

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

William E. Lawson, Special Referee

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CASE NO. 2011-CP-26-4758

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Monroe E. Cook and Lynn S. Cooke .....Appellants

vs.

Nealy Lynn Taylor..... Respondent

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**REPLY BRIEF OF APPELLANTS**

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**SC Court of Appeals**

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## ARGUMENT

### **I. The Respondent attacks Appellants' trial counsel.**

The Appellants respectfully note to the Court that Appellants' counsel was not trial counsel in this case. In fact, attorney John Long, who was trial counsel in this case, is now a member of Respondent's counsel's law firm. Attorney Long, prior to the trial of this case, accepted an offer to be a member of the law firm of Thompson & Henry, P.A. Attorney Long told Appellants that after the trial of this case, he would be joining the law firm of Thompson & Henry, P.A. The Appellants, of limited education, did not understand the consequences of this action, nor did they understand that Attorney Long and Respondent's law firm, Thompson & Henry, P.A. had decided to merge immediately after the trial.

Thompson & Henry, P.A. continues to represent Respondent in this action despite the appearances this creates.<sup>1</sup> Appellants note that Respondent's law firm attacks everything that Attorney Long (a current member of their firm) did during the trial of this case such as:

- Respondent's law firm argues that Attorney Long did not make a motion on the illegality or unclean hands defenses (Respondent Brief, p. 6);
- Argues that Attorney Long did not object to the questioning of Appellant Lynn S. Cook (Respondent Brief, p. 6);
- Argues that Attorney Long did not raise this issue in directed verdict (Respondent Brief, p. 6);

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<sup>1</sup> Appellant who was represented by trial counsel for many years is confused and distraught over this course of events. Appellants' current counsel does not subscribe any ill will or intent to Respondent's counsel, only the appearance this creates to Cook.

- Argues that Attorney Long did not move to continue the case (Respondent Brief, p. 7); and
- Argues that Attorney Long failed to object at trial (Respondent Brief, p. 7);

The Appellants are naturally suspicious of the arrangements by Attorney Long and Respondent's law firm which occurred in this case. Here, Appellants' own trial counsel joined Respondent's law firm and Respondent's law firm now argues that Appellants' trial counsel did not preserve certain errors for review by this Court and indeed made critical mistakes. Appellants respectfully submit to the Court that this creates an appearance of impropriety that Appellants were not adequately represented and that Appellants' trial counsel, John Long, should have immediately moved to be relieved because of his intention to join Respondent's law firm after the trial of this case. Also, Respondent's law firm (of which Long is a member) continues to defend this appeal in this Court. Accordingly, Appellants suggest that because of this inherent conflict (and the appearance) between the interests of Appellants' trial counsel and Respondent's counsel prior to the trial, this case should be reversed.

Appellants point to the case of *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). In that case, the Supreme Court was faced with whether or not a lawyer should be removed from a case because he had represented a child and then advocated for the child's father for reduction in child support. The Court noted: "A ward of an attorney guardian ad litem should not have to encounter that person in subsequent litigation in which the former guardian ad litem is representing anyone whose interests are potentially or actually adverse to the wards." The Court also noted that in determining the matter is

“substantially related one should consider among other things whether the effective lawyer would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.” 474 S.E.2d at 425.

While Appellants readily concede this issue was not argued in the trial court, Appellants have a defense -- Cook was advised after the trial that attorney Long could not represent him in the appeal because he was joining Respondent’s firm. Thereafter Cook sought assistance from the South Carolina Bar. At that point, Cook, with a limited education had no idea of the breadth of the conflict when Appellants’ trial counsel, John Long, announced he was closing his practice to join Respondent’s law firm immediately after the trial of this case.

For this reason alone, Appellants request that a new trial be granted since such actions by Appellants’ trial counsel, John Long, created an appearance of impropriety and an actual conflict of loyalty between his new firm (Respondent’s law firm) and representing Appellants. This is borne out by Respondent’s counsel’s citation in the Brief of the numerous errors Respondent’s law firm argues Attorney Long made during the trial.

**II. Assumption of the risk is not a defense to quantum meruit.**

Respondent in its Brief argues that assumption of the risk is a defense to quantum meruit and unjust enrichment. Respondent cites for authority an inverse condemnation case entitled *Cutchin v. S.C. Dept. of Highways and Public Transportation*, 301 S.E. 35, 389 S.E.2d 646 (1990). A review of *Cutchin* makes no mention of the doctrine of quantum meruit. In fact, the Court found no evidence of the doctrine of assumption of risk. The Court noted that the plaintiff must freely and voluntarily enter into a known danger and be subsequently injured for the defense to apply. (This was a flooding case.) Obviously, this is

not the case here and as a result, Appellants believe it was erroneous for the trial court to apply the doctrine in this case.

**III. Appellants have argued waiver in their Brief.**

Respondents argue that the doctrine of waiver should apply and as a result the Special Referee's Order should be affirmed. However, waiver is not a defense to unjust enrichment or quantum meruit. The record clearly reveals that the Cooks understood the land would be reconveyed to them by their daughter. In fact, Respondent in her testimony understood this and immediately conveyed one-half interest to her husband because she did not want to reconvey the property to the Cooks. (Tr. p. 210, lines 5-13). Also Respondent admitted she paid nothing for the land and that she asked no questions but took it (Tr. p. 203, lines 1-5; p. 206, lines 12-13).

The decisions cited by Respondent regarding waiver do not apply when the Plaintiff's claim is quantum meruit. Respondent cites *Skipper v. Perrone*, 382 S.C. 53, 62, 674 S.E. 510 (Ct.App. 2009) for the proposition that the Court should accept the doctrine of waiver. In fact, in that case the Court found waiver could not be applied against a party who was aged and had a mental condition.

In this case, the Appellants are uneducated people who relied on the Social Security Administration when they transferred the property (Tr. p. 24, lines 10-12); that the Social Security Administration employee said he needed to move some of the properties (Tr. p. 25, lines 9-10); that his daughter Nealy said she would sign the property back the same as her brother when requested (Tr. p. 26, lines 1-4); and that Respondent was told why Appellants wanted to transfer the property into her name (Tr. p. 28, lines 1-8).

Thus, with this background, Appellants did not knowingly and voluntarily waive their right to the property and is not a defense to equitable claims such as unjust enrichment or quantum meruit. See *Webb v. First Federal Savings and Loan*, 300 S.E. 507, 388 S.E.2d 823 (S.C.App. 1989). Further, because Appellants have asserted the equitable doctrines of quantum meruit and unjust enrichment, then waiver cannot be asserted since it is a legal defense.<sup>2</sup>

**IV. Appellants did not commit illegality or fraud.**

Appellants take issue with the argument that Appellants illegally tried to transfer the property to get social security benefits. There can be no illegality when a party seeks advice from a government official regarding eligibility for a program. Mrs. Cook testified that she went to the Social Security Administration and was told that Appellants had too much real property in their name to qualify for social security for their children. (Tr. p. 114, lines 6-8). Further, Mr. Cook's direct testimony was that Social Security Administration employees said he needed to move some of the properties. (Tr. p. 25, lines 9-19). There is no testimony in the record that what the Cooks were doing was illegal and as a result, the argument by Respondent that the Appellants were involved in an illegal contract is without merit. Cook was told by Social Security Administration employees to deplete his assets (Tr. p. 25, lines 9-19). Cook was also told by Social Security Administration employees that he must pay back due benefits and he actually paid them (Tr. p. 28, lines 19-20 and lines 22-23); and no one intended to defraud the government and Appellants immediately paid back the money which they had been overpaid (Tr. p. 36, lines 12-15). Appellants cite to their Initial Brief (pages 8 and 9) which clearly and unequivocally show testimony of both

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<sup>2</sup> Also, the evidence is the Cooks did not waive their rights to the property and expected Respondent to reconvey it to them.

Appellants that they discussed this matter with the Social Security Administration prior to transferring the property prior to applying for benefits.

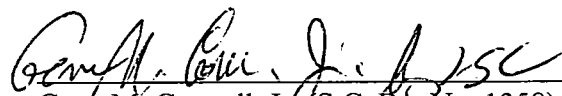
At the most, the issue with the Social Security Administration was a misunderstanding and the evidence does not rise to the level of an illegality.

### CONCLUSION

Appellants request the Court reverse this Order and remand it for a new trial. Appellants' trial counsel had already agreed to work at Respondent's law firm prior to commencement of this trial. Respondent's law firm continues to argue this appeal and argue that Appellants' trial counsel, who is now with Respondent's law firm, made numerous legal errors. Appellants believe that under the circumstances surrounding this case, Appellants' trial counsel should have immediately withdrawn because of the conflict of interest and appearance of impropriety and should not have tried this case when Appellants' trial counsel knew full well that he was leaving to join Respondent's law firm within days after this case was completed. Further, Appellants' trial counsel should have advised the Special Referee of this issue prior to the trial, as the Court, had it been advised, would have likely informed Appellants that new counsel was necessary. Accordingly, Appellants request this case be reversed and returned to the trial Court.

Respectfully submitted,

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November 18, 2013  
Surfside Beach, South Carolina.

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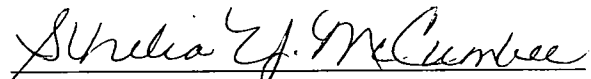
Nealy Lynn Taylor..... Respondent

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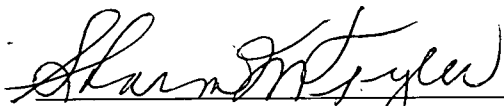
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served **Reply Brief of Appellants** on the Respondent, through her attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Phillip C. Thompson, Esq.  
Thompson & Henry, P.A.  
P. O. Box 1740  
Conway, SC 29528

DATE OF MAILING: November 19, 2013

  
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,  
this 19<sup>th</sup> day of November, 2013.

  
Notary Public for South Carolina  
My Commission Expires: 2-25-19

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