Code Ann., (1976, as amended), contemplates that a Defendant can defeat attachment by a denial, or by a denial by way of an Affidavit. Nothing in the Attachment Statute contemplates a "battle" of Affidavits from each party. Nothing in the Attachment Statute contemplates a delay in attachment, because a Defendant denies that attachment is appropriate.

Attachment is Available at the Issuance of a Summons.

For example, the Attachment Statute allows a Plaintiff to attach the property of a Defendant, **at the time Plaintiff issues a Summons against defendant or anytime afterwards.** *Section 15-19-10*, Grounds for attachment generally, "(8) The plaintiff at the time of issuing the summons or any time afterwards may have the property of such defendant or corporation attached, in the manner prescribed in this chapter, as a security for the satisfaction of such judgment as the plaintiff may recover." That means attachment is available prior to response by a Defendant or the completion of discovery.

ARGUMENT IN REPLY (Cont.)

Respondent Makes an Improper Argument.

On page “3” of Respondent’s Brief, Respondent argues, “There is nothing in the record to suggest that the [Respondent’s] relocation to Spartanburg County is in anyway (*sic*) an effort to defraud creditors.” Factually, the record shows that, Appellant provided an Affidavit to the Trial Court, in which Appellant alleged that Respondent’s attempt to sell Respondent’s residence was an effort to defraud Respondent’s creditors [Appellant] (*Affidavit of David Randolph Whitt, filed April 23, 2012 R. p. 10*).

Respondent next alleged the following exception:

**“II. THE RESPONDENT’S PROPERTY IS EXEMPT FROM ATTACHMENT
PURSUANT TO THE HOMESTEAD EXEMPTION OF S.C. CODE § 15-41-
30(A)(1).”**

Respondent’s Argument is Inapposite.

Respondent’s argument as to the exemptions to an attachment, does not apply to this Appeal, concerning the issuance of an attachment Order.

Respondent’s Exception Incorrectly Presupposes That Attachment Applies Only to Real Property.

“Under the attachment statute, **all non-exempt property of the defendant** in the state may be attached, and there is no requirement that the property attached have any connection to the dispute.” First Union Mortgage Corporation v. Thomas, 317 S.C. 63, 74, 451 S.E. 2d 907 (1994), (emphasis supplied). Therefore, a Defendant may properly attach cash, cash equivalents, automobiles, etc., belonging to a Defendant, not just real property, as Respondent herein argued.

ARGUMENT IN REPLY (Cont.)

A review of Appellant's Motion to Attach Property, reveals the following request by Appellant, **as to all property of Respondent**, not just real property, (*Motion to Attach*; R. p. 7):

- "...has assigned, disposed of, or secreted or is about to assign, dispose of, or secrete property...", (*Appellant's Motion to Attach Property*, p. 2; R. p. 7);
- "...this Court should cause the Warrant of Attachment to be directed to any Sheriff or Constable of Lexington County, South Carolina to attach and safely keep all the property of [Respondent] Fox within Lexington County, South Carolina..."(*Appellant's Motion to Attach Property*, R. p. 8); and
- "Upon information and belief, [Respondent] Fox possesses and/or is the owner of record of real property and vehicles and furnishings and equipment and bank accounts and cash equivalents and other property unknown to [Appellant] Mr. Whitt, at this writing." ..."(*Appellant's Motion to Attach Property*, R. p. 8).

Respondent Improperly Construes Attachment Statute as Being Narrow.

However, the South Carolina Attachment Statute is very broad:

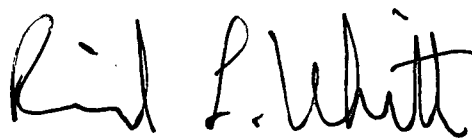
- Attachment is available to a Plaintiff immediately upon the filing of a Summons, *Section 15-19-10(8)*.
- Attachment by a Plaintiff is proper before the debt is due, *Section 15-19-30*.
- All nonexempt property of a Defendant may be attached. First Union Mortgage Corporation v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907 (SC 1994).
- There is no requirement that property attached have any connection to the dispute. First Union Mortgage Corporation v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907 (SC 1994).
- Attachment is proper before a debt is established. Attachment takes a Defendant's property into legal custody, to be applied to the Plaintiff's debt, when established. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004).
- South Carolina Courts have allowed attachment of cash and cash equivalents. American Federal Bank, FSB v. Kateman, 335 S.C. 273, 275 (1999).
- If a Defendant receives proceeds from the sale of an asset, those proceeds may also be attached. Allen, Inc. v. Island Co-op. Ass'n LTD., 109 234 S.C. 537, 548 (1959).

CONCLUSION

Based on the foregoing, the Attachment Statute, *Section 15-19-10, S.C. Code Ann., (1976, as amended) et seq.*, and applicable Case Law set forth by Appellant, the Order of the Trial Court should be reversed and this matter remanded to the Trial Court, to issue an Order of Attachment.

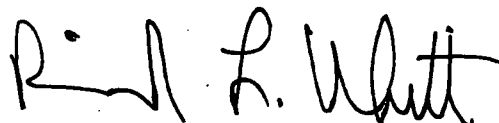
CERTIFICATE OF COUNSEL

I certify that the contents of this Brief complies with Rule 211(b).



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Respectfully Submitted,
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