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SC Court of Appeals

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. J. Derham Cole, Circuit Court Judge

Case No. 2019-CP-10-1887
Probate Case No. 2016-ES-10-02054
Appeal Case 2020-000853

In the Matter of re Estate of Annie Mae Crosby:

Jessie Fred Crosby and Robert Edward Crosby, Jr., Respondents

v.

Rose Mae Crosby Walsh, individually and as personal representative of the Estate of Annie Mae Crosby, and Kelvin Wayne Crosby, Respondents,

Of Whom Rose Mae Crosby Walsh, individually and as personal representative of the Estate of Annie Mae Crosby is the Appellant.

Petition to Rehear and Memorandum in Support

Appellants petition the Court of Appeals to rehear its order of May 8, 2024, affirming the probate court and circuit court as to removing the personal representative for having fully complied with a consent order.

The Court styles the issue as the personal representative being removed "*despite* her compliance with a prior court order." Opinion at 1, emphasis added. Stated more correctly, the Court removed her as personal representative ***because*** she complied with a prior order, an order to which all parties had consented. The Court errs in framing the issue without regard to the facts in the Record.

It is undisputed that the Respondents had communicated to Ms. Walsh their intention to "drain the estate and keep me in court until there is nothing left." R. App. 783. Consistent with

that intention, this Record reflects Respondents first consented, then objected to the very things to which they had consented. In this record, Respondents consented to the order of May 16, 2018 (that established among all beneficiaries, among other things, (a) a bid process for the property at 3283 Von Oshen Road that bidding having to begin within thirty days from the date of the order, (b) a process for perfecting the winning bid, (c) a fallback provision if a winning bid was not perfected, which fallback provision enabled the other bidder to purchase the property for a stipulated sum of $171,000, and (d) a 30-day timetable to transfer to Jesse Crosby a property at 6613 Main Street upon his payment of an agreed upon sum.[1] (R. App. pp. 1 to 6 is the consent order; R. App. pp. 878 to 881 is the transcript reflecting all beneficiaries — including Kelvin Crosby — agreeing to the terms of the consent order).[2] R. App. at p. 5, at provisions (e) and (f), are, as the Court's Order acknowledges at p. 3, the fallback provisions should a winning bid not be perfected, including the stipulated sum of $171,000 as the purchase price.

The Record reflects Respondents almost immediately objecting to provisions to which they had consented. E.g., consenting to start the bidding for 3282 Von Ohsen without conditions (R. App. 1 to 6) then within five days demanding as a condition for bidding the immediate

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[1] The price set for Jessie Crosby to purchase the Main Street property was calculated with the same formula as was used to stipulate the fallback price for the Von Oshen property "If the highest bidder cannot make such payment within ten (10) days of making the final bid. *Compare*, R. App. p. 3, provision 16 *with* R. App. 4, provision 25 *and with* R. App. p. 5, provisions (f) and (D).

[2] The Court plainly erred, Order at 5, in stating that Kelvin Crosby "was not involved in the dispute over the family home." As the Record plainly reflects, R. App. pp. 878 to 881, Kelvin Crosby was represented at the hearing at which his counsel consented, on the record and on his behalf, to the court's order as to 3283 Von Shen and 6613 Main Street. We agree Kelvin Crosby did not bid for the property, but he consented to the fallback provision he (and the Court) now complains about.

transfer of a Mill Street property (R. App. 345), claiming, R. App. 565 to 566, that the ability to bid was impaired without that property transfer. More on that below.

The process of "consent then object" is throughout this record. It's a neat trick if the Respondents are able to pull it off, as they have to date. But consenting to an order is significant as a matter of law, and the Court errs in not considering the issues associated with that consent.

As the Court's order observes, the bidding for the Von Oshen property began on May 21 and ended on May 31. Contrary to his claim that that he could not bid without the Mill Street property, Jessie Crosby submitted the high bid.[3] All parties agreed that a payment of $159,000 was needed to perfect that winning bid, as the Court's order reflects at p. 4.[4] E.g., R. App. pp. 821 to 823 (June 5 email from each of Ms. Walsh's individual counsel and counsel for the Estate). More importantly, ***counsel for the Respondents*** circulated an email after the bidding ended on May 31, 2018, R. App. 771, which states:

> It is my understanding that [Respondent] Jessie [Crosby] is the high bidder for 3283 [Von Oshen] at $312,000. I want to confirm the breakdown of what he needs to pay within the next ten days:
>
> | Bid | 75% of Bid |
> |---|---|
> | $312,000 | $234,000 |
> | Minus $75,000 credit Jessie | - $75,000 |
> | To Shelly All within 10 days | $159,000 |

The Court's order plainly errs in concluding, Order at p. 8, "there was a dispute over whether

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[3] As he was the high bidder, the Court plainly errs, Order at p. 4, in crediting Jessie Crosby's May 23 claim that somehow his bidding was impaired without the Mill Street property. The bidding itself shows that his bidding was not impaired.

[4] The Court incorrectly states that to perfect the bid "each" of Jessie and Bobby Crosby was required to pay $159,000. Assuming both could bid when the consent order limited the bidding to Jessie Crosby and Rose Walsh, an issue that became moot when the bid was not perfected, only one payment of $159,000 was required to perfect the winning bid, as all parties agreed the consent order unambiguously required.

Jessie and Bobby owed $156,000 or $159,000." No such "dispute" is in this Record. More importantly, no such "dispute" was ever provided to the personal representative. To the contrary, then counsel for the Respondents confirmed that perfecting their winning bid required a payment of $159,000.

If there was a "dispute," (as opposed to a plan by Respondents to generate another issue for prolonged litigation), it was not a dispute among the parties but a dispute among Jessie and Bobby and their counsel, a dispute ***unknown to the personal representative***.[5] Nowhere in the Record is there any communication to the personal representative or her counsel, let alone a communication before the June 11 deadline to perfect the winning bid, of any "dispute" of what was required to perfect the winning bid. To the contrary, the communication from counsel for the Respondent ***confirmed*** the required payment of $159,000. The personal representative was entitled to rely on the May 31 email from Respondents' counsel agreeing to what all parties explicitly agreed was what the plain language of the consent order required.

By the Court interjecting into the consent order new terms that it prefers, and thus new duties for the personal representative, the Court's order (a) promotes — and (b) rewards — the same subterfuge by respondent's then-counsel: first we will consent, then we will turn around and object to what we had consented to. The Court's order also (c) ignores the *res judicata* effect of the underlying consent order, and improperly imposes new terms on the personal

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[5] E.g., R. App. p. 786 (Ms. Walsh testified she relied on the email from respondent's then counsel that $159,000 was required to perfect the bid); R. App. p. 787 (Ms. Walsh testified she sought no clarification from the court because the consent order was specific); R. App. p. 792 (Ms. Walsh testified that everyone agreed that $159,000 was the payment required to perfect the bid); and R. App. p. 793 (Ms. Walsh testified she followed the consent order in assessing that the bid had not been perfected).

representative before faulting her for not complying with those new terms. In essence, the Court has erred by imposing a substantial compliance exception, which the Court may not do in an unambiguous agreement. E.g., *McGill v. Moore*, 381 S.C. 179, 187-188, 672 S.E.2d 571, ___ (S.C. 2009) (substantial compliance may not be interposed in an unambiguous agreement). Where language in an agreement is clear and unambiguous, the language alone determines the contract's force and effect. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Respondents agreed that perfecting the bid required a payment of $159,00 and then they chose not to pay that amount. The Court errs as a matter of law by interjecting a "substantial compliance" exception to the unambiguous, and agreed upon, requirement.

When the Respondents failed to perfect the winning bid as the order plainly required, the personal representative followed the fallback provision in the consent order (R. App. 18).[6] The personal representative was obligated to follow the court-approved consent order, and the Court has erred in interjecting new terms into the plain language of the agreement then removing the personal representative for failing to deviate from an unambiguous order.

The following points have been overlooked or misapprehended by the panel of the Court of Appeals and support the Court granting rehearing.

1. **The Court has erred in rewriting the unambiguous language in the consent order so as to impose a conflicting duty on the personal representative**.

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[6] It is undisputed, as the Court found, Opinion at p. 2, that Ms. Walsh complied with the consent order, as the probate court found (R. App. at p. 18). The Court of Appeals has erred as a matter of law by interjecting into the consent order new terms, and in removing the personal representative *because* she complied with the unambiguous terms of the consent order — terms to which all estate beneficiaries had consented.

No court has authority to re-write the provisions in a consent order it had previously adopted.

> "[A] consent order is an agreement of the parties, *under the sanction of the court*, and is to be interpreted as an agreement." *Johnson v. Johnson*, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992) (emphasis added). "In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Abel v. S.C. Dep't of Health & Env't Control*, 419 S.C. 434, 438, 798 S.E.2d 445, 447 (Ct. App. 2017) (quoting *Nichols Holding, LLC v. Divine Cap. Grp.*, 416 S.C. 327, 335, 785 S.E.2d 613, 615 (Ct. App. 2016)); *see also, City of North Myrtle Beach v. E. Cherry Grove Realty Co.*, 397 S.C. 497, 503m 725 S.E.2d 676, 679 (2012) ("As a general rule, judgments are to be construed like other written instruments." (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Abel*, 419 S.C. at 438, 798 S.E.2d at 447 (quoting *Nichols Holding, LLC*, 416 S.C. At 335, 785 S.E.2d at 615).

Hook v. S.C. Dep't of Health & Envtl. Control, 439 S.C. 52, 73-74 (S.C. Ct. App. 2023) (emphases in the original). *See also*, *Abel v. S.C. Dep't of Health & Envtl. Control*, 419 S.C. 434, 441, 798 S.E.2d 445, ___ (S.C. Ct. App. 2017) (improper to rewrite unambiguous language in a consent order).

A consent order is *res judicata* as to the issues it resolves. *Norton v. Planters Fertilizer Phosphate Co.*, 206 S.C. 119, 126, 33 S.E.2d 247, ___ (S.C. 1945) ("The consent order of adjudication was in settlement of the precise question sought to be raised in the present action. All the essential elements of *res judicata* are present. *Smith v. Volunteer State Life InsuranceCo.*, 201 S.C. 291, 22 S.E.2d 885; *Watson v. Goldsmith*, S.C., 31 S.E.2d 317.)"

The consent order involved in this appeal (R. App. 1 to 6) umabiguously addressed the bid process for the property at 3283 Von Oshen, the method by which the winning bid was perfected, and the specific outcome if a winning bid was not perfected. None of those provisions

is ambiguous. The parties agreed that $159,000 was the order sum required to be paid to perfect the bid. The Respondents acknowledged that sum was required and yet failed to pay that sum (most likely to continue the litigation over the Estate).

The Court has erred in changing the terms of the unambiguous consent order, refusing to "enforce the contract made by the parties," *Abel v. S.C. Dep't of Health & Env't Control*, 419 S.C. 434, 438, 798 S.E.2d 445, 447 (Ct. App. 2017), despite the prohibition in *Abel*: "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Abel*, 419 S.C. at 438, 798 S.E.2d at 447 (Ct. App. 2017). The Court has erred in imposing its own sense that the fiduciary duty of the personal representative should have included ignoring the unambiguous provisions in the consent order and should have sought "clarification" of an unambiguous order all beneficiaries had agreed to.

As detailed above, all of the beneficiaries of the estate had consented to both the bid process for the Von Oshen property, how that bid was to be perfected, and what would happen if the bid was not perfected. R. App. pp. 1-6 (the May 16, 2018 consent order), R. App. pp. 878 to 879 (the April 23, 2018 hearing transcript of the parties' agreement on the record).

As noted above, when the bidding was concluded, Respondents' then counsel circulated an email (R. App. 771), articulating that to perfect the bid required a payment in ten days of $159,000. The provisions of the order are unambiguous, as was the fallback provision if a bid was not perfected. Respondents chose not to pay that sum, activating the fallback provision and the relief it specified, *to which all beneficiaries — including Kelvin Crosby — had consented*.

The Court has erred in construing the issues as if the consent order had not been entered did not exist, and was not plain and unambiguous both on its face and to all parties. The Court

has no authority to interject a substantial compliance exception so as to redefine the personal representative's obligations, and the Court has erred as a matter of law in not treating that order as *res judicata* of every issue in this appeal.

2. **The Court has erred in concluding the consent order is "immaterial" to this appeal**.

At p. 7 of its Order the Court seeks to avoid the implications of the consent order by declaring it "immaterial" to the issues on appeal because "Jessie and Bobby did not challenge the order itself," and by claiming the probate court "did not remove Walsh for her noncompliance with the Family Home order but for her breaches of fiduciary duty to the Estate and its beneficiaries." Order at 7.

With all due respect, these conclusions are patently disingenuous. Of course, Jessie and Bobby challenged the order itself — they objected that the fallback provision was used after the plain terms of the order to perfect the bid were not followed. The Court has erred by agreeing. The supposed breach of fiduciary duty by the personal representative was for her having complied with what the Court calls the "Family Home order." The Court has erred by imposing new terms on a consent order, ignoring that it was a consent order to which all estate beneficiaries had agreed, and agreed was unambiguous, then the Court erred further by removing the personal representative for her having followed the unambiguous provision of the consent order.

As noted above, no court, including this Court, has authority to interject terms into a plain and unambiguous consent order. By doing so, the Court has imposed duties on a personal representative not found in that consent order. The personal representative should not be removed for having followed the consent order. Having consented, no party can properly claim

to have been injured by the application of those plain and unambiguous terms, which is why a consent order is *res judicata* as to the issues in this appeal and no party is aggrieved by its provisions being faithfully implemented.

3. **The Court erred in concluding that the implications that all parties had consented to the underlying order was not preserved for appeal.**

At page 7 of its Order, the Court states that Ms. Walsh failed to preserve for appellate review the implications of the Respondents challenging an order to which they and the other estate beneficiaries had consented. The conclusion is plainly erroneous.

In her return to the motion to remove Ms. Walsh as personal representative, R. App. pp. 331 to 338, Ms. Walsh contended in the probate court:

- that all parties had consented to the May 16, 2018 order (R. App. p. 332, 334, 335, 336),
- that all parties had agreed a payment of $159,000 was required to perfect the bod for 3283 Von Oshen (R. App. p. 333, 337),
- that the consent order had no preconditions, such as pre-bid transfer of the Mill Street property (R. App. p. 334),
- that the consent order was *res judicata* and law of the case as to all issues (R. App. 335),
- that the consent order controlled the dispute (R. App. 338).

In the argument before Circuit Judge Cole, R. App. 900 to 901, it was explicitly argued:

- that all parties agreed a payment of $159,000 was required to perfect the bid for 3283 Von Oshen (R. App. p. 900),

- that due to the consent order "no one is aggrieved by the outcome of this order. Everybody consented to one of the forms of relief that was going to happen once this property bidding was over" (R. App. 900),
- that "no one can object to it because they all consented to all the different outcomes" (R. App. p. 901),
- That the bidding and fallback sale "was done exactly the way the Court prescribed in the consent order" (R. App. p. 901).

When Judge Cole failed to rule on that argument, Ms. Walsh submitted a Rule 59(e) motion (R. App. 878 to 881), which contended:

- That "the court omitted that the order was a consent order among all interested beneficiaries, reflecting an agreement that had been placed on the record in April 2018" (R. App. 870),
- That the parties' consent was reflected in the April 23, 2018 transcript (as well as R. App. p. 882, when counsel circulated the consent order), and that it was undisputed that it was a consent order (R. App. p. 871),
- That all beneficiaries had consented without preconditions, to both the method of bidding and the possible outcome of one bidder purchasing the property for its undisputed market value, which the order specified (R. App. pp. 871, 875),
- That as a result of the consent, "no beneficiary was aggrieved by the outcome of the bid process, so had no standing to object to either the bid outcome when the consent order was fully complied with by Ms. Walsh in her capacity as personal

representative, or to move for her removal as personal representative" (R. App. 872. See also R. App. p. 875),

- That Ms. Walsh had no reason to consult the court for guidance or approval when the parties had consented to the process and the possible outcomes (R. App. 873 to 874), and
- That Ms. Walsh was improperly removed as personal representative for having complied with the unambiguous consent order.

The issues raised by the consent order were raised in the probate court, the circuit court, and in this Court. The issues associated with the consent order have been preserved for appellate review.

Conclusion

The Court should rehear its May 8 order, consider fully that the order under review was an unambiguous consent order, and reverse its decision. Parties should be held to their consent, and not permitted to consent then turn around and object to terms to which they have consented. Ms. Walsh should be restored as personal representative, and the sale of the Von Oshen property to Ms. Walsh should be permitted as provided in the consent order for failure of Jessie and Bobby Crosby to perfected their bid consistent with the plain and unambiguous terms of the order to which they had consented and consistent with their own lawyer's calculation of the payment required to perfect the bid.

Respectfully submitted,

s/ Gregg Meyers

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Amended Certificate of Service

Pursuant to SCACR 240(c)(1), SCACR 262, and an April 24, 2024 order of the South Carolina Supreme Court on electronic filing and service, counsel certifies that a copy of this Petition has been served on opposing counsel for the Respondents, Mr. Lydon, on May 23, 2024, by email to counsel's AIS email address:

Tom Lydon
McAngus, Goudelock & Courie, LLC
tlydon@mgclaw.com

with a pdf attachment of the email showing the Petition sent as an attachment to that email. A copy of that email to Mr. Lydon is attached to this Certificate.

As a courtesy to the remaining beneficiary of the Estate, service of the Petition was made both to the last known email address of

Kelvin Crosby
crosby1957@outlook.com

and also,

a printed copy of the Petition and this certificate have been served by United States mail, firt - class postage pre-paid, addressed to Mr. Crosby's last known address of:

Kelvin Crosby
181 Azaelea Drive
Waynesville NC 28786

The $50 filing fee for the Petition, established by SCACR 240(d) will be separately forwarded to the Court by United States mail.

Respectfully submitted,

s/ Gregg Meyers

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Attachment:
Email of May 23, 2024 to Mr. Lydon and Mr. Crosby

Gmail **G Meyers <attygm@gmail.com>**

Corrected a typo

1 message

G Meyers <attygm@gmail.com> Thu, May 23, 2024 at 12:29 PM
To: Tommy Lydon <tlydon@mgclaw.com>
Cc: crosby1957@outlook.com

Tom:

My petition to rehear had a typo in footnote 1, which I have now fixed, so I am re-sending. Apologies.

Best personal regards.

Gregg Meyers
Attorney At Law

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2 attachments

2024-05-23 - Walsh-Crosby - Petition to Rehear.pdf
212K

2024-05-23 - Petition Certificate of Service.pdf
74K