IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-1149

Patricia C. McLean, as Personal Representative of the Estate of William Eugene Connor,

Respondent,

v.

Branch Banking and Trust Company and Aurelia Connor,

Defendants,

of whom Aurelia Connor is the Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Respondent, Patricia C. McLean, as personal representative of the Estate of William Eugene Connor ("Respondent"), brought this action against the Appellant, Aurelia Connor ("Appellant") and Branch Banking and Trust Company ("BB&T") by the filing of a Complaint on October 19, 2009 in the Court of Common Pleas in Greenville County, South Carolina under case number 2009-CP-23-8876. Respondent alleged that Appellant stole assets from the subject estate and was liable for conversion of such assets. Respondent also alleged that BB&T improperly allowed Appellant to access safe deposit boxes at BB&T and that BB&T was liable for damages resulting from breach of contract and negligence.

The parties dismissed the action pursuant to Rule 40(J) of the South Carolina Rules of Civil Procedure, and restored the action by Consent Order dated February 15, 2011 under case number 2011-CP-23-1149. Respondent settled its claim against BB&T in December 2011, and BB&T was dismissed from the action pursuant to a Consent Order of Dismissal filed December 29, 2011. The trial of the case against Appellant commenced on February 27, 2012. The jury returned a verdict against Appellant in the amount of Twenty-One Thousand Seven Hundred and No/100 Dollars ($21,700.00) based on Appellant's conversion of the assets belonging in the Estate of William Eugene Connor which should have been under the control of Respondent. Appellant filed a Notice of

Motion and Motion to Amend Verdict which The Honorable Edward W. Miller denied by Order filed July 12, 2012. Appellant argued that the court should offset the amount of the verdict against Appellant by the amount of Seven Thousand Five Hundred and 00/100 Dollars ($7,500.00) received by Respondent from BB&T pursuant to its settlement. Appellant then filed a Notice of Motion and Motion for Reconsideration on July 27, 2012, but Judge Edward W. Miller denied the motion by SCRP Form 4 filed January 25, 2013.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION BECAUSE THERE WAS NO COMMON CAUSE OF ACTION AGAINST BB&T AND APPELLANT.

There can be only one satisfaction for an injury or wrong. Smith v. Widener, et al., 724 S.E.2d 188 (S.C. App. 2012) citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998). **However, the reduction in the judgment must be from a settlement for the same cause of action.** Smalls v. South Carolina Department of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (emphasis added), citing Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (refusing to apply settlement for pain and suffering cause of action to judgment in wrongful death action). In Smith v. Widener, there were overlapping causes of action pleaded by the plaintiff (Smith, at 190), and unlike the present case, the plaintiff argued unsuccessfully that punitive damages were distinct from actual damages with regard to setoff. Id., pp. 190-191.

Respondent's Complaint set forth causes of action against BB&T for breach of contract and negligence. Respondent set forth a separate cause of action against Appellant for conversion. There was no common cause of action against Appellant and BB&T. (R.

pp. 15-17). Based on the lack of any common cause of action, the trial court rightfully denied Appellant's Motion to Amend Verdict. (R. pp. 8-10).

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION BECAUSE RESPONDENT SUFFERED MORE THAN A SINGLE INJURY.

The Order Denying Motion to Amend Verdict filed July 12, 2012 found that Appellant successfully argued and proved that the funds she converted from Respondent must have been derived from a source other than BB&T and that the conversion must have occurred prior to her improper access of BB&T's safe deposit boxes. (R. p. 9). As such, the injury suffered from Appellant's conversion of assets prior to accessing BB&T's safe deposit boxes was a separate injury from the injury suffered as a result of access to BB&T's safe deposit boxes. The record supports these findings and conclusions.

At trial, Appellant, Respondent, and their brother, Ted Connor, each testified that they visited the funeral home on Saturday, the day following their father's death. (R. p. 34, lines 22-25-p. 35, lines 1-2-p. 36, lines 20-25-p. 37, lines 1-8-p. 40, lines 3-4-p. 42, lines 7-9-p. 43, lines 16-22-p. 50). Ted Connor and Respondent testified that Appellant showed the funds she converted while visiting the funeral home on Saturday, the day after decedent's death, and two days prior to Appellant's visit to take items from her father's safe deposit box at BB&T. (R. p. 40, lines 1-24-p. 42, lines 1-22-p. 43, lines 6-22-pp. 51-52). Both in her Answer and at trial, Appellant denied taking any assets (other than a high school ring) from the BB&T safe deposit boxes. (R. pp. 19-20-p. 29, lines 1-25-p. 30, lines 1-25-p. 48, lines 24-25-p. 49, lines 1-4). Furthermore, Judge Edward W. Miller found that Appellant had revealed converted funds to Respondent prior to Appellant's visits to the BB&T safe deposit boxes. (R. p. 9).

Appellant's spouse, William L. Bennett, corroborated Appellant's allegation and summarized Appellant's position as follows: "**The funny thing about that is they think this money may have come from BB&T, if we were there on Saturday and we have money and we don't go to BB&T until Monday I'd like to know how we were supposed to come up with that money**." (R. p. 47, lines 21-25) (emphasis added). Appellant's attorney made the identical argument in his closing argument: "**How could she have gotten $10,000 out of this safety deposit box on Saturday? I just ask you to consider this because she didn't go in until Monday**." (R. p. 49, lines 2-4) (emphasis added).

Since Appellant demonstrated that she must have stolen the funds in question prior to visiting BB&T, the injury sustained by Respondent from BB&T's negligence or breach of contract was a separate injury, not part of a single injury providing any right to setoff. S.C. Code Ann. § 15-38-50 requires setoff when persons are liable in tort for "the same injury." Consequently, Appellant should not enjoy the benefit of setoff against the verdict.

III. JUDICIAL ESTOPPEL PRECLUDES APPELLANT FROM SETTING OFF THE VERDICT BY THE SETTLEMENT FUNDS RECEIVED FROM BB&T.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same litigation. The doctrine's function is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) "Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in

subsequent proceedings." Quinn v. Sharon Corp., concurring opinion, 343 S.C. 411, 416, 540 S.E.2d 474, (Ct. App. 2000) citing *Black's Law Dictionary* 848 (6th ed.1990).

In the instant case, Appellant pleaded, testified, and argued that she could not have removed the converted funds from BB&T's safe deposit box. (R. pp. 18-20-p. 31, lines 2-25-p.32, lines 1-25-p. 33, lines 1-10-p. 47, lines 19-25). Therefore, Appellant should not be permitted to amend her argument to suggest that BB&T's settlement payment to Respondent was for the same injury for which the jury rendered its verdict. BB&T's payment was instead for a separate injury occurring after Appellant stole the funds for which the jury rendered a verdict against her.

IV. THE COLLATERAL SOURCE RULE PREVENTS APPELLANT FROM SETTING OFF THE VERDICT AGAINST HER.

The trial court ruled that, "as a separate and independent basis for the Court's decision, I find that the collateral source rule precludes the reduction of the verdict in the instant action." (Order Denying Motion to Amend Verdict filed July 12, 2012, p. 2). The collateral source rule is well-established law in our state. "South Carolina has long followed the collateral source rule that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of damages owed by the wrongdoer to the injured party." Rattenini v. Grainger, 298 S.C. 276, 277-278, 379 S.E 2d 890 (S.C. 1989) (citing multiple South Carolina cases). The collateral source rule has been applied liberally in South Carolina to preclude the reduction of damages. Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385, 394 (2004).

Judge Miller found that the settlement funds provided by BB&T were "from a source wholly independent of the [Appellant], and the collateral source rule prevents the

Defendant from the right to setoff or reduce the amount of the verdict in this case." (R. p. 9). Therefore, the collateral source rule must bar Appellant's motion for setoff.

V. THE RECORD SUPPORTS A DENIAL OF SETOFF.

In Fesmire v. Digh, 683 S.E.2d 803, 385 S.C. 296 (Ct. App. 2009), this Court summarized the standards of review applicable to actions at law versus actions in equity as follows:

> In an action at law, the trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings. *Townes,* 266 S.C. at 86, 221 S.E.2d at 775. In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. *See Wilder Corp. v. Wilke,* 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct.App.1996) (citing *Townes,* 266 S.C. at 86, 221 S.E.2d at 775) (holding that because the master-in-equity heard the action, which was equitable in nature, without appeal to the circuit court, the appellate court could find the facts on appeal in accordance with its own view of the preponderance of the evidence). **However, this broad scope of review does not require this Court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses.** *Laughon v. O'Braitis,* 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct.App.2004).

Fesmire v. Digh, 683 S.E.2d 803, 807, 385 S.C. 296, 807 (emphasis added). In Smalls v. South Carolina Department of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), this Court held that, "[t]he trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." The right to set-off arises by operation of law as an equitable power of the trial court. Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). As in Smalls, the instant action involves a motion to offset a verdict based on a settlement prior to trial.

Respondent would emphasize that the trial judge was in a better position to assess the creditability of the witnesses. See Laughon v. O'Braitis, 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct. App.2004). The trial court's findings and conclusions, as outlined in detail *supra*, were both well-reasoned and well-supported by a preponderance of the evidence and testimony which he observed. Regardless of Judge Miller's findings, however, the record in this matter firmly demonstrates by a preponderance of the evidence that Appellant is not entitled to setoff the verdict.

CONCLUSION

The trial court rightfully denied Appellant's Motion to Amend Verdict. There was no common cause of action against Appellant and BB&T. Appellant proved that the converted funds were taken prior to visiting BB&T, thus establishing more than a single injury required by S.C. Code Ann. § 15-38-50(1). Finally, BB&T's payment to Respondent was from a source wholly independent of Appellant, and the collateral source rule bars any setoff. Accordingly, Appellant should not benefit from any setoff of the verdict rendered against her.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

March 14, 2014

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PROOF OF SERVICE

I certify that I have served the FINAL BRIEF OF RESPONDENT on Aurelia Connor, by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2014, addressed to the appropriate party or attorney of record, Robert L. Waldrep, Jr., Esquire, 116 West Whitner Street, Anderson South Carolina 29624.

March 14, 2014

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