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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
District Court

Honorable Daniel Coble, Circuit Court Judge

Court of Appeals Case No. 2024-001152

In Re: Estate of M.K. Jennings 2010ES2800169

Beverly Hennager……..……Appellant

Mary E. Dearden, Personal Representative of the Estate of M.K.Jennings…Respondent

REPLY TO RESPONDENT'S INITIAL BRIEF

September 17, 2024

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AUTHORITIES

OBJECTIONS TO SUMMARY OF CASE

The $55,450.00 given as "*expense items*" (Pg 2) were not expenses but money the PR and KR Dauphin misappropriated to themselves from the Decedents accounts, ordered by the court to be returned (R.P. 15-16 & P. 19-20 B-D).

The $86,303.24 distribution is incorrect (Pg 2). The PR's 2020 accounting records Louis Jennings' account was $22,207.73 and my account, $16,734.40 (R.P. 177). Neither Renae Jennings, nor I received a distribution. There is no record of what became of $39,942.13. As Burns wrote the accounts were closed, the PR apparently disbursed this money to herself. Had Renae and I received it, we would have been financially capable of retaining an appellant attorney.

Regarding the 2021 hearings, Respondent fails to mention it was held to present evidence and hear arguments regarding whether a promissory note owed to the Decedent by Michael Jennings was fully paid. Burns himself acknowledges this in his April 7, 2021 post hearing memorandum: *"At the zoom hearing on March 16, 2021, the Court decided to consider rescheduling for evidence as to whether a debt to the decedent from Michael Jennings was satisfied prior to to his mother's death" (R.P. 42-43 & 180).*

The Court's June 19, 2024 affirmation was not of the actual September 3, 2021 Order because the first finding of fact was changed from, "*the promissory note of Michael Jennings was satisfied before the Decedent's death"* (R.P 42) **to**, Ms. Hennager *"attempted on this appeal to raise allegations and speculations that should have been investigated during discovery"…"An example is her allegation of unpaid promissory note from Michael Jennings to decedent"* (R.P. 45-46). In order to erase the finding of fact that proved the 2016 Order is interlocutory (and subject to revision) Burns replaced it with an unappealable finding. Given this falsification, the Court's June 19, 2024 Order is an affirmation of a non-existent Order and thus, VOID.

OBJECTIONS TO STANDARD OF REVIEW

As stated in her September 22, 2020 Order, Judge Lee affirmed the following issues: "A*llowed Mary Dearden to remain PR of the Estate, required Dearden and others to reimburse the Estate for funds removed from various joint accounts held with the Decedent; required Dearden to provide an Amended Accounting; assessed certain costs and fees against the Estate; and denied taxation of other fees against the Estate. Additionally, the Probate Court made specific findings of fact regarding the capacity of the Decedent" (R.P.22).*

Regarding the accounting and inventory omissions and inaccuracies, the entire order simply states, *"required Dearden to provide amended accounting."* (R. P. 22). Although raised in the appellant's brief (R P 58 & 74-76), there is no mention of the promissory note owed to Decedent by Michael Jennings; need for supplementary inventory to record all of the SC assets the PR testified she disbursed without recording; and, over $50,000 in untraceable loan payments that were added to the ledger and deleted on the same days (same lines) (R.P.169).

The accounting and inventory omissions and inaccuracies could not be appealed to the Court of Appeals because the 2016 Order and 2020 affirmation did not address those issues other than requiring Dearden to " *provide amended accounting*". In addition, Judge Lee could not affirm accounting that the PR herself admitted was inaccurate and incomplete (R.P. 137; P 457 L 16-20) and which she testified she intended to correct R.P. 136; P 454 > 11-25; P 455 L 1-25; P 456 L 1-9 & P 457 L 17-18). Judge Lee's Order allowed Dearden another opportunity to correct the omissions and inaccuracies.

Section 62-3-810 directs the PR to keep adequate records of her administration with all incoming and outgoing transactions.

An action to remove a Personal Representative is equitable in nature. **Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E. 2d 154, (Ct. App. 1993)**.

Appellate reviews of cases in equity are by the findings of fact in accordance with the court's own view of the preponderance of the evidence. **Townes Assoc. Etc v. City of Greenville, 266 SC 81,86, 221 S.F.2d 773,775 (1976).**

When a claim for fraud on the court is made, it is an action in equity that must be plead with specificity as required by **Rule 9(c) SCRCP.**

OBJECTIONS TO ARGUMENT

Issue No. I Is not Vague.

"Whether the June 19, 2024 Order is void because Moultrie Burns acted without authority, intentionally falsified the record and failed to respond to Discovery Requests".

Throughout the fourteen (+) years this case has languished in the South Carolina Courts, Moultrie Burns falsified the record and concealed/failed to produce documents requested in discovery, that would jeopardize a favorable outcome for his client. In the proceeding leading to his client's appointment Burns intentionally falsified the record, telling the Court the Decedent was a resident of SC (to establish jurisdiction). During the 2011 hearing, Louis Jennings testified our discovery requests were ignored; *"We haven't gotten them and that's why we are here today*". As found in the 2013 Order, and not overturned by the Probate 2016 Order, Burns ignored discovery requests, including medical records (evidence of incompetency) and the decedent's tax returns (that would prove the interest on the promissory note was never paid)(R.P. 7). When Dearden was re-instated in 2016, Burns and Dearden ignored 2016 and 2021 supplementary discovery requests asking her to record missing SC assets and provide

complete tax returns to verify whether Michael Jennings' promissory note was fully paid (R.P. 142-145 & P 207).

In **Chewning v. Ford Motor Company**, the S.C. Supreme Court found the intentional concealment of documents or failure to produce documents sought in discovery are actions by an attorney which constitute fraud on the court 346 S.C. 28, 550 S.E.2d 548 Ct. App. 2001. Relief is granted 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 actions. **Hilton Head Car. Of S.C. v. Public Serv. Comm**. 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Burns' blatant falsification of the record reaches abysmal depths in his deceitful action during the May 29, 2024 zoom appellate hearing. Burns turned his volume so low (R.p. 139 L 10-11) it was impossible to hear most of what he was saying (R. P. 141 L 24-25) so that I was unaware that he had changed the first finding of fact in the order under appeal, from the debt *"was satisfied before the decedent's death" (R.P. 42)* , to Ms. Hennager *"attempted on this appeal to raise allegations and speculations that should have been investigated during discovery"…"An example is her allegation of unpaid promissory note from Michael Jennings to decedent" R.P. 45-46)*. Burns had the audacity to suggest my attorneys and I failed to avail ourselves of discovery to ask for proof of payment of the note when he ignored all of our requests for fourteen years. My Appellant Briefs for 2016 Order, the 2021 Order, as well as the 2024 Order document many requests that were ignored.

An attorney is an officer of the court with a duty of honesty towards the court.

Rule 3.3 Candor Toward the Tribunal

A lawyer shall not knowingly make a false statement of fact or law to a tribunal, or, offer evidence that the lawyer knows to be false.

Rule 60(b) provides relief to a party when an attorney in the litigation has acted without authority. Cacevic v. City of Hazel Park, 226 F3d 483, 490 (6th Cir. 2000).

In **Hazel -Atlas Glass Co. v. Hartford-Empire Co.**, 322 US 238 (1944), the US Supreme Court found the Court of Appeals had the power ***and the duty*** to vacate judgment for fraud committed by an officer of the court. **Given the Sept. 2021 Order was falsified while under appeal, the District Court's June 19, 2024 Affirmation is of a non-existent Order; it is VOID.**

Issue No. II is not Vague.

"Whether the Court's October 27, 2016 Order is an Interlocutory Order subject to review and amendment."

Final judgment is the last decision from the Court that removes all issues in dispute and settles the parties rights with respect to those issues. The September 3, 2021 Order with the finding of fact regarding the disputed but previously unresolved promissory note is proof, in and of itself, that the October 27, 2016 Order was interlocutory because it did not address the issue of the promissory note. Burns himself acknowledged the note was not previously addressed.

If a judgment leaves some further act to be done by the court before the rights of the parties are determined, the judgment is not final. Tommy Griffin Plumbing and Heating Co. v. Jordan, Jones & Golding, Inc., 351 S.C. 459, 467 , 570 S.E.2d 197, 201 (Ct. App. 2002).

Rule 54(b) of the SCRCP provides, in part, that any order or decision which adjudicates fewer than ll of the claims shall not terminate the action as to any of the claims and the order is subject to revision at any time before the entry of final judgment.

During the 2016 hearing, an email from K Dauphin was stipulated to saying the note was not fully paid (R.P. 146). When Burns questioned me, I explained the origin of the note and what Dauphin had found (R.P. 130; TP 266 L3-2-12). Burns asked, "*Are you saying the loan is not paid to this day*?" I responded, "*We've asked about it. We get no responses. And I am saying it's a possibility*" (R.P130; TP 266 L3-20). After my questioning, my attorney told the court Burns finally provided, that morning, the 2004 tax returns sought in discovery. He explained, as he received the returns directly prior to the start of the hearing, he had not had time to review it to determine whether or not the interest was paid (R.P. 131; T.P. 3-13). After the hearing he discovered it had not been paid. We never received the other years; 1994-2003.

As Judge Lee's Order allowed Dearden another opportunity to correct the omissions and inaccuracies of her accounting, I waited for the amended documents with the expectation that it would record the note. Although proof of payment of the note was forefront in our ignored discovery requests, the Court never addressed this issue until my objections in 2021

When I saw Dearden's Amended Accounting contained the same omissions and inaccuracies that she testified she intended to correct, I demanded a hearing, which was held March 16, 2021 (a continuance on June 2). I brought to the Court's attention the absence of supplementary inventory to record all the missing S.C. assets (R.P 129; T.P.76 L.6-25), as well as the unrecorded promissory note owed to the Decedent by Michael Jennings (R.P. 147-148).

In response to my objections , Moultrie Burns sent a post hearing memorandum on April 7 :

"*The Court decided to consider rescheduling for evidence as to whether a debt to the decedent from Michael Jennings was satisfied prior to his mother's death".* (R. P. 180; paragraph 1).

The Court erroneously decided the accounting issues were previously addressed in the 2016 Order, and would not hear objections. However, it agreed with Moultrie Burns that the issue of the promissory note owed to the Decedent was never addressed and agreed to accept Burns' evidence and hear arguments regarding whether it was fully paid. Exhibit A. (R.P. 181-203), attached to Burns Memo, was ten years of Michael Jennings partial tax returns, showing that only the principal on the note was paid.

When I repeatedly tried to get complete documents to prove the interest was never paid (R.P. 105-109 & P. 110), the Court ignored my efforts and returned my motions to compel (R.P. 38 & P. 41)(documented in Final Brief). The Court made its decision in favor of the PR by excluding the relevant evidence that would prove my claim. However, the Court's September 3, 2021 Order recognized the purpose of the hearing was to present evidence and hear arguments to decide the previously unresolved issue (R.P. 42-43):

"Ms Hennager made issue with the accounting, particularly the absence of a promissory note from Michael Jennings to the decedent*….*

Based upon arguments and the prior record and the zoom proceeding, I find and conclude the following:

Findings of Fact

1). The promissory note of Michael Jennings was satisfied before the decedent's death and the Inventory is correct in not listing such debt as an assets.

2). The PR's Amended Final Accounting as submitted to this Court is approved, as being accurate, complete and in compliance with the 2016 Order".

When Burns submitted the incomplete tax documents and the Court admitted them as evidence and heard his argument, it established with certainty that the 2016 Order was not a final judgment because **some further act was done by the court.** When Burns realized he had opened pandora's box, he tried to erase his mistake by replacing the first finding of fact in the 2021 Order. This falsification of the record made void the June 19, 2024 affirmation.

Issue No. III is not Vague.

"Whether the Court deprived the Appellant of Due Process, when it improperly excluded relevant evidence Appellant sought in discovery for five years, resulting in a miscarriage of justice."

The 2021 Order acknowledges hearing arguments and reviewing evidence produced by Moultrie Burns to *"find and conclude"* its judgment that the note was paid, and the accounting was accurate and complete. As documented in my Appellant Brief, the Court supported its finding by denying my constitutional right to due process to receive complete documents I had been seeking in discovery for five years; to present the evidence necessary to establish my claim.

The Due process Clause of the Fourteenth Amendment guarantees every litigant the right "to present his case and have its merits fairly judged".

In Logan v. Zimmerman Brush Co (1982), the US Supreme Court found every litigant has the right to present their case and have its merits fairly judged and this right must include the right to present evidence necessary to establish their claim.

In Schwartz v. US 976 R3d 213 (1992), the Fourth Circuit Court found a judgment is void under Rule 60(d) if the court acted in a manner inconsistent with due process of the law.

Rule of Evidence 106 provides when a party introduces incomplete documents, the adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it. The Court's improper exclusion of evidence is proof of prejudice against me to assure the success of Moultrie Burns. This manifest miscarriage of justice caused substantial injury amounting to millions of dollars (with interest the note is approaching three million dollars). Had the complete tax documents been provided, as requested in discovery for over five years, it is undoubtable there would have been a different outcome.

Issue No. IV is not Vague

"Whether it is in the best interests of the estate to remove Mary Dearden as the Personal Representative pursuant Section 62-3-611(b) and appoint a special administrator pursuant Section 62-3-614."

The claims against the PR stand on the record as uncontested. The argument accepted by the Court isn't that the PR is not guilty of all the allegations brought against her. It is that the affirmation of the October 2016 Order made it "t*he law of the case precluding any further action*". This skewed reasoning is, the affirmation of the 2016 Order to "*provide amended accounting*", allowed Dearden to re-submit the same untruthful documents in 2020 for which she was removed in 2013; the same false oaths declaring her documents to be true and accurate while knowing that they were not. This evasion is dependent upon the 2016 Order being Final, as argued by Burns, but it is not a permanent solution because probate laws are designed to protect the beneficiaries.

Section 62-3-608 does not discharge a PR from liability for transactions or omissions occurring before termination or relieve her of the duty to preserve assets subject to her control, to account therefore, and to deliver the assets.

Section 62-3-611 Petition for removal; cause procedure

(B) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or person seeking his appointment intentionally misrepresented material facts in the proceeding leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

Mary Dearden violated every single cause for her removal. In the proceeding leading to her appointment, she and Moultrie Burns misrepresented material fact when they told the court the Decedent was a resident of SC. She was summoned to the Court in 2011, to give cause for why she should not be removed and held in contempt for failure to perform her duties (R.P. 3-5). The court accepted Moultrie Burns apologies and afforded her another opportunity to provide accurate complete accounting and inventory pursuant to law, which she failed to do. As found in the 2013 Order, and not overturned by the 2016 Probate Order, Dearden failed to respond to discovery requests for medical reports ordered by the court, and such was one basis for her removal (R. P. 7)

By her own admission, Mary Dearden is dishonest. She admitted taking money from the Decedent for personal gains. She admitted she allowed Katherine Dauphin to forge check to herself from the Decedent's accounts. She admitted filing untruthful oaths, and then had the audacity to file them again. Her court testimony is contradicted by her own witnesses and medical records (asking to be heard on remand). She testified she was financially dependent upon Michael Jennings; the person who's loan she refused to record. There are literally millions of dollars unaccounted for in the estate.

Dearden testified she disbursed all the SC assets without filing anything in the inventory, which puts this case at risk of being declared void for lack of jurisdiction. Section 62-3-201 establishes jurisdiction for probate by two, and only two, means. Venue is in the county where the Decedent was domiciled at the time of her death, but if she was not living in the state, then venue is in the county where her property was located. The Decedent was a resident of Virginia and there are no SC assets recorded in the inventory. The PR's accounting only records shipping charges from Virginia. Surely it would be in the best interest of this estate to remove Mary Dearden as PR, and appoint a special administrator to recover and records those assets.

CONCLUSION

The issues in this case are not vague (as claimed by Respondent) but they are difficult to comprehend because it is hard to wrap your mind around what Moultrie Burns was allowed to get away with. His client was removed in 2013, for failing to provide complete accurate accounting and failure to respond to discovery requests. When she was re-instated in 2016, Burns continued to ignore requests for any evidence that would threaten the outcome he was seeking. Then, to add insult to injury, he falsified a court order, substituting a false finding of fact under appeal with the ridiculous allegation that I never availed myself of discovery to ask for the information I had been seeking in discovery for over a decade.

It is very difficult to represent yourself Pro Se, but finding justice becomes even more difficult when the opposing side has a flagrant disregard for the prevailing rule of law and factual truth. Moultrie Burns' case is precariously balanced because the court's actual 2021 decision proves the 2016 Order is Interlocutory given there was at

least one issue it did not address. An Interlocutory Order is subject to review and revision, which means all of Burns falsifications of record are not conveniently buried.

For all of the following reasons, the Court's orders are VOID:

1. The Courts failed to establish jurisdiction.

2. The Appellant was denied due process.

3. Evidence sought in discovery for 14 years was concealed/ not provided by opposing counsel, such that there was never a real contest.

4. The Order under appeal was falsified so the actual finding of fact (which was changed) was not affirmed.

I respectfully request the Court to award the remedies provided in my Appellant Brief.

Respectfully Submitted,

Signed/Beverly Hennager
_____date_____

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CERTIFICATE OF SERVICE

I. Beverly Hennager, do hereby certify that I have served a copy of the foregoing

REPLY TO RESPONDENT to the following addresses:

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Hard copies to follow.

Respectfully Submitted,

S/Beverly Hennager September 17, 2024
_____date_____
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