

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

---

Walton J. McLeod, Circuit Judge

---

Appellate Case (Ct. App.) No. 2020-001673

---

Elisa Montgomery Edwards and Emily Cecile Edwards,.....Respondents,

v.

David C. Bryan, III,.....Petitioner.

---

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

---

Andrew S. Radeker  
S.C. Bar No. 73743  
Radeker Law, P.A.  
Post Office Box 6903  
Columbia, South Carolina 29260  
(803) 500-0891  
drew@radekerlaw.com  
Attorney for Petitioner

**RECEIVED**

**Feb 26 2024**

**S.C. SUPREME COURT**

## **INTRODUCTION**

This petition asks this Court to issue a writ of certiorari to review the Court of Appeals' opinion in Edwards v. Bryan, Unpub. Op. No. 2023-UP-329. The Court of Appeals' opinion affirmed the denial of a motion for judgment notwithstanding the verdict or for a new trial. The jury rendered a verdict that shoehorned in damages from a cause of action for estate mismanagement, a cause of action on which summary judgment had already been granted against the Respondents. Any damage that the Respondents suffered was a result of the way that a probate estate had been administered (a cause of action on which the Respondents had already lost), not the result of the alleged fraud on which the case went to trial.

This Court should not allow the Court of Appeals to bless a chimera, a result obtained by grafting unrelated damages onto a cause of action when those damages were not caused by the false representation on which the Respondents went to trial against the Petitioner.

## **CERTIFICATE OF COUNSEL**

The Court of Appeals issued its opinion in this case on October 11, 2023. Counsel for the Petitioner certifies that the petition for rehearing was served and filed on October 26, 2023. The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on January 26, 2024. This petition for a writ of certiorari is timely served and filed today, February 26, 2024, as February 25, 2024, was a Sunday.

## **QUESTIONS PRESENTED**

1) Did the Court of Appeals err in affirming the denial of Petitioner's motion for judgment notwithstanding the verdict or for a new trial?

## STATEMENT OF THE CASE

A jury trial resulted in a verdict for Respondents for \$500,000.00 in actual damages and \$100,000.00 in punitive damages, solely on their fraud claim, which was the only claim submitted to the jury. (R. p. 8, p. 227 ln. 19-20, p. 228 ln. 5-9.) This case came before the Court of Appeals as an appeal of Petitioner's post-trial motions relating to that verdict.

David C. Bryan, Jr. (hereinafter "Testator") died and left a will. (R. p. 13, p. 93 ln. 6-10, pp. 314-20.) Testator's son, Petitioner, served as personal representative of Testator's estate, the Testator's will was probated, and the estate was closed. (R. pp. 14-15, 29-31, p. 94 ln. 24 through p. 95 ln. 23, pp. 314-20.) Testator's will created a trust, of which Respondents were two of several beneficiaries. (R. pp. 314-20.) The trust provided for the benefit of Testator's wife for her lifetime, then for distribution of the remaining trust assets to the other beneficiaries. (R. pp. 314-20.) Petitioner filed a final accounting in the probate court that listed a disbursement of \$468,587.06 "to trust[.]" (R. pp. 321-22.)

The record indicates that Petitioner did not actually make the distribution to the trust. After the estate was closed, Respondents filed this action against Petitioner, suing him for fraud, negligent misrepresentation, conversion, and negligence *per se* for improper administration of the estate. (R. pp. 12-28).

Per their complaint, the Respondents' fraud and negligent misrepresentation claims were based on Petitioner having "misrepresented or failed to disclose to [Respondents] as required the true facts about the distribution of the Estate of [Testator]" and that he made false "representations as to the status and disbursements from that Estate and the Trust[.]" (R. p. 16). The fraud claim alleged that Respondents

“relied upon the truth of Defendant’s representations or acted in reliance upon the nondisclosures in awaiting the distributions from the Estate and Trust” and that their reliance on those representations or nondisclosures proximately caused them damages. (R. p. 16).

The conversion claim alleged that Petitioner “exercised the right of ownership or dominion over money that rightfully should have been disbursed to” Respondents. (R. p. 18). Their negligence *per se* claim alleged that Petitioner violated his duties as personal representative of the estate and that Respondents “incurred damages as a proximate result of having their funds negligently withheld by” Petitioner. (R. p. 18).

Several months before trial, the circuit court granted summary judgment – with the consent of Respondents – on the causes of action for conversion and negligence *per se*, dismissing those causes of action with prejudice. (R. pp. 9-11.) Respondents did not move for reconsideration of that order, nor did they appeal it.

As a result of this grant of summary judgment, Respondents’ claims based on Petitioner’s conversion of their portion of the estate funds and based on Petitioner’s improper distribution of estate assets were gone, dismissed with prejudice. (R. pp. 9-11.) The thrust of Petitioner’s post-trial appeal to the Court of Appeals was that Respondents offered a case at trial that revealed that the damages they sought and obtained a verdict for could only have resulted from the acts subject of these dismissed claims.

Throughout the trial of the case, in Respondent Elisa’s witness testimony and through statements of Respondents’ counsel, Respondents stated that they were not suing Petitioner for anything he may have done or omitted as personal representative and that they were not suing about the way the Testator’s estate was administered. (R.

p. 110 ln. 23 through p. 111 ln. 6, p. 114 ln. 20-22, p. 115 ln. 3-6, p. 155 ln. 5-13).

Respondent Elisa, on directed examination, testified as follows:

Q. Are you, in any way, in this case, challenging that transfer of property from David C. Bryan, as the personal representative, to himself?

A. No, I'm not.

(R. p. 115 ln. 3-6).

Respondent Elisa also testified that her reliance was on the accounting document Petitioner had submitted to the probate court as personal representative, and that document was what she was relying on in saying a fraud had been committed. (R. p. 148 ln. 4 through p. 149 ln. 2).

Respondent Elisa testified that she was damaged because she never received the money that she contended would have been distributed to her if Petitioner had distributed money to the trust as he had represented to the probate court, and she calculated out for the jury her estimate of what that money would be worth as of the day of trial had she received and invested it. (R. p. 125 ln. 13 through p. 129 ln. 1.)

Respondent Emily's deposition testimony was read into the record, and she testified as follows:

Q. Tell me in your own words what this case is about.

A. So when my great-grandfather died, his estate was supposed to be divided. And my great-uncle didn't do that and just kind of took it all for himself.

(R. p. 254 ln. 13-18.)

During the trial, Respondents voluntarily dismissed their negligent misrepresentation claim and proceeded solely on their fraud claim. (R. p. 227 ln. 19-20, p. 228 ln. 5-9).

Petitioner made and renewed a motion for a directed verdict, which was denied. (R. p. 230 ln. 17-23, p. 231 ln. 9-14, p. 271 ln. 23 through p. 272 ln. 2.) After the verdict, Petitioner moved for judgment notwithstanding the verdict, for a new trial absolute, or for a new trial *nisi remittitur*. (R. pp. 39-51.) One of the bases for the motion is that the jury's verdict could have been based only on the theory of Petitioner's improper management of the estate, his failure as personal representative to distribute to and from the trust – in other words, that there was no evidence of damages proximately caused by some misrepresentation of Petitioner's. (R. pp. 39-51.) Respondents filed a memorandum in opposition to the motion. (R. pp. 412-15.) Respondents' memorandum stated the following:

Both Plaintiffs' witness and Defendant testified, without defense objection, that Defendant filed documents with the Lexington County Probate Court establishing an exact numerical value of the "trust" (\$468,587.06). Plaintiffs' witness clearly established that the Will in question provided for each Plaintiff to receive one-fourth (1/4) of the remaining corpus of the "trust". Plaintiffs' witness clearly established calculations, based on conservative historical performance of the stock market, demonstrating that the "trust" funds not distributed by Defendant would have accrued to at least Six Hundred Seven Thousand Six Hundred Eighty Dollars (\$607,680).

(R. p. 413.)

The trial court denied Petitioner's motion, and Petitioner appealed to the Court of Appeals. The backbone of Petitioner's argument on appeal was that all the evidence that Respondents adduced tended to show, when viewed in the light most favorably to

them, that their losses were caused by Petitioner’s failure to distribute the estate assets properly, not as the result of some misrepresentation and reliance on the misrepresentation. Since summary judgment had been granted against the Respondents on their claims concerning the way in which Petitioner administered the estate, Petitioner argued that evidence of damage flowing from *those* acts, acts done in the way the estate was administered, had been taken off the table. Petitioner argued that Respondents did not make any showing of damages that were proximately caused by a *misrepresentation* by Petitioner, as opposed to caused by maladministration of the estate, and that they had thus failed to adduce evidence of damages having been proximately caused by fraud committed by Petitioner.

The Court of Appeals affirmed. The Court of Appeals decided that “Respondents were damaged because they did not receive the trust funds they planned to use for investments and to pay for Emily’s future education due to Bryan’s false representations.” (Ct. App. Op. p. 3.) The Court of Appeals did not address the summary judgment ruling against the Respondents on their estate administration claims and did not address that, if the estate had been administered in the way that Respondents contended was proper, Respondents would have received these funds.

Petitioner sought rehearing or rehearing *en banc*, and that petition was denied.

This petition for certiorari followed.

### **ARGUMENT**

The losses outlined by the testimony and evidence Respondents produced flowed from conversion of their portion of the estate and from Petitioner’s failure to administer the estate properly – but the Respondents had already given up their claims for damages arising out of those things. (R. pp. 9-11.) The Court of Appeals did not

see that, even in the light most favorable to the Respondents, the Respondents' damages flow from misadministration of the estate and from the taking of money – from estate mismanagement and conversion, claims on which Respondents had already lost.

**I. The Court of Appeals ignored the elephant in the room: that the verdict was for damages an earlier ruling had already decided were off the table.**

When faced with Petitioner's JNOV motion below, Respondents stated the following:

Both Plaintiffs' witness and Defendant testified, without defense objection, that Defendant filed documents with the Lexington County Probate Court establishing an exact numerical value of the "trust" (\$468,587.06). Plaintiffs' witness clearly established that the Will in question provided for each Plaintiff to receive one-fourth (1/4) of the remaining corpus of the "trust". Plaintiffs' witness clearly established calculations, based on conservative historical performance of the stock market, demonstrating that the "trust" funds not distributed by Defendant would have accrued to at least Six Hundred Seven Thousand Six Hundred Eighty Dollars (\$607,680).

(R. p. 413.)

This is how the Respondents argued to the Court of Appeals, too. As this quotation illustrates, even the Respondents know that their damages flow from improper estate administration – a cause of action they allowed to be dismissed with prejudice. Respondents had already given up their right to a verdict for damages based on *that*. The Respondents have never pointed to some argument that their losses arise from their reliance on a false representation made by Petitioner. They have contended at every stage of the process that their damages come from them not getting the estate funds to which they were entitled.

The Respondents' damages were not caused by a lie (i.e., a fraudulent misrepresentation); rather, they were caused by Petitioner not distributing the estate funds properly. At the time the case went to the jury, *Respondents were no longer suing Petitioner for that.* (R. pp. 9-11.)

Even in the light most favorable to Respondents, Petitioner's fraud was in lying to them about what he did with the money. The nine elements of fraud – the plaintiff's only tried claim – are “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.” Mutual Savings and Loan Ass'n. v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423 (1980).

Generally, the injured party in a fraud and deceit action is entitled to recover such damages as will compensate him for his pecuniary loss and place him in the same position he occupied before being defrauded. However, only damages which are the natural and proximate consequence of the fraudulent misrepresentations of the defendant and can be clearly defined and ascertained are recoverable.

Gilbert v. Mid-South Machinery Co., Inc., 267 S.C. 211, 223, 227 S.E.2d 189, 194 (1976) (internal citation omitted).

There is no evidence of damages caused by the fraud the plaintiffs claimed the defendant committed. Evidence of a required element of fraud is lacking. Mutual Savings and Loan, 274 S.C. at 632. The position that Respondents occupied before Petitioner's misrepresentations about where the money would be going is exactly the same position as they are in now – they were not and are not getting that money. The fraud that they claimed Petitioner did to them may have kept them from *knowing* they were not getting the money, but it did not keep them from getting the money. Even in

the light most favorable to the Respondents, the fact that they are not getting the money is caused by Petitioner's conversion and estate mismanagement.

Respondents allowed judgment to be taken against them with prejudice on their claims for damages caused by Petitioner's conversion and estate mismanagement. (R. pp. 9-11.) Recovering those damages became impossible for Respondents.

That Petitioner is *not* liable to Respondents for those damages is the law of the case. See, e.g., Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

The Court of Appeals could not lawfully look to damages caused by improper estate administration or conversion of the trust funds to supply an element of fraud, as the grant of summary judgment against Respondents barred Respondents from all rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 388, 737 S.E.2d 502, 508 (Ct. App. 2013) (emphasis in original; quoting Restatement (Second) of Judgments § 24); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

Respondents, as plaintiffs below, failed to adduce evidence of damages *proximately caused by the alleged fraud*, and Petitioner was entitled to a directed verdict. Mutual Savings, 274 S.C. at 632. The Petitioner's motion for JNOV or a new trial ought to have been granted. The Court of Appeals compounded this error by affirming it. This Court is the last stop. If this Court does not grant certiorari and reverse, the unlawful judgment against Petitioner will stand.

As noted above, the Court of Appeals, in affirming, produced an opinion that conflicts with this court's decisions, perhaps most remarkably with regard to the legal

effect of the grant of summary judgment on Respondent's conversion and estate mismanagement causes of action. Petitioner is not saying it would have been theoretically impossible for Respondents to succeed on their fraud claim once that summary judgment had been granted. Respondents would have had, though, to adduce evidence of damages other than from the loss of funds Respondents would have received if there had not been conversion or estate mismanagement. They never made a showing of any such loss. The law is that Respondents cannot escape the consequences of allowing summary judgment on these causes of action to be taken against them. Shirley's Iron Works, 403 S.C. at 573; Plum Creek, 334 S.C. at 34; S.C. Pub. Interest Foundation, 401 S.C. at 388. The trial court and the Court of Appeals allowed Respondents to escape those consequences, in contravention of this Court's decisions and established South Carolina law. This Court should grant certiorari and review whether the Court of Appeals has erred in affirming a verdict for damages that Respondents agreed it was impossible for them to have a verdict for. (R. pp. 9-11.)

### **CONCLUSION**

WHEREFORE, Petitioner prays for this Court to issue a writ of certiorari to review the Court of Appeals' opinion and decision in this case.

Respectfully submitted,

/s/ Andrew S. Radeker  
Andrew S. Radeker  
S.C. Bar No. 73743  
Radeker Law, P.A.  
Post Office Box 6903  
Columbia, South Carolina 29260  
(803) 500-0891  
drew@radekerlaw.com  
Attorney for Petitioner

February 26, 2024