THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case No: 2014-002029

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SC Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

Doyet A. Early, Circuit Court Judge)
Case No. 2008CP4006656

JOHN R RAKOWSKY,

Respondent,

v.

Adrian L. Falgione, James Spencer, Estate of Doris Holt, Rodney Lail, Irene Santacroce, Marguerite Stephens, Ricky Stephens, Horry County, South Carolina,

Appellants.

JOINT INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether in an interpleader action filed by an attorney, allegedly to determine the rightful owner of trust funds deposited with him for litigation expenses, his seven individual clients are entitled to a detailed accounting in accordance with Rule 417, SCACR (Financial Recordkeeping) of the litigation funds both received and expended by the attorney.

2. Whether it was error to permit a purported expert to file a report with the Court, which report was used as the basis for the trial court's decision, when there was no opportunity to cross-examine the expert, nor to conduct discovery on the documents that were the basis of the expert's report or otherwise challenge the report?

3. Whether the court erred in allowing an attorney to file an equitable action (interpleader) when the attorney himself had unclean hands by not following the rules of professional conduct, Specifically Rule 407 1.8(g), 1.15 and 1.16 in the underlying litigation that gave rise to the attorney's interpleader complaint, the federal appeal over the existence of a settlement, and a legal malpractice action against the attorney?

4. Whether *ex parte* communications including deliberately providing documents to the court that were withheld from the Appellants, documents that were a basis of the judge's decision in not allowing Appellants' discovery in this case in his order issued on July 23, 2011, which Judge Early cited as "the law of the case", regarding production of accounting records accounting counterclaims and discovery,[1] and in a second instance the drafting and issuing of orders without

[1] This decision was appealed to the South Carolina Appellate Court on November 23, 2011. The Appellate Court ruled this was an interlocutory appeal and could not be heard before the

the knowledge or input from the Appellants' counsel in 2014 both violate the rules against ex parte communications but also violate procedural due process and in either event is a clear basis for a mistrial in this case.[2]

5. Whether the modification of an order of a prior judge granting permission to file counterclaims, conduct discovery, including depositions, and other relief to Appellants by denying such permission violated long standing South Carolina law set forth in *Dinkins v. Robbins*, 203 S.C 199, 26 S.E.2d 689 (1943).

6. Whether the attorney bringing the interpleader action is entitled to legal fees for bringing the interpleader, which, if granted, effectively awarded the attorney all of the funds at issue [defacto conversion] when if the attorney followed the rules, specifically Rule 407 1.8(g), 1.15 and 1.16 there would have been no question as to the disposition of the funds and in that regard

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Appellate Court until the final order was issued in this case. Judge Early wrongly claimed the *Pro Se* litigants failed to appeal the ex parte communications based decision at the time thus allowing Judge Seal's order to become "the law of the case."

[2] Instead, Judge Early issued orders through opposing counsel, Desa Ballard, without any input from Appellants. This meant that the Clerk had lost control of the Docket file and orders were issued through Respondent's counsel that the Clerk had no knowledge of. See Admin Deputy Clerk Gloria Tribble statement of September 29, 2014, and exhibits A,B,C of May 8, 2015 Appellants' petition for rehearing. In addition, this procedure showed that opposing counsel was really in charge of the case as much as the judge. Ms. Ballard actually issued ex parte orders on issues not litigated before the court and quite obviously created a decision against the Appellants and in favor of her own clients on these issues. This is a breach of procedural due process and a violation of the Appellants 5th and 14th Amendment Constitutional rights. Judge Early in effect allowed Respondent's counsel Desa Ballard to defacto control the execution of the case by signing off on the ex parte orders by Desa Ballard.

whether the court erred in breaching the representation contracts which clearly documented the attorneys were to receive no compensation in the event they had not covered expenses, a term mutually agreed to by the attorneys and each of his seven clients in writing.

7. Since the funds concerned litigation in federal court and the subject of that litigation is on appeal in the federal court system, should the court have granted Appellants' request to have the "settlement" funds deposited into the registry of the state court until the case was finalized in the federal courts and in accordance with the terms of the interpleader?

8. Whether the court failed in forcing the Plaintiff to comply with the terms and conditions of the interpleader complaint he filed in the court on September 12, 2008, which required his turning the funds in question into the court forthwith, instead of allowing the Plaintiff to refuse to comply with the terms of his own interpleader complaint during the eight-year duration of this case. This resulted in a loss of interest on the funds in question compounding for eight years.

9. Whether the indigent clients should be compensated for being denied access to their litigation funds and therefore denied access to adequate counsel and an expert in their legal malpractice case when this interpleader was filed by the lawyer who is alleged to have committed malpractice representing these indigent former clients and the interpleading the litigation funds can only be considered litigation in "bad faith", and/or misuse of the judicial process to deprive his former clients of funds for counsel to effectively litigate both the interpleader and the legal malpractice case also currently being appealed.

STATEMENT OF THE CASE

In a complaint filed on September 12, 2008, Plaintiff, John Rakowsky ("Rakowsky"), an attorney, brought an action in the nature of interpleader in which he sought "an order allowing him to pay certain funds in the amount of sixty-four thousand, eight hundred fifty-five dollars and eighty-five cents ($64,855.85) into court and to make a determination of the owners of said funds which are hereby tendered to the Court." Initial Complaint, p. 1. The complaint was later amended to add additional parties.

The defendants in the interpleader who responded to the Second Amended Complaint are: The Law Offices of Adrian L. Falgione, LLC (see order filed December 2, 2012), Horry County (Answer dated December 29, 2010), James Spencer ("Spencer"), Estate of Doris Holt ("Holt"), Rodney Keith Lail ("Lail"), Irene Santacroce ("Santacroce"), Marguerite Stephens ("M. Stephens") and Ricky Stephens (hereafter "R. Stephens").

The funds that are the subject of the interpleader are the sums advanced by the clients for litigation expenses (non-attorney compensation) as well as the proceeds of a purported settlement in a case entitled *Southern Holdings Inc, et al. v. Horry County et al.*, Civil Action No. 4:02-cv-1859-RBH ("Southern Holdings case"), which was filed in the United States District Court for the District of South Carolina by a number of individual plaintiffs, some of whom are defendants in this case. The Southern Holdings case was purportedly settled pursuant to an agreement placed on the record on May 9, 2007. Since that time, one or more of the plaintiffs in the Southern Holdings litigation have filed motions in the District Court and the United States Court of Appeals

for the Fourth Circuit attempting to set aside the settlement. Proceedings remain pending in the Court of Appeals.

Solo practitioner John Rakowsky and attorney Adrian Falgione, who practices law under the corporate entity defendant The Law offices of Adrian L. Falgione, LLC, were counsel of record in the Southern Holdings case at the time of the purported settlement.

In their pro se answer, portions of which were stricken by order of Judge Seals dated July 25, 2011, Spencer, Holt, Lail, Santacroce, M. Stephens, and R. Stephens, requested that the Court deny the interpleader regarding the remaining litigation funds. They asserted that the remaining litigation funds "were solely advanced by 'RSC,' under the written condition that such funds were to be expended only under the specific direction of Defendant Spencer." They sought "the release of the entire amount of litigation funds. . .," *Id.* 16, as well as an accounting of litigation funds, and further demanded that all funds in the possession of Rakowsky (both the settlement funds and the remaining litigation funds) "be transferred forthwith into the trust account of the captioned Defendants' self-designated legal counsel." *Id.* p. 6 of 8.

Spencer, Holt and Santacroce and all the former clients had previously requested that the remaining litigation funds be released by certified check" to "the trust fund of Singleton, Burroughs, and Young , P.A., to be credited in the name of Irene Santacroce and James Spencer for use as directed by James Spencer." Motion for Court to Order Immediate Release of Funds, filed October 20, 2008). But that application was abandoned for lack of unanimous consent. However, unanimous consent of all the client defendants was obtained in writing and presented to the court. It is important to note that every funder Spencer and Rakowsky used had advanced

nonrecourse funds in that the lenders gave up all rights to claims on the funds advanced no matter the outcome of the case.

Although the "self-designated legal counsel" was not identified in the pro se answer, a Notice of Appearance was later filed by attorney Michael G. Sribnick on December 9, 2013. Sribnick filed an "objection" to the interpleader dated January 26, 2014.

A motion hearing was conducted on February 25, 2014, concerning a (1) Motion to Release Uncontested Litigation Funds, filed October 20, 2008; (2) Motion for Jury Trial, filed July 14, 2011; (3) Motion to Amend Answer and Counterclaim, filed August 29-30, 2011; and (4) Motion for Sanctions (against attorney Stephanie Weissenstein) filed December 20, 2011.

The Court directed Rakowsky and Falgione to provide affidavits and evidence detailing the receipt and disbursement of all litigation funds that were advanced for the Southern Holdings litigation so the Court could rule on the pending Motion to Release Uncontested Litigation Funds filed October 20, 2008. By email to the counsel and Spencer on February 27, 2014, the Court required "affidavits and evidence of all monies paid to Plaintiffs' counsel in the original lawsuit for litigation expenses be provided to the Court no later than 10 days prior to hearing."

In an order dated June 27, 2014, the Court reserved ruling on the Motion for Jury Trial, filed July 14, 2011, the Motion to Amend Answer and Counterclaim, filed August 29/30, 2011, and the Motion for Sanctions (against attorney Stephanie Weissenstein) filed December 20, 2011. It then (1) directed (a) the release of the balance of litigation funds in the amount of $7, 691.78 to Spencer, which was stayed until the time for appeal of the order expired, and the order became final; (2) Spencer to indemnify and hold harmless all other parties to this action as well as their

attorneys, agents, assigns, successors, heirs, representatives and insurers from any and all claims, demands, causes of actions, payments, bills, charges, etc.; (3) released Rakowsky from all responsibility for the remaining litigation funds and any related claims; and (4) retained jurisdiction of the remaining portion of the action which sought an interpleader as to the settlement funds from the Southern Holdings case once the federal court action became final.

In an order filed December 23, 2014, the Court resolved all of the remaining issues in the case. It denied the (1) motion for a jury trial, holding that it had not been timely made; (2) motion to amend the answer and counterclaim, finding that Judge Seal's ex parte driven order constituted the law of the case;[3] and (3) motion for sanctions, referring to its earlier order and finding that "there were never any 'uncontested' litigation funds" so there was no basis for sanctions.

The Court then effectively gave Rakowsky the entire "pot" of money. Citing *Byrd v. Livingston*. 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), a case having nothing to do with the issues at hand, held that Rakowsky "is entitled to his fees and costs for bringing this action to conclusion." "Rakowsky . . . requested reimbursement for attorney's fees in the amount of $66,172.35," which the Court found "reasonable."

Paying absolutely no attention to the parties' written and executed agreement concerning the fees to be paid in the federal action, the Court then granted the interpleader, and ordered (1) "Rakowsky . . . be paid $22,000.00 in attorney fees from the settlement proceeds for his representation of the Southern Holdings plaintiffs in the Southern Holding litigation. These funds

[3] Op. cit. footnote 1

are to be shared with Falgione in whatever division they mutually agreed. Allocation of these funds between Rakowsky and Falgione is not before this Court"; (2) "Rakowsky's request for equitable indemnification [be] granted in part. In addition to the award above, Rakowsky shall receive the amount of $33,000.00 as reimbursement toward his reasonable attorney fees and costs incurred by him in bringing and prosecuting this matter to conclusion"; (3) Rakowsky's request for additional compensation for the balance of his fees, be denied, as the funds were exhausted; (4)" Rakowsky be discharged from any further obligations regarding the settlement proceeds he received in his capacity as counsel for the Southern Holdings plaintiffs. Any and all claims which might have been made by any persons who are now or have been parties to this action against those funds are extinguished"; and (5) directed the Clerk of the Court "to execute a general release in favor of Horry County and the settling defendants in the Southern Holdings action on behalf of the Southern Holdings plaintiffs, to be prepared by counsel for Horry County. The general release shall release those defendants from claims that were brought or could have been brought in the Southern Holdings litigation."

ARGUMENT

A. Rakowsky Has a Duty to Account

It is basic South Carolina law that an attorney is a fiduciary and as such owes a duty to his or her client to render an accounting for all moneys coming into the attorney's hands. See, e.g., *Matter of Moore*, 280 S.C. 178, 312 S.E.2d 1 (1984). The South Carolina Supreme "Court has made it abundantly clear that an attorney is charged with a special responsibility in maintaining and preserving the integrity of trust funds." *Matter of Padgett*, 290 S.C. 209, 211, 349 S.E.2d 338

(1986) (citing numerous cases). Indeed, the Supreme Court has emphasized that, even where the funds are obtained in a transaction that does not involve the "typical attorney-client relationship," once the attorney "voluntarily assumed the obligation of handling these funds, he incurred the duty to properly account for them." *Ibid.*

Rule 1.15 of the South Carolina Rules of Professional Conduct mandates that all attorneys must comply with Rule 417, SCACR (Financial Recordkeeping). Rule 1(d) of Financial Recordkeeping requires that accountings be rendered to clients.

In short, there was no need for the interpleader if the Attorney's had followed the South Carolina Code of Ethics and furthermore if the financial records were in compliance with the South Carolina Rules there would have been no reason to deny the financial records to the former clients pertaining to the handling of their funds when such a denial violates South Carolina public policy in that the Appellants are entitled to a proper accounting in accordance with Rule 417, SCACR (Financial Recordkeeping).

B. <u>The Proper Procedure for an Accounting Proceeding was Not Followed</u>

Rakowsky filed an affidavit of Mara T. Ballard, CFE and CMA, who began to examine his "trust fund records . . . [in] 2008 , when Las Vegas attorney Ron Serota filed a complaint against Mr. Rakowsky with the Office of Disciplinary Counsel." Affd. Of Mara T. Ballard, p.1, para. 3. She concedes that this "review" was conducted on incomplete records supplied ***(emphasis added)*** by Mr. Rakowsky. *Id.* at n. 1.

If the affidavit constituted an "accounting," then Appellants had the right to object to it and a formal hearing was required following discovery. If it was intended to be an "expert" report, then

Appellants were entitled to challenge it through live cross-examination. In this case, the expert relied on hearsay evidence as a basis for her expert report[4], the Appellants were denied access to the documents the expert purportedly used to reach her opinion, denied cross-examination of the expert and Respondent and the court refused to allow the expert to be deposed despite the fact the expert was subpoenaed for deposition. This clearly violates Rule 26 (b)(4)(A) of the SCRCP which states: "Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses."

The procedure for an accounting by a fiduciary - and there is no question that an attorney is a fiduciary, see *Matter of Moore*, 280 S.C. 178 discussed above– is well settled in South Carolina. In *McNulty v. De Sausstjre*, 41 S.C. 457, 19 S.E. 926, 929, 944 (1894), our Supreme

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[4] The Appellate Court of South Carolina has ruled that a party to a lawsuit who presents an expert report is to present both the materials upon which the report presented to the Court was based, and the individual(s) who developed the report is/are to be available for deposition by the adverse party(s). In that regard, in *Allegro, Inc. v. Scully,* the South Carolina Appellate Court found an exception for the admission of inadmissible hearsay evidence like what Mara Ballard presented in this case when the expert testifies at trial and/or is available for cross examination neither of which occurred in this case, the Court ruled in *Scully*:

> "The report contained many instances of hearsay, including numerous statements by Scully. However, "the admission in evidence of inadmissible hearsay affords no basis for reversal where the out-of-court declarant later testifies at trial and is available for cross-examination." *Allegro, Inc. v. Scully,* 409 S.C. 392, 411, 762 S.E.2d 54, 64 (Ct. App. 2014)

Court directed that the procedure set forth in *Duncan v. Tobin*, Cheves, Eq. 14, be followed: "' 'According to the practice of the English courts, all parties accounting before the master are required to bring in their accounts in the form of debtor and creditor, accompanied by an affidavit a verification of the accuracy of the schedules in which are contained the details of the account, and, if any of the parties are dissatisfied with it, they may examine the accounting party on interrogatories. If the party asking the account sets up a charge not admitted in the account nor on the examination of the accounting party, he must substantiate it by evidence; when that is done either by admission or proof, the accounting party must discharge himself by the production of receipts or other competent evidence.'"

When challenged, the attorney "must vouch each item by the production of receipts or other competent evidence of such disbursements." *Id.*,19 S.E. at 944. Obviously, this was not done here, so the determination below cannot stand.

To the extent that the "report" was received as some kind of expert testimony, it, of course, constituted classic hearsay. See SCRE 801(c) (defining hearsay as a "statement, other than one made by the declarant while testifying at the trial, or hearing, offered in evidence to prove the truth of the matter asserted"). As so well explained in *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 544 (5th Cir.1978), "to admit the hearsay opinion of an expert not subject to cross-examination goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render an opinion." *Bryan* has been held to state the law of South Carolina. See *State v. Slocumb*, 336 S.C. 619, 635 *et seq.* , 521 S.E.2d 507 (S.C. App. 1999).

Finally, it should be noted that, during the course of the proceedings, at that time before Judge Barber, Rakowsky consented to the filing of an amended answer and counterclaim, and Judge Barber ordered that a deposition could be taken of Rakowsky. Transcript of May 7, 2012, pp. 22, 23, 24. That determination was effectively overturned by Judge Early. This violated the settled South Carolina rule that one judge of coordinate jurisdiction cannot overturn the ruling of a fellow coordinate judge. See, e.g., *Dinkins v. Robbins*, 203 S.C 199, 26 S.E.2d 689 (1943). Although it is true that the oral ruling would not be binding on Judge Barber, who was free to change his mind, see *First Union Nat. Bank of South Carolina v. Hitman, Inc.*, 308 S.C. 421, 418 S.E.2d 545 (1992), it is nonetheless binding on Judge Early. See *Charleston County DSS v. Father*, 317 S.C. 283, 392, 454 S.E.2d 307, 312 (1995) (a successor judge has no "discretion" to "reweigh the evidence where the trial judge has made findings of fact supported by evidence in the record.")

C. <u>It Violates Due Process to Consider Evidence without Disclosing it to All Parties</u>

Quite aside from this, Rakowsky deposited documents with the Court that explicitly were not supplied to the Appellants. In a letter of transmittal dated February 20, 2011, which was copied to Mr. Rakowsky only and not the Appellants, counsel submitted a "full copy of the [sic] Motion to Strike and to File under seal. . . . Unlike the filed copy, this copy includes the confidential exhibits for the court's consideration *in camera.*" Letter dated February 20, 2011.

That this constituted a fundamental denial of due process was well put by the Supreme Court in *Morgan v. United States,* 304 U.S. 1, 19-20 (1938): "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals

without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." See also *Mazza v. Cavicchia*, 15 N.J. 498, 105 A.2d 545 (1954).

" *[E]x parte* communication is defined as 'prohibited communication between counsel and the court when opposing counsel is not present.' " *Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440 n. 3, 581 S.E.2d 836, 838 n. 3 (2003) (quoting Black's Law Dictionary 597 (7th Ed.1999)). The Code of Judicial Conduct prohibits a judge from initiating, permitting, or considering ex parte communications unless the judge takes certain precautions, including but not limited to notifying the other parties of the substance of the ex parte communication and giving them the opportunity to respond. Rule 501, SCACR, Canon 3(B)(7)(a)(ii).

Judge Seal's never revealed the content of the ex parte communications that led to his ruling which Judge Early cited as "the law of the case."[5] This law tainted the entire proceeding, calling for reversal of all decisions and a new hearing before a different judicial officer.

D. <u>The Settlement Funds Should Have Been Deposited in Court to Await the Final Decision on the Appeal in the Federal Courts.</u>

" Rule 22(a), SCRCP, is substantially the same as its counterpart in the Federal Rules of Civil Procedure; therefore, in the absence of prior state law on the issue in question, federal cases

[5] December 23, 2014, Final Order, Page 8, Section 3, line 4.

interpreting the rule are persuasive." *First Union Nat'l Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 499, 469 S.E.2d 613, 616 (Ct. App. 1996), rev'd in part, 328 S.C. 290, 494 S.E.2d 429 (1997). Thus, as required by Rule 22(b), "A proper deposit or bond is a jurisdictional prerequisite to bringing an interpleader. . . .The stakeholder invoking interpleader must deposit the largest amount for which it may be liable in view of the subject matter of the controversy." *U.S. Fire Ins. Co. v. Asbestospray Inc.*, 182 F.3d 201, 210 (3d Cir. 1999); see also Charles A. Wright, Arthur R. Miller, et al., 7 Federal Practice & Procedure § 1716 (3d Ed. 2014).

In point of fact, this very issue was discussed before Judge Barber. He wanted a consent order to be signed and the money paid into court. Transcript of May 7, 2012, at pp. 33, 37-38.

There was no basis for deviating from this procedure. Indeed, the money should stay on deposit until the federal courts makes a final determination with respect to the settlement.

The circuit court has discretion whether to grant a stay of a matter pending before the court. *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985); *City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 480, 20 S.E.2d 157, 167 (1942). Although the appropriate standard of review is abuse of discretion, "An abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). As shown above, the determination is clearly infected with error of law.

E. Under No Circumstances is Rakowsky Entitled to Recover Attorney's Fees

The court below awarded attorney fees for Rakowsky's work in the federal court and for the interpleader. Insofar as the federal court was concerned, this was a matter to be determined by their contractual agreement. Under no circumstances is he entitled to legal fees for the interpleader. *Byrd v. Livingston.* 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), cited by the court below in support of its ruling, has nothing to do with the issues at hand.

No extended discussion is required concerning the award for services in the federal litigation. There is no overriding public policy so the court "lacked jurisdiction to affect the private contract rights between attorney and client." *Bazzle v. Huff,* 319 S.C. 443, 445, 462 S.E.2d 273 (1995); see also *Getzen v. Law Offices of James M. Russ, P.A.,,* 323 S.C. 377, 383, 475 S.E.2d 743 (1996).

Under the representation agreements, Rakowsky was entitled to one-third (1/3) of the settlement funds, that exceeded expenses at best, not 40%, as the contingency only increased to 40% in the event of trial. See objections to account, exhibit "A," agreement as to legal fees. However, since the expenses accounted for by Rakowsky exceeded $57,000.00 and the total funds from the settlement were $55,000.00, Rakowsky and Falgione under the mutually agreed to terms of the representation agreements are entitled to no legal fees.

With respect to the award of attorney fees in the interpleader, in *First Union Nat. Bank of South Carolina v. FCVS Communications*, 328 S.C. 290, 293, 494 S.E.2d 429 (1997), our Supreme Court reversed an award of counsel fees in interpleader litigation stating as follows: "we reverse

the Court of Appeals' ruling that Bank was entitled to attorney's fees as an innocent stakeholder in this case. Attorney's fees are not recoverable unless authorized by contract or statute."

Moreover, the rule in state courts, as well as federal courts, is that a pro se attorney cannot charge a legal fee because a pro se litigant, whether an attorney or layperson, as a pro se attorney does not become 'liable for or subject to fees charged by an attorney.'" *Calhoun v. Calhoun*, 339 S.C. 96, 100, 529 S.E.2d 14 (2000). The "cardinal criterion" "is that the party claiming a right to a fee has paid or owes another person money for legal services rendered and that an attorney who appears on his or her behalf does not incur such an obligation." *Id.* Federal courts apply the same rule. See, e.g., *Kay v. Ehrler*, 499 U.S .432 (1991); *Doe v. Board of Education of Baltimore County*, 165 F.3d 260 (4th Cir.1998) (denying statutory fees to an attorney-parent of a child) cert. denied, 526 U.S. 1159 (1999); *SEC v. Waterhouse*, 41 F.3d 805, 808 (2d Cir.1994).

Although the rule in federal interpleader is more liberal in awarding legal fees, nonetheless, where the party bringing the interpleader is not a mere stakeholder who tenders the money into court, the party is not entitled to an attorney's fee. As a leading treatise in federal practice puts it, "[t]ypically," attorney's fees "are available only when the party initiating the interpleader is acting as a mere stakeholder, which means that the party has admitted liability, has deposited the fund in court, and has asked to be relieved of any further liability." Charles A. Wright, Arthur R. Miller, et al., 7 Federal Practice & Procedure § 1719 (3d Ed. 2014); see, e.g., *Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61, 63 (5th Cir. 1976) (affirming a trial court's denial of attorney fees when the interpleader "actively took a position opposing [one of the claimant's] claims and supporting the claims of [the other claimant]").

The applicable rules governing the award of attorney fees and other costs in federal interpleader are well-stated in *Trustees of Directors Guild of America v. Tise*, 234 F.3d 415 (9th Cir. 2000) opinion amended upon denial of rehearing and rehearing en banc. 255 F.3d 661 (9th Cir. 2001). "Because the interpleader plaintiff is supposed to be disinterested in the ultimate disposition of the fund, attorneys' fee awards are properly limited to those fees that are incurred in filing the action and pursuing the plan's release from liability, *not in litigating the merits of the adverse claimants' positions*." *Tise,* 234 F.3d at 427 (emphasis added). Compensable expenses are limited to items such as "preparing the complaint, obtaining service of process on the claimants to the fund, and preparing an order discharging the stakeholder from liability and dismissing it from the action." *Id.*

Thus, there is no basis for awarding attorney fees.

F. <u>Appellants are Entitled to Compensation for the Loss of their Funds</u>

Appellants have been deprived of their funds for over eight years, due to the machinations of Rakowsky in failing to properly account for funds entrusted to him. In these circumstances, where an application for sanctions has been filed, *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996) provides a basis for relief.

The facts in *Runyon* bear an unfortunate resemblance to those here. In that case, after a judgment was entered against an attorney, he filed an interpleader action that same day, claiming that the funds were subject to forfeiture as drug money. When the Solicitor dropped any claim, the attorney then sought to recover almost half of this money as "attorney's fees and costs" incurred as a result of remaining a party to the action. In his written motion for summary judgment the

attorney said that he was willing to give the clients what was left of the fund. At the hearing on his motion he moved for additional attorney's fees and asked the court not to disburse the remaining monies until the client's malpractice action was resolved. According to the attorney, he wanted what was left of the fund to help satisfy an award of sanctions he hoped to receive in the malpractice action the clients had brought against him.

The circuit court found that the attorney's claims in the matter were without merit and were brought in bad faith. Consequently, as a sanction, the court ordered appellant and his attorney to pay the clients a monetary sanction, and, in addition, the court ordered the entire fund released to the clients, and ordered him to pay the outstanding interest accumulated on the fund. On appeal, our Supreme Court affirmed.

Indeed, Judge Barber advised everyone that since Plaintiff admitted that there were no conflicting claims to the $9,500, the money should be paid into court and a prompt hearing conducted. Transcript of May 7, 2012, at pp. 33, 37-38.

The Appellants have been wrongfully denied access to their litigation funds for eight years by a misuse of the judicial process by their former counsels in filing this interpleader complaint regarding the litigation funds. For eight years, they have had to pay the costs of court and endure the expenses of hiring individuals to do legal research along with incurring legal fees, and lost interest for Plaintiffs refusal to turn the money into the courts. They were forced to sit by and watch a judge award the money to the attorneys despite the failure of the attorneys' to comply with the law and the rules of ethics.

Appellants humbly request the money that they expended for this eight yearlong interpleader action including, but not limited to their court costs, legal fees, direct research costs, courier fees, and their lost interest be awarded to Appellants from the Respondent. Appellants seek punitive damages in an amount to deter this from happening to clients of attorneys who instead of complying with the law defy the law and then punish the clients through the misuse of judicial process to keep their failure to follow the required rules from being rectified.

CONCLUSION

For the reasons stated, the judgment should be reversed and the cause remitted for further proceedings.

Dated: October 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 26, 2015, the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail or by courier.

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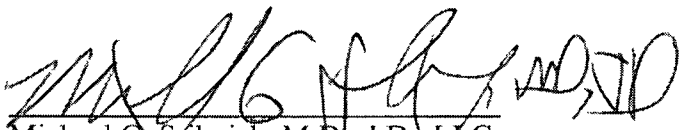

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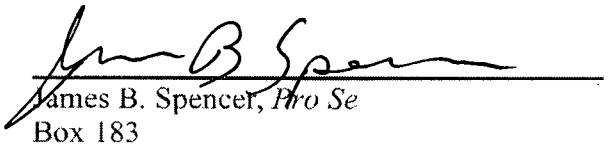

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