

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY AND DORCHESTER COUNTY

Court of Common Pleas
Patrick R. Watts, Special Referee

Appellate Case No. 2020-001489

RECEIVED

Jan 06 2021

SC Court of Appeals

John Murray Gibbs, Respondent,

vs.

Henderson Gibbs, Jr., Appellant.

INITIAL BRIEF OF APPELLANT

P. Brandt Shelbourne, Esq.
John T. Kornegay, Esq.
SHELBOURNE LAW
131 East Richardson Ave.
Summerville, SC 29483
(843) 871-2210 (p)
(843) 875-2224 (f)
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	3
STATEMENT OF FACTS	4
ARGUMENT	5
I. THE SPECIAL REFEREE ERRED IN DENYING APPELLANT’S MOTION TO SET ASIDE JUDGMENT	5
a. The Special Referee Abused His Discretion in Ruling Without Evidentiary Support.	5
b. The Delay in Raising the Medical Emergency is Not Sufficient Cause for Denial of Appellant’s Motion.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994) 7

Arnold v. State, 309 S.C. 157, 775 S.E.2d 834 (1992)..... 7

Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992) 3

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987) 6

Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004)..... 3

Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008)..... 3

State v. Irick, 344 S.C. 460, 545 S.E.2d 282 (2001)..... 6

Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885
(2009). 4

Thermal Insulation Co., Inc. v. Town & Campus, Inc., 271 S.C. 478, 248 S.E.2d 310 (1978) 4

Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App.1996) 3

Winters v. Fiddie, 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011)..... 3, 7

Rules

South Carolina Rule of Civil Procedure 59(a)..... 3

South Carolina Rule of Civil Procedure Rule 60(b). 3

STATEMENT OF ISSUES

- I. **WHETHER THE SPECIAL REFEREE ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE JUDGMENT**
 - a. **Whether The Special Referee Abused His Discretion in Ruling Without Evidentiary Support.**
 - b. **Whether The Delay in Raising the Medical Emergency is Not Sufficient Cause for Denial of Appellant's Motion.**

STATEMENT OF THE CASE

The Respondent, John Murray Gibbs (hereinafter “Respondent”) filed partition actions in Colleton County on April 06, 2015 and in Dorchester County on April 08, 2015. See Pl.’s Colleton Cnty. Compl.; see also Pl.’s Dorchester Cnty. Compl. The Appellant, Henderson Gibbs, Jr. (hereinafter “Appellant”), appearing in the case *pro se*, filed an Answer with a general denial on September 24, 2015. See Def.’s Answer. Respondent moved for the two cases to be referred to a Special Referee, filing a Motion for Order of Reference in Dorchester County on December 16, 2015 and a Motion for Order of Reference in Colleton County on January 19, 2016. See Pl. Mot. for Order of Reference filed in Dorchester Cnty.; see also Pl. Mot. for Order of Reference filed in Colleton Cnty. Appellant consented to the reference of the cases to a Special Referee, and on February 18, 2016, Judge Diane Goodstein signed an order referring the Dorchester County case to Special Referee Patrick R. Watts, and on March 14, 2016, Judge Perry Buckner signed an order referring the Colleton County case to Special Referee Patrick R. Watts. See Dorchester Cnty. Order of Reference to Special Referee; see also Colleton Cnty. Order of Reference to Special Referee. The final hearing in this case began on April 22, 2019, but the hearing was held open to allow Respondent to obtain appraisals of the properties at issue in the case. The Appellant was not present for this April 22, 2019 hearing. The final hearing was then scheduled to continue on December 04, 2019. Appellant was also not present for this hearing, but Appellant contacted the Special Referee’s office by telephone the day of the hearing attempting to request a continuance. See Final Order filed July 17, 2020, p. 6. However, this phone call was made while the hearing was already underway, and Appellant was only able to leave a voicemail. See Order filed October 07, 2020, p. 4. The Special Referee filed the Final Order partitioning the properties in this case on July 17, 2020. See Final Order filed July 17, 2020.

After the Special Referee's Order was filed, Appellant retained his current counsel who timely filed a Motion to Set Aside Judgment on July 24, 2020. See Def.'s Mot. to Set Aside J. The basis for the motion was that because Appellant's absence from the final hearing was unavoidable due to his wife's medical emergency the Special Referee should order a new hearing pursuant to Rule 59(a) or, in the alternative, should set aside judgment pursuant to Rule 60(b). Def. Mot. to Set Aside J., p. 1; see also Rule 59(a), SCRCP and Rule 60(b), SCRCP. A hearing for that motion took place on August 27, 2020. On October 07, 2020, the Special Referee filed his Order denying Appellant's motion. See Order filed October 07, 2020. On November 06, 2020, Appellant served the Notice of Appeal on Respondent. See Notice of Appeal. Appellant's counsel has contacted the Special Referee's office seeking information to request transcripts in this case and has been informed by that office that no court reporter was present for any of the hearings in this case and that no transcript, or audio or video recording, is available. See Correspondence sent December 03, 2020.

STANDARD OF REVIEW

“The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law.” Winters v. Fiddie, 394 S.C. 629, 638, 716 S.E.2d 316, 321 (Ct. App. 2011) (citing Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App.1996)). “Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court.” Southeastern Housing Foundation v. Smith, 380 S.C. 621 ___, 670 S.E.2d 680, 688 (Ct. App. 2008) (citing Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). “[O]ur standard of review is limited to determining whether there was an abuse of discretion.” Id. (citing Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004)).

“An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, ___, 681 S.E.2d 885, 888 (2009). “This Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support.” Thermal Insulation Co., Inc. v. Town & Campus, Inc., 271 S.C. 478, 481, 248 S.E.2d 310, 311 (1978) (citations omitted).

STATEMENT OF FACTS

Respondent filed suit in this case to partition three separate lots which were jointly owned with Appellant. See Pl.’s Colleton Cnty. Compl. and Dorchester Cnty. Compl. Two of these lots are located in Dorchester County, and one lot is located in Colleton County. The Dorchester County properties each have houses located on the property while the Colleton County property is an unoccupied lot with a shed and a garage that has been damaged by fire. See Final Order filed July 17, 2020, p. 8. At the hearing in this case, Respondent testified that Appellant had been continuously renting out the Dorchester County properties to tenants for a period of ten years and retaining all of that rental income. See Final Order filed July 17, 2020, p. 12. In his order, the Special Referee used the numbers of money received, as provided to him by Respondent, and ordered, based on this use and rental income testimony, that Respondent be given full title of the two properties in Dorchester County and Appellant be given ownership of the Colleton County property. See Final Order filed July 17, 2020, p. 15.

Appellant’s wife was admitted for emergency heart surgery at University Hospital in Augusta, Georgia on December 03, 2019, the day before the final hearing, and due to this medical

emergency Appellant missed the hearing date. See Def. Mot. to Set Aside J. Appellant made an attempt to contact the Special Referee on December 04, 2019 to request a continuance but was unsuccessful in reaching him prior to the hearing. See Final Order filed July 17, 2020, p. 6. Appellant contends that, if he had been present on December 04, 2019, he would have presented evidence and testimony contradicting Respondent's as to the amount of rental income received from the properties as well as further evidence regarding the repairs and upkeep expenses that were paid by Appellant on the properties. See Def. Mot. to Set Aside J., p. 1.

ARGUMENT

II. THE SPECIAL REFEREE ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE JUDGMENT

a. The Special Referee Abused His Discretion in Ruling Without Evidentiary Support.

In this case the Appellant, in his Motion to Set Aside Judgment, presented an affidavit as well as a letter from University Hospital Department of Cardiothoracic Surgery presenting evidence as to his wife's open heart surgery and why he could not be present for the hearing on December 04, 2019. See Def. Mot. to Set Aside J. Ex. A and B. The Order denying Appellant's motion is, in large part, based on the credibility of the Appellant and the Appellant's past actions during the course of litigation. See Order filed October 07, 2020, pp. 6-8. Although Appellant's filed affidavit states that his wife was having "emergency open heart surgery," the Special Referee questions why the doctor's letter provided by Appellant mentions the surgery but not that it was an emergency. Def. Mot. to Reconsider Ex. A and B; see also Order filed October 07, 2020, p. 7. The Special Referee also makes references to past non-participation of Appellant during the litigation as a reason, in conjunction with apparent concerns about the credibility of the medical emergency, for denying Appellant's motion. See Order filed October 07, 2020, p. 8.

“An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.” Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (citations omitted). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282 (2001).

If the Special Referee had concerns about the credibility of the Appellant or the existence of a medical emergency, these concerns could easily have been clarified through an evidentiary hearing. The past actions of the Appellant in this case have no bearing as to whether there was a legitimate medical emergency on December 04, 2019, and, although the letter from the hospital does not contain the word “emergency,” Appellant’s affidavit does specify that it was an emergency. See Def. Mot. to Set Aside J. Ex. A and B. Also, any past lack of participation by Appellant does not preclude his right to be present and testify at the December 04, 2019 hearing. If the Special Referee deemed the letter and affidavit insufficient in establishing a medical emergency, the circumstances surrounding the heart surgery on Appellant’s wife could be clarified. Id. There has not been any evidence presented contradicting the Appellant’s affidavit or letter regarding the medical emergency, but only the Special Referee’s impressions based on prior actions of Appellant in the case and Appellant’s manner of handling the medical emergency. See Order filed October 07, 2020, p. 7. The Order denying Appellant’s motion questions the existence of a sufficient and credible basis for Appellant’s motion drawing “factual conclusions . . . without any evidentiary support.” Fontaine, 291 S.C. at 538, 354 S.E.2d at 566; see also Order filed October 07, 2020, p. 8. Because the Special Referee ruled on this basis, disputing the existence of an emergency without evidence supporting that position and without holding an evidentiary

hearing, there was an abuse of discretion and the order denying Appellant's motion should be reversed.

b. The Delay in Raising the Medical Emergency is Not Sufficient Cause for Denial of Appellant's Motion.

If the Special Referee would have granted the request for a continuance or rehearing for the Appellant had the existence of a medical emergency been raised in December, then the Special Referee should have granted Appellant's motion raising this in July.

“South Carolina jurisprudence indicates that a moving party must raise the objectionable issue at the appropriate time during trial; thus, unobjected to *trial error* cannot be advanced as grounds for a new trial.” Winters v. Fiddie, 394 S.C. 629, 639, 716 S.E.2d 316, 321-2 (Ct. App. 2011) (emphasis added).

In denying Appellant's motion, the Special Referee points to cases where the Courts have ruled that a party may not use a motion for a new hearing or a motion to reconsider “to present an issue he could have raised prior to judgment but did not.” Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994). However, in the cited cases the Court is addressing parties who raise new legal arguments in their motion for a new trial or for reconsideration that could have been argued prior to judgment. Id.; see also Arnold v. State, 309 S.C. 157, 173, 775 S.E.2d 834, 842 (1992). In this case, the new issue was not a legal argument related to the facts of the case, but a medical emergency which is unrelated to the case other than the fact that it impacted Appellant's ability to be present for the December 04, 2019 hearing. The medical issue, in and of itself, has no legal bearing on the case, other than as the basis for Appellant to be allowed to present his case and evidence he has related to the properties being partitioned.

The Special Referee also wrote in his Order that “the Defendant was aware of the December 4, 2019 hearing, and while his wife's surgery and condition would have been a basis

reasonably considered by the Court in permitting a continuance had one been requested, the Defendant did not notify the Court at any time.” Order filed October 07, 2020, p. 6. Although Appellant failed to make a proper, timely continuance request, he did reach out to the Special Referee’s office the day of the hearing in an attempt to postpone or reschedule the hearing. See Final Order filed July 17, 2020, p. 6. However, the timing of Appellant presenting the reason for his absence should not dictate the decision on whether to allow for a new hearing date. If the medical emergency and surgery that Appellant’s wife underwent would have been sufficient basis in December to grant a continuance or a new hearing, then it should still be sufficient in July when it was timely raised and brought before the Special Referee through Appellant’s motion.

CONCLUSION

Because of the medical emergency that existed at the time of the final hearing and Appellant’s timely motion raising this issue, Appellant hereby asks that this Court reverse the Special Referee’s decision and grant Appellant’s Motion for a New Hearing or in the alternative to Set Aside Judgment in this case. In the alternative, if this Court deems it appropriate, Appellant asks for an evidentiary hearing specific to the medical emergency in order to clarify any credibility concerns that the Special Referee may have had in denying Appellant’s motion.

Respectfully Submitted,

SHELBOURNE LAW

s/John T. Kornegay

P. Brandt Shelbourne, Esq. (#15143)

John T. Kornegay, Esq. (#102294)

131 E. Richardson Avenue

Summerville, SC 29483

843.871.2210 (ph)

843.875.2224(f)

Counsel for Appellant

January 6, 2021

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY AND DORCHESTER COUNTY

Court of Common Pleas
Patrick R. Watts, Special Referee

RECEIVED

Jan 06 2021

Appellate Case No. 2020-001489

SC Court of Appeals

John Murray Gibbs, Respondent,

vs.

Henderson Gibbs, Jr., Appellant.

PROOF OF SERVICE FOR APPELLANT'S INITIAL BRIEF

I certify that I have served a copy of *Appellant's Initial Brief* by e-mail on Respondent, John Murray Gibbs counsel, Andrew Shepherd, Esq at andrew@sheplawfirm.com on January 6, 2021.

SHELBOURNE LAW

s/John T. Kornegay
P. Brandt Shelbourne, Esq. (#15143)
John T. Kornegay, Esq. (#102294)
131 E. Richardson Avenue
Summerville, SC 29483
843.871.2210 (ph)
843.875.2224(f)
Counsel for Appellant

January 6, 2021

From: [Yvonne Franklin](#)
To: andrew@sheplawfirm.com
Cc: [John Kornegay](#)
Subject: Gibbs v. Gibbs; Appellate Case No. 2020-001489
Date: Wednesday, January 6, 2021 11:49:00 AM
Attachments: [Gibbs v Gibbs Appellant Designation of Docs.pdf](#)
[Gibbs v Gibbs POS Initial Brief of Appellant.pdf](#)
[Gibbs v. Gibbs POS Appellant Desiq of Docs.pdf](#)
[Gibbs v. Gibbs Appellants Initial Brief.pdf](#)

Good Morning,

Attached please find Appellant, Henderson Gibbs, Jr.'s Initial Brief and Designation of Records to be Included in the Record on Appeal in the above-referenced matter along with a Proof of Service for each document. The attached are being submitted for filing today with the Court of Appeals. Please let me know if you would like a paper copy of the attached and I will place in the mail.

Thank you.
Yvonne

Yvonne Franklin
Civil Litigation Paralegal
Shelbourne Law
131 E. Richardson Ave.
Summerville, SC 29483
843-871-2210 (ph)
843-875-2224 (fax)
civlit@shelbournelaw.com