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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas, 13th Circuit

Letitia H. Verdin, Circuit Court Judge

COMMON PLEAS CASE NO.: 2019-CP-39-01224

Appellate Case No. 2022-001777

Christopher Young and Biotech Restorations, LLC,

Appellants/Respondents,

v.

Joanna Marie Paynter, a/k/a Joey Paynter, Samantha P. Nelson, and Paynter Consulting, LLC,[1]

Respondents/Cross-Appellants.

FINAL BRIEF OF APPELLANTS/ RESPONDENTS CHRISTOPHER YOUNG AND BIOTECH RESTORATIONS, LLC AS RESPONDENTS TO CROSS-APPEAL

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[1] Defendant Paynter Consulting, LLC is in default in the underlying action, and was not disclosed in the probate of the estate of Valerie Paynter, Case No. 2017-ES-39-00607. (R. p. 309-310, 343-346, 347). Paynter Consulting, LLC was the sole Plaintiff in the herein referenced 2015-Litigation (Common Pleas Case No. 2015-CP-39-01006, removed and assigned Civil Action No. 8:15-cv-03778-TMC). (R. p. 1-3). Paynter Consulting, LLC was not represented by any counsel in the underlying action and is not a party to this appeal. (R. p. 16-17).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT OF ISSUES

I. THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENTS/CROSS-APPELLANTS MOTION FOR A DIRECTED VERDICT ON *RES JUDICATA.*

II. THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENTS/CROSS-APPELLANTS MOTION FOR A DIRECTED VERDICT ON THE STAUTE OF LIMITATIONS.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING THE MAY 30, 2006 GENERAL PARTNERSHIP AGREMENT INTO EVIDENCE.

STATEMENT OF CASE

Procedural History

Appellants/Respondents filed this action[2] on Sept. 11, 2019, seeking redress for Respondents/Appellants refusal to comply with provisions in partnership agreements with their mother. By order filed August 17, 2020, the Special Referee appointed to hear discovery disputes required counsel for Defendants' to retain[3] the Factor Technology notes received from their mother, Dr. Valerie Paynter, in 2016. (R. pp. 5-15). Appellants/Respondents' undersigned counsel was contacted by Eric Englebardt, Esquire on Oct. 10, 2019 at a mediation in a separate and unrelated case, advising he would be assisting the Defendants, and, if we could not reach an agreement, he would Accept Service, which he never did. (R. pp. 712-714). Appellants/ Respondents' account of the facts regarding the actions of counsel in representing they would accept service was set forth in a Motion for Default Against Samantha P. Nelson, filed Feb. 5, 2020. (R. pp. 244 -250).

The parties participated in a court-ordered mandatory mediation on June 29, 2021, which resulted in an impasse. After further discovery and depositions, and motions for summary judgment, the parties tried this case beginning on April 20, 2022, in Pickens County. The case

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[2] Appellants/Respondents also filed motions in Pickens County Probate Court, seeking to re-open the estate of Dr. Valerie Paynter. (R. p. 217-235). No final orders from the Probate Court are included in this appeal, as no decisions were ever rendered by the Probate Court, in response to those filings.

[3] The relevant portion of the Protective Order required:

> Counsel for Defendants Paynter and Nelson is currently in possession of approximately 20-30 lab notebooks, having approximately 50-450 pages in each lab notebook, that were created from approximately 1993 until 2016, that describe Dr. Paynter's bioremediation trade secrets, and counsel for Defendants Paynter and Nelson shall retain all such materials while this matter is pending unless directed otherwise by this Court.

(R. p. 5, ¶ 1, lines 5-8, p. 6, lines 1-2).

started out as a jury trial. On April 20, 2022, Appellant called two witnesses: (i) Appellant / Plaintiff Chris Young, (ii) Kevin Dillard, a third-party. The jury was dismissed on April 21, 2020, and the parties consented to a bench trial. During a Status Conference on August 11, 2022, Respondents/Appellants rested their case. The Respondents/Appellants called no witnesses, and presented no evidence. The trial court issued the orders and the judgment, which are the subject of this appeal in November 2022.

Appellants/Respondents filed their Notice of Appeal on Dec. 14, 2022, regarding the following: (i) [Amended] Order Construing the General Partnership Agreement, filed Nov. 17, 2022; (ii) Form 4 Order, filed Dec. 12, 2022, at 9:11 A.M.; and (iii) Judgment entered Dec. 13, 2022 (12:51 P.M.). Respondents/Appellants filed their Notice of Cross-Appeal on Jan. 11, 2023.

Prior to the filing of this action, on or about Aug. 17, 2015, Paynter Consulting, LLC filed its lawsuit in state court against Appellants/Respondents (Case No. 2015-CP-39-01006, hereafter the "2015-Lawsuit"). (R. pp. 44-62). The 2015-Lawsuit was removed to District Court based on diversity of citizenship. (C/A No. 8:15-cv-03778-TMC). (R. pp. 63-74). Among other things, Paynter Consulting, LLC sought a dissolution of the May 30, 2006 General Partnership Agreement[4] under S.C. Code Ann. § 33-41-10 *et seq*. (R. pp. 51-53, ¶¶'s 29-41). In the federal case, The Honorable Timothy M. Cain sent all of Paynter Consulting, LLC's claims to arbitration by order filed Feb. 16, 2016. (R. p. 1, ¶ 2, lines 6-7). Judge Cain issued an order dismissing the action without prejudice on May 9, 2016. (R. p. 1-3). Paynter Consulting, LLC never pursued arbitration.

[4] In Para. 6 of its Complaint, Paynter Consulting, LLC alleged, "On May 30, 2006, Paynter Consulting and Biotech Restorations entered into a partnership agreement (hereinafter "the partnership") to pursue business ventures across the country using The Factor." (R. p. 47).

Background Facts

Appellants/Respondents began doing business in the field of in-situ soil remediation with Dr. Valerie Paynter in 2004. (R. p. 651-652). Dr. Valerie Paynter is now deceased. (R. p. 4). She was the sole owner of Paynter Consulting, LLC (R. p. 47, ¶ 5, lines), and mother of Respondents/Appellants Dr. Joanna Marie Paynter and Samantha P. Nelson ("Daughters"). Appellant Chris Young and Dr. Valerie Paynter initially executed a handwritten agreement on Nov. 19, 2004. (R. p. 651-652). On or around January 10, 2006, Appellants/Respondents and Dr. Valerie Paynter and Paynter Consulting prepared and executed a first two-page General Partnership Agreement. (R. p. 653-654). According to records of the S.C. Secretary of State, Paynter Consulting, LLC was formed on Jan. 26, 2006, and dissolved on Jan. 21, 2020 by Joanna Paynter, as its fiduciary. (R. p. 351). In May 2006, Appellants and Dr. Valerie Paynter and Paynter Consulting, LLC prepared and executed a second two-page General Partnership Agreement. (R. p. 655-656).

As set forth in the May 30, 2006 General Partnership Agreement (hereafter the "GPA") (R. p. 655-656), Chris Young brought his existing environmental remediation business and market knowledge skills to the partnership, and Dr. Valerie Paynter / Paynter Consulting, LLC would provide, *inter alia*, "technical and scientific assistance in support of the Partnership." (R. p. 655, ¶¶'s 3.b and 3.c). The GPA further provided the partners agreed "to work exclusively[5] in support of the Partnership in matters relating to the development of and commercial use of Factor based products in the environmental remediation marketplace." (R. p. 655, ¶ 3.a).

[5] The General Partnership Agreements executed by the parties in Jan. and May 2006 each reference or use some form of the word, "exclusive" 4 times in the two-page agreements. (R. p. 655-656)

Paragraph 4 of the GPA provided the "Partnership shall commence on and continue until dissolved by mutual agreement of the partners." (R. P. 655). The final sentence of Para. 4 of the GPA, added by the parties in the May 2006 version, provided as follows in the event of a death of a partner: "The continuing partner will pay 10% of net profits annually to the heirs / estate of the deceased partner on any contract involving the use of the Factor, and 10% gross from the sale of the Factor Technology." (R. p. 238, Compare p. 653 w/ 655).

Paragraph 7 of the GPA includes the parties' non-standard arbitration provisions. (R. p. 656). These arbitration provisions were unchanged in the January and May 2006 versions of the parties' agreements. (R. p. 239, Compare 654 w/ 656). In the order filed Feb. 16, 2016, Judge Cain noted "[Paynter Consulting, LLC] filed a response in opposition [to arbitration] on October 30, 2015, arguing that the parties intended for the second sentence of paragraph seven to facilitate mediation, not arbitration." (R. p. 657-664). Appellants/Respondents and Paynter Consulting, LLC conducted little-to-no business under the GPA after August 2015. (R. pp. 453-455).

Dr. Valerie Paynter passed away on Sept. 4, 2017. Her estate was probated in Pickens County as Case No. 2017-ES-39-00607. Her daughter, Respondent Dr. Joanna Paynter sought to be and was appointed Personal Representative. (R. p. 300-305, 343, 350). Neither the operation, nor the existence of Paynter Consulting, LLC, or the General Partnership Agreement(s) were disclosed in the probate filings. (R. p. 343-346). Appellants filed a claim in the probate matter. (R. p. 347). In response to that claim, they received a letter dated March 5, 2018, from the Probate Court Judge, advising, *inter alia*, "you should file this in Circuit Court." (R. p. 347).

Ownership, Value, Sale of the Factor

In the 2015-Lawsuit, the only Plaintiff was Paynter Consulting, LLC, which alleged:

> 5. Paynter Consulting, LLC, owns a proprietary biochemical formula used to remediate soil pollution known as "The Factor." Paynter Consulting is owned by Valerie Paynter, a retired Clemson University professor. The formula Paynter developed has broad implications for soil remediation at seriously polluted sites. The Factor can be customized to address the needs of various remediation projects based on soil conditions, contaminant type and contaminant level, among other criteria.

(R. p. 47) (underline emphasis added).

Based on the Declaration in the record of Dr. Joanna Paynter, the Factor was given to her and her sister to "have and own." (R. p. 716, ¶ 13). This occurred "between February and April 2016." (R. p. 716, ¶ 13, p. 309-310). The trial court order found that Respondents/Appellants became the sole owners of the Factor upon the death of their mother. (R. p. 34, ¶ 3, lines 2-3, p. 35, ¶ 1, lines 5-7).

In her Declaration, Dr. Joanna Paynter stated, "[i]n 2015 and 2016, I participated in discussions between my mother and various entities that offered more than $10,000,000 to purchase my mother's bioremediation technology." (R. p. 716, ¶ 12). Kevin Dillard testified he worked with Dr. Valerie Paynter, Respondent Dr. Joanna Paynter, and Jason Dibble (CEO of EnvirogenX) in negotiations regarding the Factor in 2016 and 2017. (R. p. 566, p. 567, lines 22-24, p. 568-569, and 583). Kevin Dillard testified that he knew about the 2015-Lawsuit and Jason Dibble did too, and that Dibble was concerned about it, but they were told by the Paynters it was dismissed. (R, p. 568, lines 22-25, p. 569, lines 1-15, p. 578, lines 2-11). Kevin Dillard was to receive "around a half a million dollars" for his role in brokering the potential arrangement between Paynter Consulting, LLC and EnvirogenX. (R. p. 570, lines 4-10).

Kevin Dillard testified Chris Young was not made a party to any of the discussions with EnvirogenX. (R. p. 573, lines 15-25). Dillard further testified "there was going to be an initial

payment of several million dollars." (R. p. 575, lines 5-7). Kevin Dillard testified he (and EnvirogenX) were told the partnership "Biotech had with Paynter Consulting had been extinguished." (R. p. 577, lines 2-10). Kevin Dillard testified, "We were told directly that -- that it was no longer an issue and that Dr. Paynter said that she had the total freedom to work with us, or with whomever." (R. p. at 577, lines 15-21).

Technology Development

Chris Young met Dr. Ellis Kline and Dr. Valerie Paynter at Clemson, and starting getting to know them. (R. p. 425-429). Chris Young testified the first project he brought to Clemson for assistance was known as the "Hercules" project in Brunswick, Georgia, which involved soil contaminated with "toxaphene." (R. p. 428, lines 19-21, p. 429, lines 3-6). The impetus for the project was to be able to remediate the property without having to "dig up all [the contaminated soil] and haul it away to a primitive landfill." (R. p. 429, lines 5-6). Dr. Ellis Kline had never been involved in the remediation business. (R. p. 431, lines 8-11). Chris Young testified he paid Dr. Kline "to develop a compound for us," and that "Dr. [Valerie] Paynter worked for [Dr. Kline] at the time." (R. p. 432, lines 1-3). Chris Young testified the effort was based on their collective "hope" Dr. Kline could help solve the problem. (R. p. 433, lines 1-9). Ultimately, in that initial effort with Dr. Kline, they remediated a 50-acre site, and it was considered a success. (R. p. 434, lines 7-8). Chris Young testified, "prior to the work we did [with Ellis Kline] at Hercules, no one else had been able to biologically degrade toxaphene." (R. p. 439, lines 23-25).

The Partnership with Dr. Paynter

Chris Young testified he met Dr. Valerie Paynter in the late 1990's, (R. p. 434, lines 22-25), and they entered into their first written agreement in November 2004. (R. p. 442, lines 17-

25). The first project he worked on with Dr. Paynter was a 15-acre pecan orchard contaminated with toxaphene in California. (R. p. 443, lines 12-23). This was known as the "Borello" project and it led to them doing more work in California from 2004 to 2007. They were paid approximately $500,000.00 for the Borello project. (R. p. 444-445). Chris Young testified that Dr. Paynter's "sole responsibility in the partnership was to take the soil and test the Factor on it." (R. p. 445, lines 13-15). Chris Young testified he and Dr. Paynter "continued to do Borello-type projects in California and wherever else we could identify the projects for the next 10 years." (R. p. 447, lines 16-18).

Chris Young further testified the partnership worked as follows:

> My job was to develop the business, find the opportunities, do all of the -- you know, do all the leg work involved, meeting with the regulatory folks. Then I would -- I would collect the soil, send it back to Dr. Paynter. She would identify the appropriate Factor to use. And then I would have that formulated into the finished product that would then be delivered to the site where I would perform the clean up in conjunction with the engineering firm.

(R. p. 446, lines 14-22).

Based on their success in California and with the Borello type projects, Chris and Dr. Paynter entered into a second written agreement in Jan. 2006 (R. p. 653-654). Then, shortly thereafter, they entered into a "modified" agreement in May 2006. (R. p. 655-656, and p, 451, lines 4-22). Chris and Dr. Paynter were friends. He attended their weddings. They did 12-15 projects together after executing the May 30, 2006 GPA. (R. p. 454, lines 10-11). Over the course of the relationship, he testified Dr. Paynter was paid "just under a million dollars." (R. p. 454, line 24).

Dr. Paynter was diagnosed with cancer in or around 2013, and she just "dropped off the radar." (R. p. 455, lines 2-9). Around this time, Chris was approached by a group wanting to

bring capital into the business to scale it up. (R. p. 457-459). Dr. Paynter was made aware of all these discussions. They were also working on a project with Northrop Grumman that would have generated significant revenue for the partnership. (R. p. 466, p. 475-476). Chris Young testified he had not been able to continue the business of the partnership because he did not have the data, and that Respondent/Appellant Dr. Joey Paynter had it and refused to provide him any access to it since at least as far back as 2016. (R. p. 468-470).

STANDARDS OF REVIEW

"The standard of review as regards the refusal to grant a directed verdict is well established: In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this [c]ourt when there is not evidence to support the ruling below." *Solanki v. Wal-Mart Store #2806*, 410 S.C. 229, 236, 763 S.E.2d 615, 618 (Ct. App. 2014). This is the proper standard for analysis of Respondents/Cross-Appellants Arguments I and II.

"The admission of evidence is a matter left to the discretion of the trial judge and, absent clear abuse, will not be disturbed on appeal." *Stevens v. Allen*, 336 S.C. 439, 447-48, 520 S.E.2d 625, 629 (Ct. App. 1999). "For this Court to reverse a case based on the admission of evidence, both error and prejudice must be shown." *Id.* at 448, 520 S.E.2d at 629. This is the proper standard for analysis of Respondents/Cross-Appellants Argument III.

ARGUMENTS

I. Res Judicata Cannot Apply in View of Fraud on Probate Court

The 2015-Lawsuit involved Paynter Consulting, LLC as Plaintiff and Chris Young and Biotech Restorations, LLC as Defendants. That matter was sent to arbitration, but arbitration was never pursued by Paynter Consulting, LLC. In the Probate of her estate, Dr. Valerie Paynter's most valuable assets were not disclosed and, therefore, the Probate Court only had jurisdiction over those matters that were disclosed by the Personal Representative.

Paynter Consulting, LLC was never disclosed or made a party in the probate estate of Valerie Paynter. Therefore, *res judicata* cannot apply. (R. p. 347). Specifically, the Inventory and Appraisement prepared by and filed by the Personal Representative, does not disclose (or value) any assets related to the partnership or Paynter Consulting, LLC. (R. p. 343-346).

The fact of non-disclosure of the partnership / General Partnership Agreement was stated by the Probate Judge in her letter to Appellants/Respondents dated March 5, 2018, stating:

> I have received your claim on the above-captioned estate. Please find enclosed a stamped copy for your records.
>
> As for your Motion for Declaratory Judgment, I am returning it in as much as you should file this in Circuit Court.
>
> For your information, the estate Inventory is enclosed, please note that it does not reflect the Partnership as an estate asset.
>
> Thank you in advance.

(R. p. 347) (underline emphasis added).

Appellants/Respondents Chris Young's claims were filed in the Probate Court on Feb. 28, 2018. (R. p. 347, 703). Appellant. Young's attempt to make a claim for declaratory relief was not filed, but instead was sent back to him by the Probate Judge, as noted above. (R. p. 347).

Appellant/respondent Chris Young's officially rejected claim attached a copy of the May 30, 2006 GPA, which referenced Paynter Consulting, LLC as the partner and Dr. Valerie Paynter

as its sole owner. ((R. p. 704-705). In the Notice of Disallowance of Claim, filed April 25, 2018, the Personal Representative, Respondent/Cross-Appellant Dr. Joanna Paynter, stated as follows: "WITH ALL DUE RESPECT, THE CLAIM FROM CHRISTOPHER YOUNG[6] IS OF A PERSONAL NATURE AND BEARS NO VALIDITY OR TRUTH. NOR WOULD THIS CLAIM HAVE ANY CONNECTION TO HER PERSONAL ESTATE SINCE VALERIE PAYNTER OWNED PAYNTER CONSULTING, LLC AND THAT ENDED UPON HER DEATH." (R. p. 705) (all-caps in original).

Paynter Consulting, LLC did not end at Dr. Valerie Paynter's death. It terminated on Jan. 21, 2020, by filing in the Office of the Secretary of State by the Personal Representative, acting as its "fiduciary." ((R. p. 706). At the time of filing of this action on Sept. 11, 2019, the S.C. Secretary of State records showed Paynter Consulting, LLC was an active company.

The Personal Representative had a conflict of interest in that by her Declaration filed May 20, 2020 (R. p. 715-716), she claimed to have owned the Factor since Feb. to April 2016, which was not disclosed at any time to Appellants/Respondents prior to that filing, and was not disclosed while the partnership was in effect up until Sept. 4, 2017. The Probate Court was never made aware of this alleged transfer of the valuable Factor. (R. p. 343-346, p. 347). The Probate Court was never made aware of the existence of the partnership by the Personal Representative, who accepted a sworn duty on Sept. 26, 2017 to, *inter alia*, be "responsible to make sure all assets of the estate are properly administered and that I can be personally liable to any beneficiary or other person(s) having an interest in the estate for any negligence and/or

[6] Biotech Restorations, LLC was not listed as a claimant on the claim filed by Appellant/ Respondent Chris Young on Feb. 28, 2018 in the Probate Court. Paynter Consulting sued both Chris Young and Biotech Restorations, LLC in its 2015-Lawsuit.

intentional misconduct in the performance of my duties as Personal Representative." (R. p. 350) (underline emphasis added)).

As a part of her Application to the Probate Court, the Personal Representative also "submitted to the jurisdiction of the Court in any proceeding relating to the Estate." (R. p. 305). This point is relevant to the representations made by Mr. Englebardt in 2019 while promising cooperation and Acceptance of Service, while at the same time stating the Defendant Daughters of Dr. Valerie Paynter did not want to concede jurisdiction. (R. p. 207, ¶ 22, lines 3-4). Yet, as of that time, Defendant Samantha P. Nelson resided in Pickens County and Defendant Dr. Joanna Paynter had previously agreed to "submit to the Court's jurisdiction" in her Oath to Application to Informal Probate of Will [of Valerie A. Paynter] and Appointment as Personal Representative, filed with the Probate Court on Sept. 26, 2017. (R. p. 350).

Further to this point, the undisputed trial testimony of Kevin Dillard established that the representations set forth by Mr. Englebardt in his Oct. 30, 2019 email to the undersigned, stating, "It is still my understanding that no attempts to sell anything have occurred since Valerie's death (or really since she got really ill toward the end)," were false. (R. p. 206, ¶ 15). Respondents/ Cross-Appellants absolutely knew of the value of the Factor and took affirmative steps to conceal it from the Probate Court. Had a full and proper disclosure of all of Dr. Paynter's assets been made by the Personal Representative, the Probate Court could have joined the issues and provided for a Removal / Order of Reference of Mr. Young's claims and Declaratory Judgment filing to the Circuit Court.

With full disclosure of all assets, these matters would have (and should have) been litigated. Instead, there was fraudulent non-disclosure by the self-interested Personal Representative. Other creditors, such as American Express, CitiBank, N.A. and Wells Fargo

also accepted and relied upon the inadequate disclosure of assets made by the Personal Representative. (R. p. 230, ¶ 32(b) and (c)). American Express accepted a resolution of its claim for $8,320.20 for payment of $832.02, essentially $0.10 on the dollar. (R. p. 229, ¶ 32(a), and p. 161, ¶ 13).

The Personal Representative's fraud on the Probate Court and also her attempt to claim ownership of the Factor (outside of the GPA) during the pending 2015-Litigation are undeniable from even a cursory review of this record. "There is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 609-610 (2003). Appellants/Respondents filed a motion under, *inter alia*, S.C. Code Ann. § 62-3-1005,[7] Probate Court Rule 2, and under the principles of Rule 60, SCRCP,[8] to re-open the Probate Estate of Valerie Paynter on April 24, 2020. This motion was not ruled upon by the Probate Court.

Extrinsic fraud is required to overturn a prior decision for fraud on the court. (*Chewning*, at 610). "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Hilton Head Center, Inc. v. Public Service Com.*, 294 S.C. 9,

7 Section 1005 provides:

> Unless previously barred by adjudication and except as provided in any accounting, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the application for settlement of the estate, required by Section 62-3-1001. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

(*Id.* (underline emphasis added).

8 *See e.g.*, S.C. Code Ann. § 62-1-304, stating, "The South Carolina Rules of Civil Procedure (SCRCP) adopted for the circuit court and other rules of procedure in this title govern formal proceedings pursuant to this title."

11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." (*Id.*). Here, the Personal Representative's fraud prevented the Probate Court from properly responding to the claims made by Appellant/Respondent Chris Young in the Probate Court.

In 2005 at Comment 12 to Rule 3.3, "Candor Toward the Tribunal," of its Amendments to the Rules of Professional Conduct, Rule 407, SCACR, our Supreme Court stated as follows:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

In re Amendments to Rules of Prof'l Conduct, Rule 407, SCACR (2005).

The undersigned has raised these issues in the Probate Court, and responses have been filed by counsel to the former Personal Representative, but a full disclosure of undisputed estate assets has yet to be made. Therefore, any decisions of the Probate Court are tainted with fraud and must be corrected, declared void or voidable. Because Dr. Joanna Paynter was an Officer of the Probate Court acting as Personal Representative, her conduct in mis-representing assets must be addressed in the same manner as if she were a licensed attorney knowingly submitting false evidence. *Chewning*, 579 S.E.2d at 610-611 (noting when an "officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court."). By virtue of the non-disclosure, Appellants/respondents did not

get their day in Court in the Probate Court, and Respondent/Cross-Appellant has thus far gotten away with it, much to her benefit as she now claims ownership of the probate-free Factor.

Appellants/ Respondents respectfully represent that had the assets of Paynter Consulting, LLC been disclosed to the Probate Court, the proper procedure for handling Mr. Young's claims at that time would have been to remove the claims to the Circuit Court under S.C. Code Ann. § 62-1-302(d)(3) or (4). However, because the Personal Representative did not disclose the assets of Paynter Consulting, LLC to the Probate Court, the Probate Judge was not able to ascertain whether or not any claim made by Young "concern[ed] property in which the estate of a decedent or protected person asserts an interest." (*Id.*). Appellants/Respondents claim for the existence of a Constructive Trust ("Created other than by will") also falls within the specific provisions of S.C. Code Ann. §§'s 62-1-302(d)(4) and 62-7-201(c)(1), and should have been removed to Circuit Court in the initial probate proceeding.

In *Estate of Stanley v. Sandiford*, 287 S.C. 148, 149, 337 S.E.2d 248, 249 (Ct. App. 1985), the Court of Appeals decided a case it described as follows: "This case essentially involves the determination of ownership of the savings account." (*Id.*). The Court in *Sandiford* further stated, "under long established case law, the probate court is required to identify the assets in the estate and to distribute them pursuant to the decedent's will." (*Id.* at 250). This did not happen in Case No. 2017-ES-39-00607, *In The Matter of Valerie Anne Paynter*, because a full and complete disclosure of assets was not provided to the Probate Court. (R. p. 343-346, 347).

Still further, from the trial testimony, it was known to all that the Factor had value, perhaps tremendous value, yet the Personal Representative took affirmative steps to conceal it and to deny claims based on false pretense that "PAYNTER CONSULTING, LLC … ENDED

UPON [DR. PAYNTER'S] DEATH." (R. p. 705) (all caps in original). Such a declaration is tantamount to claiming that the assets of a limited liability company pass outside of probate, much like real property held as a Joint Tenancy with Right of Survivorship, or proceeds from a life insurance policy. No legal authority supports this *de facto* contention.

In addition, Appellants/Respondents brought equitable claims for Injunctive Relief and establishment of a Constructive Trust. In *Thomerson v. DeVito*, 430 S.C. 246, 250, 844 S.E.2d 378, 380 (2020), the Supreme Court held a 3-year statute of limitations not "applicable to [an equitable] claim of promissory estoppel."

Finally, this action involved claims against the "heirs / estate of the deceased partner," which were not raised or litigated in any prior proceeding. To the extent that Respondents/Cross-Appellants wish to assert *res judicata*, they must be able to show that Paynter Consulting, LLC and its assets, namely the Factor, were disclosed and put within the jurisdiction of the Probate Court. As the partnership existed until the death of Dr. Valerie Paynter on Sept. 4, 2017, Appellants/Respondents were owed a fiduciary duty by the Defendants/Respondents/Cross-Appellants to disclose activity related to the Factor. Respondents/Appellants here seek to assert defenses of *res judicata* and statute of limitations based on either aiding and abetting breaches of fiduciary duty or fraud on the Probate Court. "Fraud upon the court is a narrow and invidious species of fraud that 'subverts the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.'" *Perry v. Heirs at Law & Distributees of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504 (Ct. App. 2003) (underline emphasis added).

For at least the reasons set forth herein and above, Respondents/Cross-Appellants First Argument based on *Res Judicata* must be denied, because the parties were not the same, the claims were not the same, and because of the fraud perpetrated on the Probate Court by the Personal Representative. Ample evidence in the record supports this trial court decision.

II. *Statute of Limitations Cannot Apply in View of Fraud by Personal Representative*

As set forth in argument section I above, the statute of limitations will not apply when a party has effectuated an extrinsic fraud on the court. *Chewning*, 579 S.E.2d at 609-610.

Still further, Appellants/Respondents filed this action within the applicable statute of limitations under any scenario. The fraudulent probate of Dr. Paynter's estate was not closed until March 25, 2019. The estate residence, 200 Valley View Drive, Clemson, South Carolina, 29631, which is the address listed for Dr. Valerie Paynter in the May 2006 GPA, was not sold until June 19, 2019. (R. p. 290, ¶ 1; *see also* Pickens County RMC Office, Book 2068, Page 335 to 339). Chris Young filed this action on Sept. 11, 2019, and thereafter was subjected to numerous schemes by the Respondents/Cross-Appellants via their counsel to avoid the jurisdiction of this Court, which should have had jurisdiction over these matters from the initial probate of their mother's estate.

As if the fraud perpetrated on the Probate Court were not enough, the Respondents/Cross-Appellants persisted on a continuing course of conduct that included falsely telling their mother's counsel in the 2015-Lawsuit to represent to the undersigned on Oct. 30, 2019, that "no attempts to sell anything have occurred since Valerie's death (or really since she got really ill toward the end)." This "story" was contradicted by the testimony of Kevin Dillard at trial. Dillard's testimony further showed the Personal Representative was well aware of the value of

the Factor and Paynter Consulting, LLC at the time of filing the Inventory and Appraisement on Oct. 16, 2017. (R. p. 343-346). Respondent/Cross-Appellant Joanna Paynter was an Officer of the Court by virtue of her role as the Personal Representative. (R. p. 704).

Chris Young presented both a monetary claim and a filing for a Declaratory Judgment to the Probate Court. Both of those filings were timely. (R. p. 347, p. 703-705). The Declaratory Judgment filing sought a declaration as to who owned or had rights of use to the Factor. As set forth herein, the Probate Court sent that filing back to Mr. Young, advising, "you should file this in Circuit Court." (R. p. 347). The Probate Judge was also apparently misled by the inadequate filing of an Inventory and Appraisement by the Personal Representative. Any judgment issuing from the Probate Court on this record is void / voidable. *McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (noting "definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction."). Here, because the assets of Paynter Consulting, LLC were not disclosed the Probate Court, *arguably*, lacked jurisdiction over those assets to properly administer them. If not void, any judgment issued by the Probate Court is voidable. *Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC*, 423 S.C. 611, 614, 815 S.E.2d 780, 781 (Ct. App. 2018) (noting a "voidable judgment is nothing more than one made in error by a court with jurisdiction, as our facts can show.").

Appellants/Respondents effected service on Paynter Consulting, LLC via the S.C. Secretary of State on April 22, 2021. (filed in this action, May 3, 2021). Despite two separate Officers of this Court representing to the undersigned that they would accept service as early as October 2019, thus inducing not only settlement negotiations on false pretenses, but also inducing the undersigned not to pursue other means of service, the record shows Mr. LeBlanc

accepted service of the Summons and Verified Complaint on Jan. 19, 2021. This was within three years of the closing of the fraudulently probated estate on March 25, 2019, and also within three years of the date of denial of Appellant/Respondent's claim in the probate estate on Feb. 28, 2018.

There is no place for a party, much less an Officer of the Court, to commit the types of fraudulent non-disclosure(s) that occurred here and now claim time has run out on the defrauded part(ies). *Rish v. Rish*, 435 S.C. 681, 689, 868 S.E.2d 719, 723 (Ct. App. 2021) (noting "a void judgment cannot gain validity with the movant's delay because it is a nullity from its inception.").

For at least the reasons set forth herein and above, Respondents/Cross-Appellants 2nd Argument based on Statute of Limitations must be denied. Ample evidence in the record supports this trial court decision too.

III. Paynter Consulting, LLC is Estopped from Denying the May 30, 2006 GPA

As set forth in the Statement of Facts, Paynter Consulting, LLC filed its own lawsuit in 2015 (R. p. 44-62), based on the same partnership document Respondents/Cross-Appellants now wish to exclude from evidence due to the death of their mother. Notably, Dr. Valerie Paynter did not challenge the validity of the contents of the May 30, 2006 GPA when it was filed by Appellants' counsel in the 2015-Lawsuit on Nov. 15, 2015. (R. p. 237-240). The filing provided to the District Court on Nov. 15, 2015, showed the red-line changes made to the Jan. 10, 2006 version of the parties General Partnership Agreement, and is entirely consistent with the formation of Paynter Consulting, LLC by Dr. Paynter on Jan. 26, 2006. (R. p. 351). In fact, in Para. 6 of its Complaint in the 2015-Lawsuit, Paynter Consulting, LLC alleged, "On May 30,

2006, Paynter Consulting and Biotech Restorations entered into a partnership agreement (hereinafter "the partnership") to pursue business ventures across the country using The Factor." (R. p. 47, ¶ 6, lines 1-3).

The specific issue of the existence and validity of the May 30, 2006 GPA has already been litigated and not challenged by the Respondents/Appellants or their mother during her lifetime. (*See e.g.,* R. p. 657, ¶, lines 7-9 (stating, "On May 30, 2006, Paynter and Biotech entered into a partnership agreement for purposes of conducting business related to 'the treatment of contaminated soil, marine sediments and other media.'")). The District Court then went on to order all claims brought by Paynter Consulting, LLC to arbitration based on this very May 30, 2006 General Partnership Agreement. (R. p. 664, ¶ 2, line 1 (stating, "having concluded a valid arbitration agreement exists between the parties," and granting Defendants' motion to compel arbitration))).

It was proper for the trial court to admit the May 30, 2006 General Partnership Agreement into evidence.

CONCLUSION

Respondents/Cross Appellants appeal must be denied in its entirety and these matters must be remanded as requested in Appellants/Respondents Initial Brief.

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