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Aug 16 2021

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. J. Cordell Maddox Jr., Circuit Court Judge

Common Pleas Case No. 2015-CP-04-01518

Appellate Case No. 2020-001253

DEUTSCHE BANK NATIONAL
TRUST COMPANY, as certificate
Trustee on behalf of Bosco
Credit II Trust Series 2010-1,

Respondent,

v.

DORIS J. DIXON and
ANMED HEALTH,

Defendants,

Of Whom Doris J. Dixon is

Appellant.

Initial Reply Brief of Appellant

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Comes now Appellant Doris Dixon and would respectfully offer the following Reply Brief.

ARGUMENT

Respondent's attempt to invoke the two-issue rule, [Opp. at 6-7], is inapposite here for two reasons. First, in the Opening Brief, Ms. Dixon established that alleged futility is no grounds to have denied the motion for relief: "Where a judge should have recused himself but did not, the judge's actions must be set aside regardless as to whether they were or were not correct on the merits." [Open. Br. at 8 (citation and footnote omitted)]. Second, and in any event, given that the challenge here is a jurisdictional one and "jurisdiction may not be waived, even by consent of the parties," *Badeaux v. Davis*, 337 S.C. 195, 205 (Ct. App. 1999), the two-issue rule could never apply so as to confer jurisdiction where none existed.

Insofar as Respondent claims that the appeal can make no difference, [Opp. at 7-8], Respondent is wrong. If Ms. Dixon is successful in this appeal, title to the real estate will be restored to her name, unless and until a new order confirming sale is issued. With title in her name, she may be able, for example, to obtain relief via the federal bankruptcy code, even if she has no defense on the merits under state law. *See* 11 U.S.C. § 541(a)(1) (providing that a bankruptcy petition creates a bankruptcy estate with respect to "all legal or equitable interests of the debtor in

property as of the commencement of the case”).

While Respondent tries to argue that Ms. Dixon waited unreasonably long to have filed her motion, [Opp. at 9-10], Respondent overlooks that Ms. Dixon was *pro se*. Unlike Judge Kirven (and all the attorneys in this matter who failed to remind Judge Kirven), Ms. Dixon did not know of the prohibitions contained in the Code of Judicial Conduct. To whatever extent that she should somehow be chargeable with the Code of Judicial Conduct as though it were a criminal statute, she would have been objectively entitled to believe that some other judge would take the bench at any hearing unless and until she had affirmatively consented to Judge Kirven’s presence. *See* Canon 3(F), CJC, R. 501, SCACR (allowing a judge to preside who is otherwise subject to recusal only after disclosure to the parties and an “agreement [of the parties that is] ... incorporated in the record of the proceeding”). Further, with respect to the one-year deadline, Ms. Dixon would note that that provision does not apply at all to motions involving a “void” judgment, R. 60(b)(5), SCRCP, or one for which “it is no longer equitable that the judgment should have prospective application,” R. 60(b)(5), SCRCP.

Insofar as Respondent claims that Judge Kirven was never actually required to recuse himself, [Opp. at 12], Respondent is wrong. Respondent certainly thought that AnMed was involved in the “matter in controversy”—after all, it named

AnMed as a defendant in the Complaint. [Compl.]. If representing a defendant is not involvement in the matter in controversy, it is difficult to imagine what would be.

As for the claim that actual prejudice is required before recusal is required under the specific examples provided in Canon 3, [Opp. at 12], Respondent is wrong there, too. The plain text of Canon 3 makes clear that prior service as a lawyer in the matter is conduct that categorically constitutes a circumstance in which a judge's impartiality might be questioned. *See* Canon 3(E)(1)(b), CJC, R. 501, SCACR (“A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, *including but not limited to instances where... the judge served as a lawyer in the matter in controversy....*” (emphasis added)).

To whatever extent that any case law might suggest that actual prejudice is required with respect to any of the enumerated categories, despite the plain text to the contrary, Ms. Dixon would respectfully suggest that that case law is misplaced, as court rules are subject to the same plain-meaning requirement as are statutes, *see Green by & ex rel. Green v. Lewis Truck Lines*, 314 S.C. 303, 304 (1994) (“In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes.” (citations omitted)). But Ms. Dixon would note that

even the case that Respondent cites for the contrary proposition, *Davis v. Parkview*, 409 S.C. 266 (2014), specifically noted that “[n]one of the disqualification situations outlined by Canon 3(E) were present,” *id.* at 286, and thus only the general standard applied. Here, the specific situation, rather than the general one, is at issue.

As for whether Judge Kirven’s failure to recuse was a mistake that would allow resort to R. 60, SCRPC, even Respondent concedes that South Carolina only “generally” prohibits a party from obtaining relief from a mistake of fact. [Opp. at 15 (quotation omitted)]. “Generally” is, of course, not the same as “categorically.” *See, e.g., Savage v. Cannon*, 204 S.C. 473, 477 (1944) (noting that an attorney’s mistake as to proper practice for answering can count “although the mistake might be termed one of law, rather than of fact....”). And of course, here, the person having made the “mistake” was not the party—but the judge. South Carolina has long sought to promote judicial economy, and thereby avoid unnecessary appeals, by allowing judges to correct their own mistakes. That is, after all, why parties must present all of their arguments to the trial judge before making them on appeal. *Cf. I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422 (2000) (explaining that the purpose of error preservation is “to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments” (citation omitted)). Ruling

here that a judge somehow lacked the power to correct his mistake, whether of law or of fact, would be inconsistent with that policy.

Insofar as Respondent faults Ms. Dixon for not citing authority applying R. 60(b)(5), SCRCF to a similar situation, [Opp. at 17], that is no grounds to find abandonment. After all, even Respondent admits that little caselaw exists interpreting the provision. *See* [Opp. at 18]. Furthermore, it is thankfully rare that the situation presented here arises—*i.e.* a judge presides despite having been an attorney of record to the action. It is, therefore, not surprising that neither party has found a directly analogous case. *Cf. United States v. Lanier*, 520 U.S. 259, 271 (1997) (“[T]he easiest cases don’t even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages or criminal liability.” (quotation omitted)). Ms. Dixon continues to maintain that it is, or ought to be, inequitable to allow orders from a disqualified judge to stand.

CONCLUSION

This Court should reverse the denial of Rule 60 relief below, vacate all orders and judgments signed by Judge Kirven, and remand for further proceedings in the circuit court.

Dated this 16th day of August, 2021, at Pendleton.

DORIS J. DIXON

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Proof of Service

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Dated this 16th day of August, 2021.

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Reply Brief - Deutsche Bank v. Dixon, No. 2020-001253 (Ct. App.)

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Please see the attached which has been submitted for filing.

Best,
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