

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

CASE NO. 2008-CP-26-7941

John Sherrill and Estate of Gaye Marie Reynolds..... Appellants

vs.

Gary Moore and Robert Moore Respondents

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Master-in-Equity err in holding that if the Plaintiff was a successful bidder he must offer cash in an amount equal to the homestead exemption?
- II. Did the Master-in-Equity err in failing to hold that the South Carolina Constitution trumps the homestead exemption and as a result Moore was not entitled to the homestead exemption?
- III. Did the Master-in-Equity err in holding that the Plaintiff could not raise additional grounds as to why the homestead exemption should not apply in subsequent supplementary proceedings pursuant to SCRCP 59?
- IV. Is the homestead exemption inequitable in a case in which the Plaintiff attempts to collect a civil judgment from a criminal Defendant for his crime?
- V. Is the Defendant entitled to a homestead exemption since this is not his residence?
- VI. Is *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002) applicable or is it unfair?

STATEMENT OF THE CASE

This is an action brought to collect a wrongful death judgment obtained by the Plaintiff against Defendant Gary Moore. On October 20, 2002, Gaye Marie Reynolds, the deceased was walking down U.S. Highway 17 Business in Surfside Beach on her way to work when Gary Moore struck her with his vehicle and killed her. Moore left the scene and was later identified by witnesses as the driver of the vehicle in question. Moore was charged with felony DUI including a death and hit and run with great bodily injuries/death. Moore was convicted by a jury and was sentenced to fifteen years in prison on October 24, 2005. Moore currently is in custody and serving that sentence at the South Carolina Department of Corrections. Shortly thereafter, Plaintiff obtained a wrongful death judgment /Confession of Judgment against Moore in the amount of \$500,000.00. Later, the Plaintiff discovered Moore had deeded the real property in question to his girlfriend. A lawsuit was

brought and the Circuit Court ordered the real property be put back in his name. (See Consent Order dated August 28, 2007, C/A No. 2006-CP-26-5460) (R. p. 17). Plaintiff then brought supplemental proceedings against Gary Moore and his brother Robert Moore since they jointly owned the real property in Myrtle Beach, South Carolina. The collection of the judgment was referred to the Master-in-Equity pursuant to S.C. Code § 15-31-10 of the 1976 Code of Laws, as amended, and Rules 53 and 71 of the South Carolina Rules of Civil Procedure.

At the Master's hearing, Plaintiff sought to enforce the judgment and sell the property jointly owned by Defendants Robert A. Moore and Gary R. Moore located at 5848 Creekside Drive in Myrtle Beach, South Carolina. The Honorable Cynthia Graham Howe found that the Plaintiff's judgment only attached to one-half of the Creekside Drive property because Gary R. Moore was a tenant in common. (Order of Judge Howe, June 10, 2011, C/A No. 2008-CP-26-7941) (R. p. 7). The Master then referred the matter to the Sheriff for a Writ of Execution. The Defendants accepted service of the Writ and the Plaintiff requested the property be sold at a Court ordered auction.

After an additional hearing, the Master-in-Equity ruled by Order dated April 15, 2013 (R. p. 4) that Gary Moore was entitled to a homestead exemption of \$50,000.00 in the real property located at 5848 Creekside Drive, Myrtle Beach, South Carolina and that if the successful bidder is the judgment creditor he should be required to pay the selling officer cash in an amount equal to the homestead exemption pursuant to *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002).

The Estate of Gaye Marie Reynolds moved for reconsideration of the Court's Order which was denied by the Master-in-Equity on June 10, 2013. This appeal timely follows.

ARGUMENT

I. The South Carolina Constitution is supreme and thus trumps S.C. Code § 15-41-30 (the homestead exemption).

The Plaintiff argued in his motion for reconsideration that the South Carolina Constitution protects victims' rights to restitution and that this judgment was akin to restitution because it was for wrongful death of the victim during the commission of a crime by the Defendant. South Carolina amended its Constitution and adopted the Victims' Bill of Rights, which provides in pertinent part:

Article I.

Section 24. Victims' Bill of Rights.

(A) To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion or economic status, victims of crime have the right to:...

(9) receive prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury including both adult and juvenile offenders....

South Carolina has also adopted a homestead exemption statute for protection of debtors from judgments. It provides:

Section 15-41-30. Property Exempt from Attachment, Levy and Sale.

The following real and personal property of a debtor domiciled in this state is exempt from attachment, levy, sale under any mesne or final process issued by a court or bankruptcy proceeding:

1. The debtor's aggregate interest not to exceed \$50,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence...¹

¹ This statute was amended on May 22, 2008 to increase the exemption from \$5,000 to \$50,000—the same day that the wrongful death Order (R. p. 11) in this case was signed by the Circuit Court. Thus, Plaintiff challenges the amount of the homestead exemption as \$5,000 under the old statute and not \$50,000 as found by the Court.

Plaintiff timely argued before the Master-in-Equity that the Victims' Rights Act enacted as part of the Constitution trumped the above homestead exemption statute. (S.C. Code § 15-41-30(1)).

The reason that the South Carolina Constitution is supreme is found in Article I, Bill of Rights, Section 23 entitled Provisions of Constitution mandatory. It states:

The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms.

Thus, the Constitution directs that the victim has a constitutional right of restitution which the homestead exemption (S.C. Code § 15-41-30(1)) cannot prohibit because the Constitution is the supreme law of the state.

This argument was echoed by the Supreme Court in *Littlefield v. Williams*, 343 S.C. 212, 540 S.E.2d 81 (S.C. 2000). In that case the Supreme Court held:

South Carolina citizens overwhelmingly ratified the Victims' Bill of Rights, which ensures victims are informed of their rights and any alternative means that might be available to them if the criminal prosecution is unable to meet their needs.

Further, when construing the Constitution, this Court applies rules similar to those relating to the construction of statutes. See *McKenzie v. McLeod*, 251 S.C. 226, 161 S.E.2d 659 (1968). Accordingly, the Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the Constitution's operation. The plain language of Article I Section 24(9) of the Constitution requires victims to receive "prompt and full restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." In this case, the homestead exemption for a criminal defendant is in clear contravention of the Victims' Bill of Rights and the plain and ordinary language of the Constitution which allows the victim to have

prompt and full restitution. Thus, the homestead exemption statute cannot be used as a shield from the plain command of the Constitution. Accordingly, the Master-in-Equity erred in not giving the Constitution of South Carolina priority over a state statute. See *Gilstrap v. South Carolina Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992) (holding repeatedly this Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to a forced construction). With this in mind, the Master-in-Equity on reconsideration should have held the Constitution was the supreme law of the land and it nullified the homestead exemption defense since the judgment arose from a criminal conviction of Moore.

While not completely on point, a similar issue has been decided in the United States Courts. In *U.S. v. Lamien*, 89 F.3d 1316 (1996), the Court held the homestead exemption was not a bar to a restitution order of the district court. See also *U.S. v. Rogers*, 461 U.S. 677, 691-694, 700-702, 103 S.Ct. 2132, 2141-43 (1983) (The government may enforce a lien upon property owned by a delinquent taxpayer including homestead property in which taxpayer's spouse shares an interest with the taxpayer.) See also, *U.S. v. Jaffe*, 314 F.Supp. 2d 216 S.D.N.Y. (2004) (Florida homestead exemption will not protect a defendant from his duty of restitution pursuant to a valid court order); *U.S. v. Hyde*, 497 F.3d 103 (1st Cir. 2007) (once a home is sold the homestead exemption does not follow the proceeds).²

² Some states have held that their homestead exemption statutes do not apply in civil forfeiture cases. *In re: Forfeiture of 5118 Indian Garden Road*, 654 N.W.2d 646, 650 (Mich.App. 2002); *In re: 1632 North Santa Rita*, 801 P.2d 432, 437 (Ariz.App. 1990). See also *U.S. v. Fleet*, 498 F.3d 1225 (11th Cir. 2007) (Appeals Court holds when a criminal defendant did not have enough cash to cover a payment ordered by a Court upon conviction the government could seize the defendant's interest in his homestead). See also *Steward v. Bader*, 154 N.H. 75, 907 A.2d 931 (N.H. 2006) (Defendant convicted of murder of his wife; Defendant's homestead exemption extinguished because he was sentenced to life in prison.)

II. ***Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002) does not apply to this case.**

The Master-in-Equity held that *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002) applies in this case. Appellants believe *Holden* does not apply because the South Carolina Constitution allows the victims of crimes to get reasonable compensation and restitution and because requiring the victim to pay a homestead exemption in cash prior to the sale defeats its purpose. Simply put, the homestead exemption statute is not supreme when this Court construes the Constitution.

In *Holden*, plaintiff had a judgment for assault and battery, however, the case does not reveal whether or not it was derived from a criminal conviction. In this case, the plaintiff has a judgment for wrongful death deriving directly from a criminal conviction in which the defendant Gary Moore is currently in prison. It would turn the idea of restitution on its head to find that *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002) does not allow a victim of a criminal act to obtain restitution by the sale of the defendant's half-interest in a house. Also, in *Holden*, the defendant Cribb was in jail on back child support and not as a result of the wrongful act perpetrated on the plaintiff. Thus, *Holden's* discussion of the incarcerated person being entitled to protection of the homestead exemption has no application. Here, Moore is in jail for the criminal acts from which the Plaintiff obtained a judgment (the death of his wife). To allow Moore to have homestead protection under these circumstances is inequitable, especially in light of the fact that the homestead exemption does not protect criminals who steal money and then use that money to buy and/or construct homes in which they live. See S.C. Code § 15-41-30 (12,13) (a claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into a individual retirement account or other plan).

III. If *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (SC App. 2002) applies, it is inequitable and unfair as a matter of law.

In this case, Defendant Moore struck and killed the decedent and is currently serving a prison sentence for his criminal conduct. The Master-in-Equity ruled that the homestead exemption protected Moore and that if Appellant was the successful bidder he would be required to pay the homestead exemption of \$50,000 to Moore. This is illogical. First, Moore only owns half the home, thus, the exemption at best is \$25,000 (or less). Second, the homestead exemption was never intended to protect criminals' wrongful acts and to allow it to do so here makes a mockery of the justice system. Third, the Defendant signed the Confession of Judgment in this case on April 4, 2008 (R. p. 16) and the Circuit Court signed the Wrongful Death Settlement Order on May 22, 2008 (R. p. 11), the same day the General Assembly increased the homestead exemption from \$5,000 to \$50,000. Appellant readily concedes that if this matter had not arisen from the criminal acts of Moore that the homestead exemption would be applicable, but not under the unique circumstances in which Reynolds is a crime victim and lost her life as the result of the those acts. Fair play and justice require that the homestead exemption never apply to criminal acts. In fact, parts of the homestead exemption statute prohibit fraudulent conveyances into retirement accounts and thus allow the homestead exemption to be trumped for certain criminal acts. See S.C. Code § 15-41-30(A)(13) "a claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan." Surely, the felony DUI death of a person is as important as a forger or embezzler stealing money and putting it into his or her retirement account? This Court ought to hold that homestead exemption has no application under the unique facts of this case.

IV. The Court erred in holding that the Plaintiff could not bring up additional grounds on reconsideration.

The Master, in her Order, found that the Constitutional argument could not be raised for the first time on motion for reconsideration. The Master cited *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct.App. 1990) for that proposition. However, this was not a trial. It was an attempt to enforce a judgment through supplemental proceedings. (Something which the Plaintiff could do for up to ten years under current law.) Appellant could have simply filed a new supplementary proceeding and raised this additional ground in a new hearing. Thus, not allowing Appellant to raise this ground by a reconsideration motion would be judicially inefficient and waste scarce judicial resources. Appellant submits that this Court should consider the additional ground in the motion for reconsideration as timely and appropriate based on the fact that Appellant could raise it again through a new supplementary proceeding at any time.

V. The Defendant is not entitled to a homestead exemption since the real property in this case is not his residence.

In 2005, the Defendant was sentenced to fifteen years for the death of Gaye Marie Reynolds. It defies logic that under those circumstances he can claim a homestead exemption since he cannot live at this house. The basis of this argument is that this property is not Moore's residence under S.C. Code Ann. § 15-41-30 (a)(6) because he is confined to the State prison system. The term "residence" has been defined by this Court in terms of legal residence and actual residence. Here, the Defendant Moore is an actual resident at the Department of Corrections in Columbia. Further, he is a "legal resident" of the Department of Corrections. Accordingly, he is not entitled to a homestead exemption. See *Roof v. Tiller*, 195 S.C. 132, 105 S.E.2d 333 (S.C. 1940); *Ford v. Beaufort County Assessor*, 398 S.C. 508,

730 S.E.2d 335 (S.C.App. 2012) (allowing preferred assessment only to those owner occupants who limit the use of their legal residence to statutory defined parameters). Using this logic, Moore does not live on the property and is neither a “legal resident” nor a “resident” of the property in question. Accordingly, Moore cannot claim a homestead exemption.

VI. The Master erred in holding that the Plaintiff must pay cash in an amount equal to the homestead exemption.

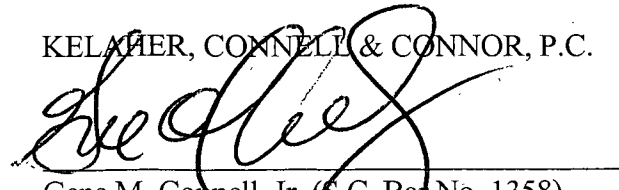
The Master erroneously ruled that the Plaintiff must pay cash to the Defendant in the amount of the homestead exemption. (See Order of Master dated April 15, 2013) (R. p. 4). In fact, S.C. Code Ann. § 15-41-10 provides the “Sheriff or other officer shall state the minimum bid for the property must be in the amount of the exemption...” This section does not require the Plaintiff or anyone pay cash, it only means no bid shall be accepted less than the homestead exemption. The effect of the Master’s Order stopped the sale of the property since it requires cash be paid at the execution sale. Plaintiffs believe a sale should have been held and the money from any sale be held to determine the amount, if any, of the homestead exemption. For this reason the Master’s Order should be reversed.

CONCLUSION

The result in this case which punishes the innocent and protects the convicted criminal is troubling at best and downright unfair at worse. Plaintiffs have waged an eleven year battle for justice and restitution. If ever there was a case which needs the Wisdom of Solomon, it is this case. The Courts are designed to guard the rights of victims and protect the innocent. All the Plaintiff asks is that it be done in this case and that Moore be denied any claim for a homestead exemption for the property located at 5848 Creekside Drive, Myrtle Beach, South Carolina.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.

A large, stylized handwritten signature in black ink, likely belonging to Gene M. Connell, Jr., is written over a horizontal line.

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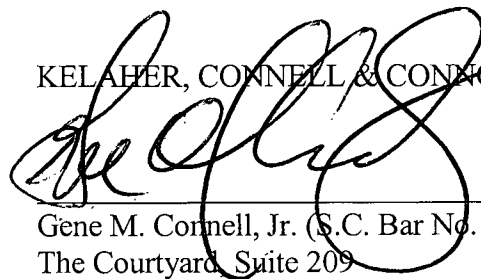
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),
SCACR.

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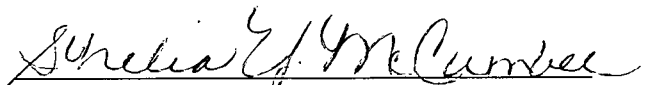
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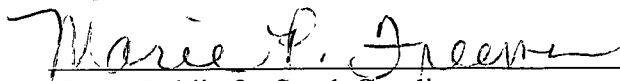
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served the **Final Brief of Appellants** on the Respondent Gary Moore, through his attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Kimberley Campbell, Esquire
Kimberley Campbell, LLC
P. O. Box 760
Murrells Inlet, SC 29576

DATE OF MAILING: February 14, 2014


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 14th day of February, 2014


Notary Public for South Carolina
My Commission Expires: 6/24/14