THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Judge

Case No. 2022-001655

James Marshall Shoemaker, III.....Appellant,

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee, Edward Sloan Shoemaker and Jonathan Evans Shoemaker.....Respondents.

REPLY BRIEF OF APPELLANT

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A. Opposing counsel's argument that the Probate Judge was required to hear the summary judgment motion directly is legally inaccurate and directly contravenes the undisputed fact that the Probate Judge did in fact ultimately recuse himself from the case (which could not have occurred had his adjudication been mandatory upon him).

In their initial brief, Respondents argue that Judge Jennings, in the initial Probate Court case, was REQUIRED to hear the case under Judicial Canon 3(B)(1). (Respondent's Initial Brief p. 10). Their argument is made in direct contravention of the procedural history of this as well as direct contravention of their own recognition that Judge Jennings did in fact recuse himself from the case months after the summary judgment hearing, as admitted by Respondents (Respondent's Initial Brief p. 10). If Judge Jennings were required to hear the case as the Respondents first argue, then he would not have been able to recuse himself at a later time when the facts remained identical as they were at the first inclusion of Judge Jennings in the case. Thus, Respondents seek to have their proverbial cake and eat it too by first stating Judge Jennings was required to hear the case, but then equivocating and noting and justifying him later recusing himself, which is entirely contrary to their first assertion of the mandatory nature of Judge Jennings' duty to hear the case.

Judge Jennings' recusal was specifically based upon his relationship with Respondents' counsel. That very same relationship existed at the time of the dispositive summary judgment motion and the judge's ruling. The basis for recusal existed then, and it never changed in any manner; thus, the Judge's later recusal based upon that relationship must necessitate the conclusion that recusal was appropriate and called for at the initial summary judgment hearing. And again, his recusal at a later point in the case fully negates Respondents' argument that Judge

Jennings was 'required' to hear the case under the Canons. On the contrary, he was required to recuse himself from the outset as soon as he established a pecuniary and working relationship with the Respondents' counsel, especially in light of his complete failure to follow remitter procedures and notify Appellant and counsel of such relationship.

B. Opposing counsel's reliance upon 'facts' is improper and irrelevant to this Court's inquiry because the Probate Court committed reversible error initially by finding facts in direct violation of the standard of review which involves merely the determination of whether there is a dispute of material fact, not to determine the facts themselves.

All litigators and jurists know the standard of review for summary judgment as one of the most utilized and applied standards in all of motion practice, and there can be no disagreement that summary judgment may only be granted if 1) there is no genuine issue of material fact, AND 2) the moving party is entitled to judgment as a matter of law. Both of these are required to be present. Therefore, there are only 2 questions for a Court on a motion for summary judgment: 1) Is there a genuine issue of material fact? If the answer to that is YES, then a Court must deny the motion. If the Court finds that there is no genuine issue of material fact, then the Court proceeds to inquiry 2) is the moving party entitled to judgment as a matter of law? If the court concludes Yes to that question, then and only then is summary judgment proper.

It is axiomatic, then, that when considering a motion for summary judgment, the ONLY inquiry of the court as to facts is whether there is a genuine issue of a material fact. That is all. Nothing in the summary judgment standard of review allows a judge to be the finder of fact, only a determiner of whether a genuine issue of material fact exists.

Respondents' brief is replete with references to the original summary judgment hearing in its references to the 'facts' of the case, and Respondents repeatedly focus on the "finding" of fact, not dispute of fact. This case's most important material fact is whether Appellant's father

lacked the requisite mental capacity to validly execute a will. Respondents make great efforts to point out things such as that they presented 7 affidavits as to that most material fact whereas Appellant provided only 1 medical doctor's affidavit which directly disputed and refuted that material fact. Without looking any further, the Probate Court should have recognized a genuine issue of material fact. All that mattered, or should have mattered, in the lower court, is that the parties both submitted evidence on the record clearly revealing a genuine dispute as to the most material fact. Yet, the Probate Judge chose to be a fact finder, weighing the relative volume of evidence of both parties and relative credibility and weight of evidence rather than applying the appropriate standard of identifying the presence or absence of a genuine issue (dispute) of material fact. Thus, reversal is appropriate.

C. Appellant suffered "actual prejudice" as a result of the Probate Court Judge's grant of summary judgment to Respondents.

In their initial brief, Respondents argue that Judge Jennings' failing to disqualify himself matters not, claiming that Appellant would have to demonstrate that he suffered "actual prejudice" as a result of the conflicted Judge Jennings' failure to disqualify himself, and further claiming that Appellant cannot prove actual prejudice.

The Respondents' argument is without any merit and needs very little consideration, and the actual prejudice to Appellant is as self-evident as any prejudice could be. For the sake of historical/factual/procedural perspective:

1) Judge Jennings held court under a direct conflict of interest by virtue of having a co-counsel and pecuniary relationship with Respondents' counsel;
2) Despite that relationship, the Probate Judge did not recuse himself *sua sponte*;
3) The Probate judge failed to disclose this relationship with opposing counsel to the Appellant;

4) Without Appellant or his counsel having ANY knowledge of such relationship, the Probate Judge held a hearing on his co-counsel's Motion for Summary Judgment (Respondents' motion) regarding a multi-million-dollar estate dispute;

5) The Probate Judge granted summary judgment to Respondents, a dispositive ruling ending the case (except for appeal) for the Appellant and foreclosing his opportunity to proceed to trial on the merits of his claim to a multi-million dollar share of his father's estate.

Noting the above, Appellant's case was LOST with finality by Judge Jennings' grant of summary judgment to Respondents. By granting summary judgment to Respondents, Judge Jennings ended Appellant's rights to pursue all legal and factual challenges to trial on the merits (subject only to appeal) and essentially 'gave' Appellant's arguable multi-million dollar share of the estate to his two brothers, who were already receiving their equal shares. It is difficult to imagine a more glaring example of a party (the Appellant) suffering actual prejudice from a judge's failing to disqualify himself under the Canonical directives.

The simple fact that Appellant had his case stripped from him with finality by a judge operating under a recusal-necessitating conflict 'actually' prejudices the Appellant on its face. In fact, one could call this particular result 'absolute' prejudice, and Respondents' assertion that actual prejudice did not result to Appellant is quite simply poppycock.

The lower Court's ruling should be reversed, and Appellant should have the right to be heard in such dispositive motion by the Supreme Court appointed Judge Queen, who has been specifically appointed to hear all matters related to this case moving forward as a judge guaranteed to have no possible disqualifying facts or circumstances.

D. The Circuit Court erred in granting Respondent's Motion to Dismiss Appellant's appeal based on grounds of untimely appeal (*pro se*) because the Appellant was denied due process and notice when Clerk of Court failed in its statutory duty to administratively dismiss the appeal and failed to provide Appellant with notice that he had 15 days to request reinstatement for good cause.

Respondents have argued for affirmation that Appellant's appeal from Probate Court to Circuit Court was untimely, that such untimeliness was fatal to his appeal and with no avenue of relief from mere untimeliness. The Circuit Court Order (hereafter "Circuit Order"), which was adopted verbatim as submitted by Respondents in the lower court, simply cited S.C. Code Ann. §62-1-308 which sets for the 10-day rule regarding a party's time to file a Notice of Appeal from the Probate Court. (Circuit Order p. 4). The Circuit Court went on to rely upon the case of *In Re: Estate of Charles H. Crtezmeyer, Jr., 365 S.C. 12, 14, 615 S.E. 2d 116, 116–17 (2005)* in determining that the time for appeal was a strictly applied standard and essentially immoveable. As a result, the Court dismissed Appellant's appeal as untimely filed. (Circuit Court Order p. 4-5). This was error.

The Circuit Court erred in its reasoning and ruling because it failed to take into account the failure of the lower court to provide Appellant his due process rights or follow statutory directives to give him notice of his right to move for reinstatement within 15 days of administrative dismissal.

When a party fails to timely file a notice of appeal, the appeal is to be (without any motion of any party) dismissed by the Clerk of the court of jurisdiction. SCACR Rule 260(a). If and when that occurs, the Clerk's office then must notify the parties of the dismissal and indicate in writing to the dismissed Appellant that they have 15 days within which to file a motion to reinstate said appeal, and the Court may reinstate the appeal upon good cause shown. *Id.*

Mr. Shoemaker's Notice of Appeal from Probate Court to Circuit Court was several days late. It was also submitted *pro se*, because his attorney had been indefinitely suspended from the practice of law only two weeks prior, and Appellant Shoemaker rushed to file on his own behalf under the extremely unique and surprising circumstances as he suddenly discovered he was no longer represented.

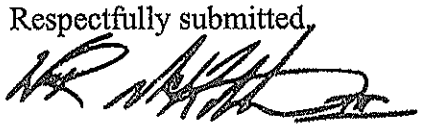
Though he was several days late, the Clerk did not dismiss the appeal, and as such, since it was not dismissed, Mr. Shoemaker was also not notified of his right to move for reinstatement. Instead, the appeal remained fully active, ultimately briefed and argued in September 2022.

Under South Carolina's Appellate Court Rules, Shoemaker's appeal should have been dismissed administratively as untimely, and he would thereafter have received notice that he had 15 days to move for reinstatement for good cause; he would have filed such a motion, then had a hearing with opportunity to show good cause for his very short untimeliness. Had that appropriate procedure occurred, Appellant almost certainly would have successfully presented good cause for reinstatement. He would have presented to the court the evidence of his attorney having been stripped of his law license around Christmas 2022, that he had no knowledge that his attorney was at risk of such discipline, that he did not learn of such discipline until the 'midnight hour,' so to speak, before his notice of intent to appeal was due, and that he operated as quickly as possible to prepare and file one himself, among other things.

Though good cause is not an issue before this court, it is very important because it goes directly to the heart of the issue, that the Appellant's untimely filing was not properly dismissed by rule nor were his rights honored to be provided notice of his rights to seek reinstatement after dismissal. For these reasons, even if the Court were to uphold the Lower Court's ruling that the appeal should have been dismissed as untimely, the Court should remand the matter to the lower

court for the lower court to provide notice to all parties of Appellant's right to move for reinstatement, and for Appellant to have an independent hearing to seek reinstatement of his appeal on a showing of good cause.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify and offer proof of service that the Respondents were served Appellant's **Reply Brief** by email, pursuant to Rule 262, Rules of Appellate Practice, this 23rd day of June to the ctappfilings@sccourts.org; tpclark@sccourts.org; and the following attorneys:

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