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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case Number: 2023-001281

Marcus Riley, ……. Appellant,

v.

Dorothy Riley, individually and Dorothy Riley in her role as Personal Representative of the Estate of Marion F. Riley, Jr.……... Respondent.

INITIAL BRIEF OF RESPONDENT

---

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FACTS

Appellant is the child of Marion F. Riley, Jr. Hereafter, Marion F. Riley, Jr. will be referred to as "Sonny," which was his nickname. Appellant is the grandchild of Marion F. Riley, Sr. Hereafter, Marion F. Riley, Sr. will be referred to as "Grandfather."

On May 18, 1995, Grandfather executed a Power of Attorney naming Sonny as his attorney-in-fact. (Plaintiff's Exhibit C: May 18, 1995, Power of Attorney). On May 28, 1998, Grandfather revoked that Power of Attorney. (Plaintiff's Exhibit D: May 28, 1998 Revocation of Power of Attorney). On October 15, 1998, Grandfather executed a second Power of Attorney naming Sonny, again, as his attorney-in-fact. (Defendant's Exhibit Five: Power of Attorney, Book 123 at Page 143). On February 26, 1999, Sonny, as attorney-in-fact, signed a deed conveying certain real property from Grandfather to Sonny. (Plaintiff's Exhibit F: February 26, 1999 Deed, Book 127 at Page 1 concerning TMS: 0123-08-08-042; TMS: 0123-08-08-061; TMS: 0123-08-08-024; TMS: 0123-08-09-008; TMS: 0123-08-09-010; TMS: 0123-08-09-011; TMS: 0128-08-02-011; TMS: 0128-08-02-012; TMS: 0128-08-02-006; TMS: 0123-08-07-020).

Grandfather died on May 10, 1999. His Estate is of record in Allendale County in Probate File #1999ES0300042. (Defendant's Exhibit Two: Petition for Appointment, Estate of Marion F. Riley, Sr.).

In his Will (signed May 22, 1995), Grandfather left his Estate, in various devises, to his children, including Sonny, Janice, Evelyn, and Virginia, his heirs at law, all of which survived their father. (Defendant's Exhibit 7: Will of Marion F. Riley, Sr.).

Sonny was appointed Personal Representative of Grandfather's Estate. (Defendant's Exhibit 2, Petition for Appointment with Order for Informal Probate).

On November 5, 2001, Virginia Priester and Janice Heard filed suit in the Probate Court, seeking to invalidate Grandfather's May 22, 1995 Will, the October 15, 1998 Power of Attorney, and the February 26, 1999 Deed of Conveyance, executed by Sonny as attorney-in-fact, asserting that Grandfather lacked the mental capacity to execute those documents. (Defendant's Exhibit 9, Complaint, Probate Court). An Order was entered on October 25, 2002, by Probate Judge Brenda P. Bennett, dismissing the Complaint with prejudice, because the claims were properly time-barred, and the Probate Court lacked jurisdiction. (Defendant's Exhibit 10, Probate Court Order). That Order was not appealed.

On April 8, 2003, Grandfather's Estate was closed, by Order of the Probate Court. (Defendant's Exhibit 11, Order Closing Estate).

On April 14, 2014, Sonny conveyed his interest in certain real property (TMS: 123-08-09-008) to his daughter Renique Y. Riley. (Defendant's Exhibit 12, Deed Book 246 at Page 98). Renique Y. Riley, the owner of this parcel since 2014, was not named as a party to this action.

Sonny died testate in Allendale County on June 8, 2018. The Estate is of record in Allendale County in Probate File #2018ES0300055. (Defendant's Exhibit 1, Will of Marion F. Riley, Jr.). A notice to creditors was published three consecutive weeks beginning on July 18, 2018 and ending on August 1, 2018. (Defendant's Exhibit 3, Affidavit of Jonathan Vickery, Exhibit to "Request to Take Judicial Notice of the Facts"). On February 19, 2020, Appellant

filed a Demand for Hearing in Sonny's Estate, asserting that Sonny lacked competency to make a will and to object to Respondent's performance of her duties as Personal Representative. In addition to the Demand for hearing, Appellant filed this action. [1]

STATEMENT OF THE CASE

On July 6, 2020, Appellant filed his action in the Court of Common Pleas against Respondents. The Complaint was Amended on July 28, 2020. (Amended Complaint: 2020CP030176). The Amended Complaint asserts a cause of action for fraud against Sonny's Estate, asserting that decedent Sonny committed fraud when Grandfather executed the October 15, 1998 Power of Attorney. The Amended Complaint alleged a second cause of action for "Lack of Capacity," asserting that Grandfather lacked the mental capacity to execute a power of attorney in 1998. (This is the same issue dismissed with prejudice by the final Order of October 25, 2002, of Probate Judge Brenda P. Bennett.) (Defendant's Exhibit 10, Probate Court Order). Appellant sought the relief of the cancellation of the October 15, 1998 Power of Attorney and the voiding of the February 26, 1999 deed executed by Sonny, as attorney-in-fact.

On November 18, 2020, Respondents filed their Amended Answer to the Complaint, asserting several affirmative defenses including lack of subject matter jurisdiction, lack of standing, res judicata, *plene administravit,* and the applicable statute of limitations. (Amended Answer of Dorothy Riley, individually and as PR of the Estate of Marion Riley, Jr., November 18, 2020).

[1] These facts, with the supporting documentation were provided to the Court in Defendant's uncontested "Request to Take Judicial Notice of the Facts," along with accompanying documentation. (October 18, 2022, "Request to Take Judicial Notice of the Facts," with exhibits).

Prior to the trial of this case, Respondent filed a motion to dismiss, pursuant to Rule 12(b)(6), SCRCP, asserting Marcus Riley lacks standing to bring this suit, the Court lacks subject matter jurisdiction to hear this claim, the Complaint concerns matters outside the applicable statute of limitations, as well as matters previously litigated in Grandfather's Estate which are *res judiciata* and not subject to review. (Motion to Dismiss, Rule 12(b)(6), SCRCP, February 12, 2021, with accompanying memorandum, August 4, 2021). That motion was denied. (Order, August 19, 2021).

At the trial of this matter, Respondent moved for a directed verdict at the conclusion of Appellant's case in chief, asserting the same grounds as his motion to dismiss. *(See Transcript of Record, Page 88, line 11—Page 104, line 10; Page 122, line 8—Page 133, line 15).* The Court permitted the trial to continue, while holding that motion in abeyance. Respondent renewed her motion for directed verdict at the conclusion of the evidence. These motions were denied. *(See Transcript of Record, Page 239, line 11—Page 240, line 10.)*

At the trial, the parties stipulated on the record that Dorothy Riley, individually, should be dismissed from this action. *(See Transcript of Record, Page 214, line 14—line 19).*

On November 1, 2022, the jury found unanimously for Appellant, Marcus Riley. (*See Transcript of Trial, November 1, 2022, Page 273, line 6—Page 274, line 5).*

On November 3, 2022, Respondent filed her motion for a New Trial Absolute, pursuant to Rule 59, SCRCP. (Motion for a New Trial, November 3, 2022). On November 9, 2022, Respondent filed her motion to Alter or Amend the Judgment of the Court, asserting again the legal defenses of lack of standing, lack of jurisdiction, statute of limitations, and *res judicata,* pursuant to Rule 59(e), SCRCP. (Motion to Alter or Amend Judgment, November 9, 2022).

On May 4, 2023, the trial court issued its Order voiding Grandfather's October 15, 1998 Power of Attorney, recorded in Deed Book 123 at Page 143. (May 4, 2023, Order).

While these motions were pending, Janice Heard, daughter of Grandfather, petitioned to have herself appointed Personal Representative of Grandfather's re-opened Estate. Respondent asks the Court to take judicial notice of the June 30, 2023 Amended Inventory and Appraisement in Grandfather's Estate, incorporating the real property conveyed to Sonny by the February 26, 1999, recorded in Deed Book 127 at Page 1, along with other real property. (Amended Inventory, Estate 1999-ES-03-00042). This list includes the home of Renique Y. Riley, who was not a party to this action. The value of the real property is listed therein at $103,800.00. (June 30, 2023, Amended Inventory, Estate 1999-ES-03-00042).

On July 18, 2023, the trial court issued its Order granting Respondent's Motion for a New Trial Absolute, pursuant to Rule 59(e), SCRCP. Therein, the Court asserted, "the evidence presented in this case does not justify the verdict." (July 18, 2023, Order Granting Motion for New Trial Absolute).

From this Order, Appellant appeals.

STANDARD OF REVIEW

South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial. Trial judges are not required to provide detailed reasons for their decisions to determine that the evidence in a case does not justify the verdict, and then to grant a new trial solely upon the facts, "when [the trial judge] finds that the evidence does not justify the verdict." *Folkens v. Hunt,* 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). The trial judge can, as the thirteenth juror, effectively "hang" the jury by refusing to agree with the jury's otherwise unanimous verdict. The effect is the same as if the jury failed to reach a verdict. A new trial is

ordered. *See Youmans ex rel. Elmore v. South Carolina Dept. of Transp.,* 380 S.C. 263, 272, 670 S.E.2d 1, 5 (Ct. App. 2008). In this instance, no purpose is served by requiring the trial judge to make factual findings. Ibid.

Upon review, a trial judge's order granting a new trial will be upheld unless the order is "wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *South Carolina State Highway Department v. Clarkson,* 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). The appellate court review is limited to consideration of whether evidence exists to support the trial court's order: "[T]he question of existence or nonexistence of evidence is one of law; and to that extent such an order is subject to our review." *Mims v. Coleman,* 248 S.C. 235, 237, 149 S.E.2d 623, 624 (1966). *See also Carolina Aviation v. Glens Falls Ins. Co.,* 214 S.C. 222, 224, 51 S.E.2d 757, 758 (1949). As long as there is conflicting evidence, the Supreme Court has held that the trial judge's grant of a new trial will not be disturbed. *See Norton v. Norfolk S. Ry. Co.,* 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002); *Dent v. Redd,* 270 S.C. 585, 243 S.E.2d 460 (1978); *South Carolina Dept. of Highways and Public Transp. v. Mooneyham,* 275 S.C. 205, 269 S.E.2d 329 (1980). "[T]he trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." *Worrell v. South Carolina Power Co.,* 186 S.C. 306, 195 S.E.638, 641 (1938). The trial judge, "charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." *Graham v. Whitaker,* 282 S.C. 393, 321 S.E.2d 40 (1984).

The appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." *Todd*

v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993), *citing Gray v. Davis,* 247 S.C. 536, 148 S.E.2d 682 (1966). "Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." *Vinson v. Hartley,* 324 S.C. 389, 404, 477 S.E.2d 715 (Ct. App. 1996).

ARGUMENT

I. Is there some evidence to support the order of the trial judge granting a new trial, pursuant to Rule 59?

Appellant's Amended Complaint contains two causes of action, for fraud, allegedly committed by Sonny, deceased, and for the cancellation of the October 1998 Power of Attorney of Grandfather, also deceased. At the trial of this matter, Appellant testified he had been living out of state and was uninvolved in Grandfather or Sonny's affairs in 1998 and 1999, at the time of the alleged fraud. Appellant asserted that he suspected that Sonny had somehow fabricated Grandfather's Will. *Transcript of Trial, Page 19, line 15—Page 21, line 7.* Appellant further testified that he suspected that Sonny had either fabricated a Power of Attorney or manipulated Grandfather into executing a Power of Attorney document in October, 1998, when Grandfather lacked capacity. *Transcript of Trial, Page 21, line 19—Page 22, line 23.* Appellant testified that he suspected Grandfather may have had a medical problem that limited his ability to understand. *Transcript of Trial, Page 26, line 19—Page 27, line 2.* Appellant also testified that he was entirely removed from the family during this time period: Q: "At any time, were you aware that there was this change in documents or there was a revocation and another one that was brought about?" A: "I was living in Oklahoma City at the time working on the Air Force base. I had no idea this stuff was going on. I had no clue." *Transcript of Trial, Page 27, line 3—line 8; Page*

36, line 2—line 8. Appellant testified that he knew that his aunts had attempted to invalidate the October 1998 Power of Attorney during the administration of Grandfather's Estate, because they objected that Sonny "ended up with everything, and that just wasn't right." *Transcript of Trial, Page 31, line 21—Page 32, line 20.*[2]

Grandfather's daughter, Janice Heard, testified at the trial as well. She testified that Grandfather needed a pacemaker late in his life and was diagnosed with prostate cancer that led to his death. *Transcript of Trial, Page 50, line—Page 51, line 2.* Ms. Heard testified that, in her opinion, the signature on 1995 will was not Grandfather's signature. *Page 58, line 17—line 22.*

At trial, Laurie Anne Hoeltzel was qualified as a forensic handwriting expert. Hoeltzel testified that she noted differences between a sample of "known" signatures provided to her by Appellant and the October 1998 Power of Attorney. *Transcript of Testimony, Page 67, line 16—Page 85, line 20; Page 87, line 11—line 13.* Her conclusion was that Grandfather did not sign all of the documents that she reviewed: Q: Miss Hoeltzel, in your professional opinion, Mr. F. Riley, Sr. sign all of the documents that you reviewed? A: No. *Transcript of Trial, Page 85, line 17—20.* Her report did not provide copies of the "known" samples that were provided to her by the Appellant. Neither did she offer her opinions to a reasonable degree of certainty as an expert in the field of forensic handwriting. (*Plaintiff's Exhibit K, Affirmation).* Her report includes the conclusion that it was only "probable" that the will and power of attorney did not match the

[2] The Power of Attorney was recorded on October 15, 1998. The deed was recorded on February 26, 1999. Appellant was on constructive notice of the existence and use no later than February 26, 1999. *See Berry v. McLeod*, 328 S.C. 435 (Ct. App. 1997) (Statute of limitations began to run when documents were publicly filed.); *see also Fuller-Ahren v. South Carolina Dept. of Highways and Public Transportation*, 311 S.C. 177 (Ct. App. 1993) (An individual on inquiry or constructive notice is held to be on notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed.). Appellant claims that he is entitled to a much later "discovery" of the alleged fraud, but Appellant cites no precedent that permits each individual child, grandchild, or great-grandchild of Grandfather their own discrete statute of limitation based on their "discovery" of public information.

"known" samples, none of which were authenticated, and all of which were handpicked and submitted to the expert by Appellant.

At the trial, Respondent called Lynn Mannuel, who testified that she witnessed the signatures on the contested will, which she recalled Grandfather signing at the law offices of Attorney Eltzroth, where she worked. *Transcript of Trial, Page 106, line 19—Page 108, line 22.*

Attorney Clyde Eltzroth, Jr. also testified at trial. *Transcript of Trial, Page 137, line 21—Page 147, line 12.* He recalled drafting the subject documents for Grandfather, whom he specifically recalled. He also referred to his diary, where he discovered appointments with Grandfather that corresponded to the documents prepared. He also recalled notarizing the May 22, 1995 Will.

June Bilka testified that she had witnessed the will and notarized the October 15, 1998 Power of Attorney. *Transcript of Testimony, Page 153, line 5—Page 155, line 18.* Bilka also testified that she knew Sonny, and he was not present at the time of the execution of the documents, in accordance with the policy of the law office. *Transcript of Testimony, Page 155, line 14—line 18.* She also named the additional witness on the Power of Attorney as Janet Palazzolo, who was another employee of the law office. *Transcript of Testimony, Page 154, line 11—line 17.*

In his closing statement, Appellant argued that the May 22, 1995 Will and the October 15, 1998 Power of Attorney should both be invalidated. *Transcript of Testimony, Page 245, line 2—Page 246, line 15.* Appellant asserted that his objective was to "make it right," by voiding the will and power of attorney. *Transcript of Testimony, Page 246, line 7; Page 248, line 5-6.*

However, there was scant evidence of any "wrong" having been committed, only a general sense of disapproval at the decisions of Grandfather, made well over twenty years ago. [3]

Appellant did not introduce into evidence a single medical record of any actual health issues of Grandfather in 1995 or 1998 that would render him incapable of executing either a will or a Power of Attorney. There is no credible diagnosis in the record to substantiate or support a claim of mental incapacity.

Appellant did not put forth any evidence that June Bilka, Attorney Clyde Eltzroth, Jr., or Lynn Mannuel were involved or complicit in the alleged fraud. There is, rather, compelling evidence that the documents were signed in a routine fashion, by Grandfather, in the lawyer's office, before neutral witnesses and a notary, none of whom were alleged to have benefitted from the execution of the documents. Nor did any of these witnesses recall that Grandfather was acting under any compulsion or under any duress.

Appellant did not present any evidence that Grandfather objected to the deed in question, which was recorded on February 26, 1999, during his life. (Grandfather died on May 10, 1999.) Nor did Appellant present any specific evidence that the May 22, 1995 will was inconsistent with the wishes of Grandfather.

Appellant further did not present any documentation to demonstrate what "known" samples of writing, alleged to be Grandfather's, were submitted to the expert by Appellant for evaluation, nor when those "known" samples were alleged to have been created. Further, the expert did not offer her opinions to a reasonable degree of certainty of a forensic handwriting expert.

[3] Appellant concedes that he is not an heir of Grandfather. Under §62-1-201(20), S. C. Code of Laws, an "heir" is defined as a person who is entitled under the statute of intestate succession to the property of a decedent. Under §62-2-103(1), S. C. Code of Laws, Appellant is not an heir of Grandfather, because Sonny survived Grandfather. This is a reason that Appellant has no standing to bring this claim.

These facts are sufficient to support the decision of the trial judge to grant a new trial, absolute, under the thirteenth juror doctrine.

II. Did the trial judge err in exercising his discretion as the 'thirteenth juror' in granting Respondent a new trial, absolute?

The trial judge did not err is relying on his discretion to grant a new trial, in light of the factual evidence presented in this case.

Regarding the will, the judge was well within his discretion in relying upon the testimony of the witnesses and notary regarding the execution of the will. A self-proved will incorporates an affidavit signed by the testator, the witnesses, and a notary into the will, declaring due execution of the will, testator's capacity, and that there was no undue influence upon the testator. *See S. C. Code Ann.* §62-2-503 (Supp. 2020). "A self-proved will does not require the production of evidence as to the due execution of the will." *Smith v. Lawton,* 435 S.C. 179, 188, 865 S.E.2d 782, 786 (Ct. App. 2021). In this case, the will was self-proving. Respondent was also able to produce credible testimony from the witnesses and the notary to the challenged will. Each witness and the notary confirmed their recognition of their signatures on the document, which was a certified true copy of the will of Grandfather. (Defendant's Exhibit 7: Will of Marion F. Riley, Sr.).

Similarly, Respondent presented credible evidence from June Bilka that the Power of Attorney was signed at the office of Attorney Eltzroth, before witnesses and a notary. The trial judge did not abuse his discretion in giving weight to the evidence that the documents were not irregular in nature, as there was evidence that they were executed by Grandfather, at his request, before the appropriate witnesses and notary. The record, therefore, contains facts upon which to support the granting of a new trial. *See Norton v. Norfolk S. Ry. Co.,* 350 S.C. 473, 479, 567 S.E.2d

851, 854 (2002); *Dent v. Redd,* 270 S.C. 585, 243 S.E.2d 460 (1978); *South Carolina Dept. of Highways and Public Transp. v. Mooneyham,* 275 S.C. 205, 269 S.E.2d 329 (1980). As a matter of law, the trial judge further did not abuse his discretion in granting a new trial.

The Complaint in this action states two causes of action: 1. Fraud by Sonny and 2. Lack of Capacity of Grandfather to execute the Will or Power of Attorney. "In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent proximate injury. *Regions Bank v. Schmauch,* 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct. App. 2003).

At the trial of this matter, the parties agreed to dismiss Dorothy Riley, individually, from the action. *(See Transcript of Record, Page 214, line 14—line 19).* The only other named Defendant in this action is the Estate of Sonny. Yet, at trial, the evidence presented did not speak to any action, statements, or representations by Sonny regarding the creation or execution of the contested power of attorney or the contested will. There is simply no credible evidence of any fraud by Sonny against Appellant, who is not a beneficiary of the Estate of Grandfather. Further, there was no evidence that the conveyance to Sonny violated the wishes or instructions of Grandfather. The trial judge does not err in granting a new trial, where there is little or no persuasive evidence in the record to support the verdict. (Verdict Form, November 1, 2022)

Regarding the creation of the Power of Attorney, "in order for the principal to create the agency relationship in the first instance the principal must have the mental capacity to contract." *In re Thames,* 344 S.C. 564, 570, 544 S.E.2d 854, 856-857 (Ct. App. 2001), citing 3 Am.Jur.2d. *Agency §12*. "South Carolina has defined *contractual capacity* as a person's ability to understand,

at the time the contract is executed, the nature of the contract and its effect." *In re: Nightingale's Estate,* 182 S.C. 527, 542, 189 S.E.2d 890, 896 (1937)(emphasis added). "Where a transaction is challenged on the ground of mental incompetency, the individual's competency on the date of that transaction must be determined." *Grapner v. Atlantic Land Title Co.,* 307 S.C. 549, 551, 416 S.E.2d 617, 618 (1992). The party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. *Id.*

In this case, Appellant presented no medical evidence at all. Appellant and his aunt, Janice Heard, presented some vague evidence, based on their own personally recollections, that Grandfather was generally unwell in the months preceding his death. However, Appellant contradicted his own evidence when he repeatedly testified that he was living out-of-state and was uninvolved in Grandfather's life at the time of the execution of the Power of Attorney. *Transcript of Testimony, Page 27, line 3—line 9; Page 37, line 17—Page 38, line 15.* Heard was unable to cite any specific diagnosis, treatment, or medication that would have impaired Grandfather's ability to contract. *Transcript of Testimony, Page 50, line 7—Page 51, line 2; Page 53, line 11—line 17.* Respondent presented evidence from Grandfather's attorney that the documents were not irregular, and Grandfather came into the office to sign both the Will and Power of Attorney of his own volition and under his own strength. The trial judge did not err in giving greater weight to the evidence of Grandfather's attorney and discounting the self-serving and vague evidence of the Appellant and Janice Heard, which was wholly unsupported by any medical evidence.

The appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." *Todd,* 315 S.C. at 36, 431 S.E.2d at 598 (Ct. App. 1993). In this case, Appellant has not highlighted any manifest

errors of law in the record.[4] Nor can Appellant demonstrate any abuse of discretion by the trial judge in exercising his authority as the thirteenth juror. To disturb the decision of the lower court, it must clearly appear that the trial judge abused his discretion. *Campbell v. Hall,* 210 S.Ct. 423, 43 S.E.2d 129 (1947). The Order of the trial court granting a new trial absolute should not be disturbed in this case, as the decision of the trial judge is supported by the evidence and the conclusion reached was not controlled by any error of law. *See Trivelas v. South Carolina Dept. of Transp.,* 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004). *See also, Clarkson,* 267 S.C. at 126—127, 226 S.E.2d at 697.

If there is any error of law in this case, it is that this case should be dismissed for lack of subject matter jurisdiction. Appellant has no standing to bring this claim. "A plaintiff must have standing to institute an action." *Mulherin-Howell v. Cobb,* 362 S.C. 588, 597, 608 S.E.2d 587, 592 (Ct. App. 2005). To have standing, one must have a personal stake in the subject matter of the lawsuit: "One must be a real party in interest." *Ibid.* "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. *Charleston County Sch. Dist. v. Charleston County Election Comm'n,* 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999); *see also Huff v. Jennings,* 319

[4] Respondent raised several applicable affirmative defenses that would also prevent Appellant from receiving the requested relief. Appellant lacks standing to bring this case. In order to have standing to present a case, a party must have a personal stake in the subject matter of the lawsuit. *Furman University v. Livingston,* 244 S.C. 200, 136 S.E.2d 254 (1964); *see also, Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control,* 430 S.C. 200, 209-210, 845 S.E.2d 481, 485—486 (2020). Appellant has no interest in the subject property and no interest in the Estate of Grandfather. Neither does Appellant have the right to assert a fraud claim against Sonny. *See Fisher ex. Rel. Shaw v. Huckabee,* 422 S.C. 234, 811 S.E.2d 739 (2018). That action belongs to Grandfather's Estate. Those matters were litigated in Case Number: 99ES03000042, where Virginia Priester and Janice Riley sought the same relief as Appellant. That case was dismissed, with prejudice on October 25, 2002. There was no appeal from that Order. "A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30, 512 S.E.2d 106 (1999). The action to set aside a 1999 deed and 1999 Power of Attorney are time barred by S. C. Code Ann §15-3-40, which is ten years for the recovery of property, and 15-67-210. An action to set aside a will must be timely filed in Probate Court, pursuant to §62-3-803(a)(1) and (2), S. C. Code of Laws, a maximum of one year after the date of death. This claim was not filed until two years after Sonny died. These affirmative defenses present numerous applicable defenses which do not support the case even being submitted to a jury, much less the jury verdict in this action.

S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995)("A real party in interest is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.") In this case, Appellant repeatedly testified that he was not an heir of Grandfather, never owned even an expectancy interest in the subject real property and was motivated solely by his desire to right some perceived wrong from decades ago. Appellant has no interest in the real property conveyed by the February 26, 1999 deed. The jury verdict in this case did not benefit Appellant in any way. Rather, Appellant in this action is acting a proxy for his aunts, the actual heirs of Grandfather, who are foreclosed from bringing this action, as the issue is precluded by a prior Order of the Probate Court. (Defendant's Exhibit 10, Probate Court Order). *See Taylor v. Sturgell,* 553 U.S. 880, 895, 128 S.Ct. 2161, 2173 (2008)("[A] party bound by a judgment may not avoid its preclusive force by relitigating through a proxy."). *See also,* Amended Inventory, Estate 1999-ES-03-00042.

CONCLUSION

The trial judge, in its discretion as the thirteenth juror, granted a new trial, in accordance with Rule 59, SCRCP, based on the compelling factual and legal issues presented at the trial of this matter. Appellant has not carried his burden and cannot demonstrate that the trial judge abused his discretion in granting a new trial absolute. The appeal should be dismissed, and the case remanded to the lower court for a new trial.

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