

STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

AUG - 8 2014

Robert E. Hood, Circuit Judge, Fifth Judicial Circuit **Supreme Court**

Appellate Case No. 2013-002802

Anonymous Surgeon *Appellant,*

~ vs. ~

Matthew T. Siedhoff, M.D. *Respondent.*

**RESPONSE TO MOTION TO DISMISS APPEAL &
CROSS MOTION TO SUBSTITUTE PERSONAL REPRESENTATIVE**

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Appellant respectfully opposes the pending Motion to Dismiss on grounds that is is untimely made and granting it would be prejudicial to the Appellant, as well as the interests of justice; it does not comport with governing statutes; and that a personal representative has been appointed, and the case may therefore proceed.

Appellant further moves that the Court substitute the personal representative of the Estate as the Appellant in this action and permit the case to proceed accordingly.

PROCEDURAL HISTORY

The procedural history of this case is correctly stated in Respondent's Motion.

THE MOTION IS UNTIMELY

At this late date, Respondent argues that the appeal should be dismissed because a personal representative has not been appointed, and that the Decedent cannot, by virtue of her departed status, proceed under her own name.

This argument could have been made at the trial level, but it was not. Certainly it is not preserved for review here. This argument could have been made in response to the Notice of Appeal in the Court of Appeals, but it was not. It was likewise not raised upon the Motion to Certify to this Court.

And even after Appellant filed her initial brief, and served her designation of materials for the record, Respondent moved for an extension of time to file his initial brief—which was granted—when the argument at hand could instead have been raised.

Whether or not Respondent might be entitled to relief on his argument, he has rested on it far too long, and dismissing this appeal would be fundamentally unfair, unjust, and inequitable, and work great prejudice upon the Appellant's journey thus far to vindicate her rights. Respondent's present claim for relief has grown quite stale. And it is a fundamental

precept that a party is expected to raise issues and claims in timely fashion as they accrue. Laches is an equitable doctrine, which "arises upon the failure to assert a known right." *Ex parte Stokes*, 256 S.C. 260, 267, 182 S.E.2d 306, 309 (1971); *see Byars v. Cherokee County*, 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961) ("Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence.").

To prove laches, a party must establish: "(1) delay, (2) unreasonable delay, [and] (3) prejudice." *Hallums v. Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988). Here the question of delay in bringing the present argument is facially evident. Likewise, the unreasonableness is apparent. From the moment Respondent moved for summary judgment below, it was public knowledge that Appellant was deceased, and a key fact motivating Respondent to terminate the case.

Finally, Appellant took appeal to the Court of Appeal, moved to Certify to this Court, has briefed the case, and labored under further delay, all the time incurring expense and effort. Dismissal at this point, because Respondent only now realized his potential argument exists, is unequivocally prejudicial to the Appellant.

RESPONDENT'S ARGUMENT DOES NOT COMPORT WITH GOVERNING PROBATE STATUTES

Respondent argues that this appeal must be dismissed pursuant to S.C. CODE ANN. § 62-3-703(c) claiming it *requires* appointment of a personal representative in order for a decedent's estate to maintain a cause of action: "Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this

State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.”¹

Statutes perform two functions: They grant powers, or limit them. Here, the section upon which Respondent relies merely grants powers to personal representatives. By its plain text, it imposes no limits, and offers no ground upon which this appeal should be dismissed.

Respondent further relies on S.C. CODE ANN. § 62-3-804(7)(a) in part: “A legal proceeding pending on the date of a decedent's death in which the decedent was a necessary party shall be suspended until a personal representative is appointed to administer the decedent's estate, unless a court otherwise orders.” At best, an action of this nature would be suspended, not dismissed. Respondent’s eleventh-hour request to dismiss the case is hardly worthy of attention for reasons previously recited. Respondent could have sought suspension much earlier in the day.

**A PERSONAL REPRESENTATIVE HAS BEEN APPOINTED,
WHICH MOOTS RESPONDENT’S MOTION TO DISMISS**

Because a personal representative has been appointed to administer the Decedent’s estate, Respondent’s ill-fated motion to dismiss is moot.

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative *relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter.* Prior to appointment, a person named personal representative in a will may protect property of the decedent's estate and carry out written instructions of the decedent relating to his body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

¹ Respondent also cites two foreign authorities of no precedential value, neglecting to mention that in both cases, the causes of action against the decedents were commenced *after* their death, a key distinguishing fact.

S.C. CODE ANN. § 62-3-701 (*emphasis added*). A personal representative has been appointed. (Ex. 1) That appointment relates back in time to all steps taken to maintain this action, and rtifies it's present vitality. By virtue of the appointment under § 62-3-701, the Court's inquiry ends here, and the motion to dismiss must be denied.

THE COURT MAY AND SHOULD SUBSTITUTE THE PERSONAL REPRESENTATIVE AS THE PARTY IN INTEREST

The very locus of this appeal is whether the Appellant's death releases the Respondent from his liability to her, *ergo*, her estate. Having known all along of Appellant's passing, and now seeking dismissal, Respondent's eleventh-hour pleas should be ignored, and the appointed personal representative should be substituted as the real party in interest.

"If a party to an appeal dies or becomes incompetent, the appellate court may, upon motion or on its own initiative, order substitution of the proper parties or remand the case to the trial court for the substitution of the proper parties as provided by Rule 25, SCRCPP." Rule 265(b), SCACR. Remand would at this point, without deciding the merits of the appeal would make no sense. However, this Court is clearly empowered to effect substitution, and would be prudent in so doing, especially in light of the gravity of the question presented in this case.

WHEREFORE, Appellant requests that the Motion to Dismiss be denied, and that the personal representative be substituted as the proper party.

FOR THE APPELLANT:



Aaron J. Kozloski

August 8, 2014
Lexington, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE MATTER OF)
SUSAN JAYNE KEESHAN)
(Decedent))

IN THE PROBATE COURT

CERTIFICATE OF APPOINTMENT

CASE NUMBER: 2014ES3200819

This is to certify that

AARON J. KOZLOSKI

is/are the duly qualified

- PERSONAL REPRESENTATIVE
 SUCCESSOR PERSONAL REPRESENTATIVE
 SPECIAL ADMINISTRATOR

In the above matter and that this appointment, having been executed on the
5th day of August, 2014 is now in full force and effect.

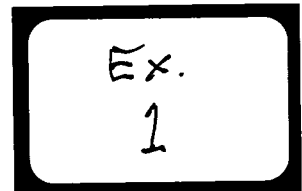
RESTRICTIONS:

Executed this 5th day of August, 2014

Daniel R. Eckstrom

DANIEL R. ECKSTROM, PROBATE JUDGE

Do not accept a copy of this certificate without
the raised seal of the Probate Court.



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APPEAL FROM THE COURT OF COMMON PLEAS **S.C. Supreme Court**
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Robert E. Hood, Circuit Judge, Fifth Judicial Circuit

Appellate Case No. 2013-002802

Anonymous Surgeon *Appellant,*

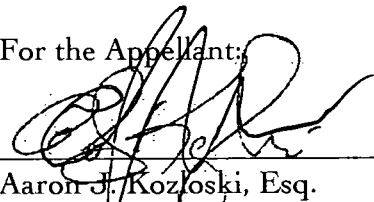
~ vs. ~

Matthew T. Siedhoff, M.D. *Respondent.*

CERTIFICATE OF SERVICE

The Response to Motion to Dismiss Appeal and Cross Motion to Substitute Personal Representative in this case were served upon the Respondent by first class mail addressed to counsel at their address below.

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August 7, 2014
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