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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-001856

Jacquelyne Hollander, Appellant,

v.

The Irrevocable Trust Established by James Brown on August 1, 2000 and Russell L. Bauknight, as Trustee of the Irrevocable Trust established by James Brown in August 1, 2000, Defendants,

Of whom Russell L. Bauknight is the Respondent.

FINAL REPLY BRIEF OF APPELLANT

January 14, 2014

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TABLE OF CONTENTS

Table of Authorities 2

Arguments

I. THE TRIAL COURT ERRED IN RULING THAT A PARTNERSHIP FOR CHARITABLE PURPOSES CAN NEVER BE A LEGAL PARTNERSHIP AND IN DISMISSING APPELLANT'S COMPLAINT BECAUSE APPELLANT FAILED TO ALLEGE THE EXISTENCE OF A PARTNERSHIP.......... 3-8

II. ANY STATUTE OF LIMITATIONS WAS ESTOPPED BY THE ACTIONS OF THE SPECIAL ASSISTANT ATTORNEY GENERAL AND THE SETTLEMENT AGREEMENT.......... 8-11

III. TRIAL COURT SHOULD HAVE ALLOWED AMENDMENT OF COMPLAIT... 11-12

IV. INCLUSION OF RECORDS 12-13

Conclusion 13

TABLE OF AUTHORITIES*

CASES

Cindy Graham v. State Farm Mutual Automobile Insurance Company, 319 S.C. 69; 459 S.E.2d 844; 1995 S.C. LEXIS 111 (1995) 3-4

Southern RY. Co. v. Order of RY. Concuctors of America, 210 S.C. 121; 41 S.E.2d 774; 1947 S.C. LEXIS 10; 19 L.R.R.M. 2488; 12 Lab. Cas. (CCH) P63,637 (1947) 4

Medlin v. Ebenezer Methodist Church, 132 S.C. 498; 129 S.E. 830; 1925 S.C. LEXIS 239 (1925) 6

Wyman v. Davis, 223 S.C. 172; 74 S.E.2d 694 (1953) 7

Stevens v. Stevens, 213 S.C. 525; 50 S.E.2d 577; 1948 S.C. LEXIS 127 (1948) 7

Christopher Scott Black v. Lexington School District, 327 S.C. 55; 488 S.E.2d 327 (1997) 9

Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) 9

Wilson v. Dallas, 403 S.C. 411; 2013 S.C. LEXIS 240 (2013) 9

Mabel Dixon v. Stevan Fay Dixon, 362 S.C. 388; 608 S.E.2d 849; 2005 S.C. LEXIS 14 (2005) 10

Deborah W. Spence v. Deborah W. Spence, et al, 368 S.C. 106; 628 S.E.2d 869; 2006 S.C. LEXIS 124 (2006) 11

Colonial Penn Insurance Co. v. Coil, 887 F.2d, 1236, 1239-40 (4th Cir., 1989) 12

STATUTES

S.C. Code Ann. §15-53-130 (1976) 3
S.C. Code § 33-41-10 et seq. 3
S.C. Code § 33-41-220 6
S.C. Code Ann. § 15-3-530 .... 10, 11

OTHER

Bill S. 552 5
Rule 59(e), SCRCP 11
31A C.J.S. Evidence §96 (2013) 12
Rule 201(f), SCRE 12

ARGUMENTS

I. THE TRIAL COURT ERRED IN RULING THAT A PARTNERSHIP FOR CHARITABLE PURPOSES CAN NEVER BE A LEGAL PARTNERSHIP AND IN DISMISSING APPELLANT'S COMPLAINT BECAUSE APPELLANT FAILED TO ALLEGE THE EXISTENCE OF A PARTNERSHIP.

A. Purpose of the action

Respondent incorrectly alleges that the purpose of this action is, "... a purported legal claim to ownership of all the musical assets of the late James Brown ("Brown") that are owned by the Trust." (Response Brief, p. 5). That is a disingenuous interpretation of the pleading.

This action seeks a declaratory judgment under S.C. Code Ann. §15-53-130 (1976) that Appellant and Brown were partners and that the Trust was an extension of that partnership (R. p. 29, lines 20-23 – p. 30, lines 1-3.). Based upon that determination the South Carolina Uniform Partnership Act, *S.C. Code § 33-41-10 et seq.* would determine Appellant's rights to the partnership assets based upon a winding up of the partnership affairs.

The value of Appellant's rights in the partnership will be based upon an accounting of the partnership from its formation until its dissolution at Brown's death and the equity of Appellant in partnership proceeds would be based upon her share in the partnership. It would not be the total control of Brown's musical property.

B. Declaratory judgment complaint

As a complaint for declaratory judgment, the only question for the Trial Court to determine for dismissal was whether a justifiable controversy existed, not whether the Complaint itself stated a partnership or inadvertently left out the profits enjoyed by Appellant and Brown.

The Supreme Court of South Carolina in Cindy Graham v. State Farm Mutual

Automobile Insurance Company, 319 S.C. 69; 459 S.E.2d 844; 1995 S.C. LEXIS 111 (1995) provided as follows:

> Under the Declaratory Judgment Act, a party whose rights, status, or other legal relations are affected by a contract may seek a court's determination of any question of construction or validity of the contract and obtain a declaration of the party's rights, status, or other legal relations thereunder. See Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992); S.C. Code Ann. § 15-53-30 (1977). The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships. Williams Furniture Corp. v. Southern Coatings and Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).
>
> To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.

Prior to that decision the Supreme Court for South Carolina ruled in Southern RY. Co. v. Order of RY. Concuctors of America, 210 S.C. 121; 41 S.E.2d 774; 1947 S.C. LEXIS 10; 19 L.R.R.M. 2488; 12 Lab. Cas. (CCH) P63,637 (1947) that, "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties ... and requests that these rights and duties be adjudged by the court."

There can be no doubt that the Complaint here alleges a justiciable controversy. Appellant clearly asserts in her Complaint that she and Brown were partners in the I Feel Good Trust ("the Trust"). This is a concrete issue and an assertion by Appellant of her legal rights. As demonstrated by Respondent's denial of Appellant's partnership interest, this is indeed a matter in controversy. In fact, it is an important matter as it potentially affects all potential beneficiaries of Brown's estate.

If the Trial Court determines that the partnership existed between Appellant and Brown, then the Trust, as the administrator of all of the assets of that partnership, will have legal duties in the winding down of the partnership affairs and the appropriate distribution of partnership assets to the Appellant and the estate.

By dismissing the Complaint with prejudice, and not because of the lack of a controversy or because of mootness, the Trial Court has ruled ad hoc on the question of whether a partnership existed without giving Appellant the benefit of a hearing on the issue and has deprived Appellant of her due process rights to a hearing on the issue.

C. Unincorporated nonprofit association

The Complaint alleges that Appellant and Brown did not work through a trust, a corporation (tax exempt or otherwise) or through any formal business entity. The two of them were, in fact, an unincorporated nonprofit association.

There is currently a Bill S. 552 before the South Carolina General Assembly to amend the code of laws of South Carolina, 1976, by adding Chapter 33 to Title 33, so as to enact the "Revised Uniform Unincorporated Nonprofit Association Act" to recognize this particular entity. The Bill describes an unincorporated nonprofit association under §33-33-20(11) as, "...an unincorporated organization consisting of two or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes."

The existence of this Bill demonstrates that the association between Appellant and Brown has not been well defined by statute or case law. Respondent would have this Court determine that no charitable association could be a partnership solely on the vague basis of profit [1].

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1 Although the Trust formed in August of 2000 may be a 501(c)(3) tax exempt organization, the

D. Profits are only one indication of a partnership

Respondent cites to Medlin v. Ebenezer Methodist Church, 132 S.C. 498; 129 S.E. 830; 1925 S.C. LEXIS 239 (1925), a case that predates the South Carolina Uniform Partnership Act, as precedence that a charitable association cannot be a partnership. Yet even in that case the South Carolina Supreme Court stated in dicta that, "An association, **not engaged in business enterprises** and the objects of which do not contemplate profit or loss, is not a partnership, and the liability of its members for debts contracted in behalf of the association is governed, not by the principles of partnership, but by those of agency [emphasis added]."

That case regarded application of common law to an unincorporated nonprofit association. This case is very distinguished from Medlin in that, (1) the South Carolina Uniform Partnership Act was enacted in 1950; and, (2) the Ebenezer Methodist Church operated as a place of worship for its parishioners without engaging in substantial public business activities. In contrast, this Complaint alleges many business transactions including record sales, songwriting and publication, organization of public events, contracts with the American Wrestling Association and other celebrities (R. p. 26, lines 21-23 – p. 27.)

The South Carolina Uniform Partnership Act, *S.C. Code § 33-41-220* provides, in its entirety, that the existence of a partnership is determined by application of the following:

> (1) Except as provided by Section 33-41-380 persons who are not partners as to each other are not partners as to third persons;
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profit made by the use of the property;
> (3) **The sharing of gross returns does not of itself establish a partnership,** whether or not the persons sharing them have a joint or common right or interest in

PARTNERSHIP REFERRED TO IN THE COMPLAINT THAT IS THE BASIS OF THIS ACTION HAD NO SUCH RECOGNITION.

any property from which the returns are derived; and
(4) **The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business**, but no such inference shall be drawn if such profits were received in payment
(a) as a debt by installments or otherwise,
(b) as wages of an employee or rent to a landlord,
(c) as an annuity to a widow or representative of a deceased partner,
(d) as interest on a loan, though the amount of payment vary with the profits of the business or
(e) as the consideration for the sale of the good will of a business or other property by installments or otherwise [emphasis added].

There is not even a definition in the South Carolina Uniform Partnership Act for profits. Profits can be pecuniary or otherwise. Many businesses are run at a loss in order to achieve other less tangible benefits. As an example, the Complaint alleges how Brown received the benefit of a reduced sentence for criminal charges as a direct result of his involvement in the partnership (R. p. 27 lines 17-22.)

Respondent also relies on Wyman v. Davis, 223 S.C. 172; 74 S.E.2d 694 (1953) as precedence that a partnership cannot exist without a profit motive. Those cases are the only precedence provided by Respondent. Every other citation is to a secondary source.

And yet even the Wyman Court states that, "Every partnership is governed by its own facts." *Id at 175* and that the sharing of profits was only one factor to determine partnership along with a community of interest in partnership capital or property; and, the partners' community of interest in control and management. *Id. at 181.*

The South Carolina Supreme Court in Stevens v. Stevens, 213 S.C. 525; 50 S.E.2d 577; 1948 S.C. LEXIS 127 (1948) clearly disavowed the element of profits as the primary determination of partnership formation. That Court ruled, "One of the most important tests as to the existence of a partnership is the intention of the parties." The Complaint alleges that Brown

and Appellant even made a public announcement of their partnership as "The I Feel Good Trust" (R. p. 27 lines 11-14.)

The Complaint is replete with the history of the partnership between Appellant and Brown. They worked together to raise money through concerts and songwriting and they jointly contributed money to charitable causes for children.

II. ANY STATUTE OF LIMITATIONS WAS ESTOPPED BY THE ACTIONS OF THE SPECIAL ASSISTANT ATTORNEY GENERAL AND AS A COMPLAINT FOR EQUITABLE REMEDY.

A. Issue preservation

As detailed in Appellant's Initial Brief, the argument for statute of limitations was first brought up by Respondent as their oral argument on July 2, 2013 (R. p. 67, lines 15-25 – p. 68, lines 1-20.) Only at that time did Respondent provide the Court and opposing counsel their unfiled Memorandum in Support of their Motion to Dismiss (R. p. 63, lines 10-13.) On that date the Trial Court ruled that both sides were to tender Proposed Orders to the Court for consideration by August 1, 2013 (R. p. 55 line 25.) Appellant filed her Proposed Order and Memorandum in Opposition to Respondent's Motion to Dismiss specifically addressing the arguments of profit motive and statute of limitations on July 29, 2013 (R. p.p. 44-52.) The Order provided by Appellant referenced her Memorandum in Opposition (R. p.p. 53-55.) The arguments set forth in the Memorandum in Opposition were made part of the record and preserved for appeal.

On the other hand, the arguments set forth in Respondent's Motion to Dismiss were not filed prior to the Court's ruling on August 8, 2013 and have not been preserved for appeal other than the allegations in oral argument.

B. Attorney General as Defendant

Respondent argues that the Statute of Limitations should not be estopped as the Complaint only alleges actions by the Attorney General that engendered the delay in filing the action by Appellant. Respondent argues that only actions of the Defendant may be applied in Application of estoppel as provided under Christopher Scott Black v. Lexington School District No. 2, 327 S.C. 55; 488 S.E.2d 327 (1997) and Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000).

This case is unique in part because of the incestuous relationship between the Attorney General's office and the Respondent. In its historical ruling of Wilson v. Dallas, 403 S.C. 411; 2013 S.C. LEXIS 240 (2013) the South Carolina Supreme Court recognized and criticized this relationship:

> Brown's 2000 Irrevocable Trust contained a detailed procedure for the succession of trustees that was gutted and replaced with provisions **allowing the AG the sole authority to select the managing trustee and to serve at his pleasure** [emphasis added]. *Id. at 447.*
>
> [By the Chief Justice] The AG has taken unprecedented action in this case. After effecting a total takeover of Mr. Brown's estate by excluding its trustees and banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust. Along the way, a seemingly carefully executed testamentary devise was completely disregarded without any sworn testimony that the document, itself, is somehow defective. In asking this Court to give our imprimatur to the settlement agreement, Respondents effectively asked us to dispense with the cardinal rule of trusts and estates law that the intent of the testator must prevail wherever possible. See Johnson v. Thornton, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975) ("In determining this question we are guided by the rule that in construing the provisions of a will the intention of the testator is the primary inquiry of the court."); Limehouse v. Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971) ("The court's aim in construing a Will is to discover and effectuate the expressed intention of the testator."). **Were we to accept the new estate plan, we would undermine any confidence citizens may have in their ability to do with**

> **their personal assets as they wish, leading to a chilling effect on future testators in South Carolina wishing to make charitable testamentary devises, as the result sought by the AG would permit him to become the effective "super member" of the boards of directors or trustees of these future testators' foundations whenever he chose to intervene in the administration of their estates.** Evelyn Brody, Whose Public? Parochialism and Paternalism in State Charity Law Enforcement, 79 Ind. L. J. 937, 1034 (2004) [emphasis added]. Id. at 453
>
> **The AG gave himself sole authority to select, remove, and replace the managing trustee of the Legacy Trust.** Furthermore, the disinherited children and putative wife of Mr. Brown were authorized to select a trustee from whom the managing trustee would seek input and advice when managing the Legacy Trust [emphasis added]. *Id. at 454.*

Rarely does this Court have the opportunity to get facts directly from the South Carolina Supreme Court on the very case that it is being asked to rule. For the Respondent to argue its independence from the Attorney General when the facts have already been determined is at best disingenuous and at worst misguided.

The actions of the Attorney General through Sonny Jones as alleged in the Complaint which delayed Appellant in her pursuit of this action were those of the same party that appointed the Respondent in an effort to take over the Trust through the Settlement Agreement. Accordingly, this Court should treat the actions of the Attorney General as those of Respondent.

Taking the facts pled in a light most favorable to Appellant, the conduct of the Attorney General's office through Jones and, by extension, the Defendants in this action who were selected by Jones as Trustees, induced delays in the Appellant to proceed in the Trial Court and it was unjust of the Trial Court to not recognize those delays and estop the Statute of Limitations.

C. Statute of Limitations inapplicable in equity actions

As previously stated herein, this was a two-count complaint that sounded in equity for Declaratory Judgment and Accounting. It is well established doctrine in South Carolina that the

Statute of Limitations pursuant to S.C. Code Ann. § 15-3-530 is inapplicable for actions in equity. Mabel Dixon v. Stevan Fay Dixon, 362 S.C. 388; 608 S.E.2d 849; 2005 S.C. LEXIS 14 (2005).

The Trial Court's jurisdiction to rule in equity transcends the Statute of Limitations and therefore the argument that the Complaint was filed late under S.C. Code Ann. § 15-3-530 is moot. The Trial Court should have heard evidence and ruled based upon that evidence on Appellant's claims of partnership.

III. TRIAL COURT SHOULD HAVE ALLOWED AMENDMENT OF COMPLAINT.

As previously stated, Appellant inadvertently left out of the pleading facts that would have alleged profit motive between Appellant and Brown in spite of their attempts to jointly help children. This included income received from their joint music publications, fees from the organizations that were in business with them and the benefits that each received as "image enhancement" from the partnership.

The Trial Court dismissed Appellant's action with prejudice in the first draft of her Complaint. While Respondent argues that this issue is not preserved for appeal due to Appellant's failure to file a Rule 59(e) Motion, the Supreme Court allows this Court to act for Appellant and preserve justice in her pleading.

In Deborah W. Spence v. Deborah W. Spence, et al, 368 S.C. 106; 628 S.E.2d 869; 2006 S.C. LEXIS 124 (2006) the South Carolina Supreme Court recognized, in another Declaratory Judgment Action, the need to allow the Plaintiff in an action the ability to re-plead upon dismissal of their Complaint:

> When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an

> appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court **should follow this procedure** when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 1998 ME 70, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); Barkley v. Good Will Home Asso., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)); Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal) [emphasis added]. *Id. at 32-33.*

In this case Appellant has emphasized the charitable work done in the partnership at the expense of the commercial work done in the partnership that provided profits to Appellant and Brown. Appellant can easily amend the Complaint to include those facts and cure the alleged defects complained about by Respondent and used by the Trial Court to dismiss the action.

Furthermore, the Memorandum in Opposition to the Motion to Dismiss filed by Appellant requested the Trial Court to allow Appellant, in the alternative, to amend the Complaint rather than to dismiss it with prejudice (R. p. 52, lines 2-4.)

IV. INCLUSION OF RECORDS.

Respondent has sought this Court's indulgence in taking judicial notice of the records in other actions filed between the parties, including those filed in Federal Court in other states under 31A C.J.S. Evidence §96 (2013); Colonial Penn Insurance Co. v. Coil, 887 F.2d, 1236, 1239-40 (4th Cir., 1989); and, Rule 201(f), SCRE.

Appellant concurs and offers the Motion for Summary Judgment with exhibits and the

Respondent's Motion to Dismiss filed in the dismissed action between these same parties for the same cause of action in the United States District Court for the Northern District of Illinois, Western Division, case number 12 CV 50313.

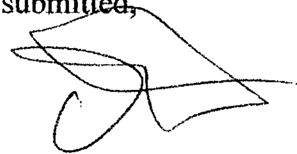
The Motion for Summary Judgment with Exhibits will provide this Court with unique and imperative insight as to the relationship between Appellant and Brown and the Motion to Dismiss will provide insight to this Court as to the representations of Respondent that this action needed to be heard before the Trial Court in South Carolina. Appellant has included those documents in their Designation of Record on Appeal.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

January 17, 2014



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