

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Deborah S. Dubose,)
)
 Plaintiff,)
)
 vs.)
)
 Ashley C. Cone and Branch Bank & Trust)
 Company,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

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Civil Action No. 2014-CP-40-3104

DEC 01 2015

SC Court of Appeals

**ORDER GRANTING
 DEFENDANT'S MOTION FOR
 SUMMARY JUDGMENT AND
 DENYING PLAINTIFF'S MOTION
 FOR SUMMARY JUDGMENT**

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This matter is before the Court on cross motions for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. A hearing on these motions was held in Columbia, South Carolina on April 16, 2015. Pope D. Johnson, III and Arthur E. White, III appeared on behalf of Plaintiff Deborah S. Dubose ("Plaintiff" or "Deborah") and Thornwell F. Sowell, III and Bess J. DuRant appeared on behalf of Defendant Ashley C. Cone ("Defendant" or "Ashley"). The Court has carefully considered the issues presented by Plaintiff's and Defendant's motions, the arguments of counsel, and the applicable legal theories. The Court finds that Defendant is entitled to summary judgment in his favor as to all of the causes of action set forth in the Complaint for the reasons set forth herein.

FACTS AND PROCEDURAL HISTORY

Ashley Cone was the son of G. Hollis Cone ("Hollis"). Hollis became ill with liver cancer in the fall of 2013. Soon after the diagnosis, Hollis died on January 26, 2014. However, ten days prior to his death, Hollis married Deborah Dubose on January 16, 2014.

On the same day that Hollis married Deborah, Hollis and Deborah signed a Waiver of Spousal Rights Agreement ("Waiver"), in which Deborah agreed to waive any spousal rights in

exchange for receiving (a) \$2.8 million from Hollis's life insurance policies and (b) possible proceeds from Hollis's Buy-Sell Agreement with his former business partner. The Waiver also provided that jointly held property, as between Hollis and Deborah, would be distributed to Deborah. (Waiver ¶ D (Emphasis added).) The Waiver further stated that it can be amended or modified, provided that the amendment or modification be in writing and signed by Hollis and Deborah. (Waiver ¶ J.)

On the following day – January 17, 2014 – Hollis changed his individual account with BB&T into a joint account and added Ashley and Deborah to the account. On or about January 17, 2014, Hollis, Ashley, and Deborah signed a signature card for the BB&T Account. As stated on the BB&T Signature Card, Hollis, Ashley, and Deborah agreed to the following:

We understand that BB&T may pay any or all of the funds in the account on the order of any one person named on the account. Upon the death of a party to the account, the deceased party's ownership in the account passes to the surviving party or parties in the account. . . .

Hollis, Ashley, and Deborah indicated their agreement with this term, along with many others, by signing directly underneath this term. In addition to this term, Hollis, Ashley, and Deborah agreed that (1) each of them is a co-owner of the account; (2) each of them serves as each other's agent "to deposit, withdraw, and conduct any business on the joint account;" and (3) each may withdraw or transfer any and all of the funds in the account. (See BB&T Bank Services Agreement, dated Dec. 16, 2013, § C(2).) Hollis died nine days after he made the account joint.

Upon Hollis's death on January 26, 2014, the funds on deposit in the BB&T Account passed to Ashley and Deborah, the surviving parties, in accordance with the terms of the BB&T Account. The balance of the BB&T Account was \$183,255.24 on January 26, 2014. (Aff. of Ashley C. Cone ¶ 5.) Deborah has already received slightly over half of the \$183,255.24. (*Id.* ¶ 6.) She received a \$68,459.91 BB&T counter check on or about April 2, 2014. (*Id.* ¶ 7(a).) She

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withdrew \$19,871.62 from the BB&T Account on or about April 1, 2014. (*Id.* ¶ 7(b).) Finally, her personal bills, totaling \$3,296.56, were paid by Ashley. (*Id.* ¶ 7(c).) Consequently, Deborah has received \$91,628.09 in funds from the BB&T Account. (*See also* the deposition transcript of Deborah Dubose on file with the Court.)

After Hollis's death, Ashley wrote a check to himself on the BB&T Account for \$130,000.00. (*Id.* ¶ 8.) He deposited the check into his personal account at TD Bank. (*Id.*) Of this \$130,000.00, Deborah has received \$68,459.91, while the Estate of G. Hollis Cone has received \$3,296.56. (*Id.*) The remaining \$57,931.77 is still on deposit in Ashley's TD Bank account. (*Id.*) The funds that Ashley has withdrawn from the BB&T Account have been used to pay for bills and expenses of Deborah and Hollis. (*Id.* ¶ 9.)

In May of 2014, approximately three and one-half months after Hollis's death, Deborah filed this lawsuit against Ashley, asserting three causes of action – (1) declaratory judgment that Deborah is the sole owner of the funds in the BB&T Account, as of Hollis's death, (2) conversion, and (3) constructive trust. Specifically, Deborah claims that she is entitled to all of the funds in the BB&T Account (1) because Hollis wanted her to have the funds "so that she would have the funds to live on while his estate was being settled"; (2) because the Waiver states jointly held property, as between Hollis and Deborah, shall pass to Deborah; and (3) Section 62-6-202 of the South Carolina Code provides that Deborah, as surviving spouse, is entitled to Hollis's interest in the BB&T Account. (Compl. ¶¶ 3-6.)

The parties engaged in written discovery, and counsel for Ashley deposed Deborah. Counsel for Deborah noticed Ashley's deposition, but later canceled the deposition. Both parties

filed motions for summary judgment, which were heard by this Court on April 16, 2015. Both motions were supported by affidavits of the parties.¹

Despite the filing of cross motions for summary judgment, counsel for Deborah – Pope D. Johnson, III and W. Steven Johnson – submitted their own affidavits opposing the entry of summary judgment. Two days before the hearing, Deborah filed the Affidavit of Pope D. Johnson, III, in which Mr. Johnson claims that discovery is not complete because he wants to take the deposition of Ashley, along with his siblings. (Aff. of Pope D. Johnson, III, filed April 14, 2015.) On the day of the hearing, Deborah filed the Affidavit of W. Steven Johnson, in which Mr. Johnson provides that he would like to take (1) the deposition of Catherine H. Kennedy to establish the legislative intent and public policy behind Section 62-6-202 and (2) the deposition of David Sojourner, Hollis's estate planning lawyer, to determine Hollis's intent as to the funds and what advice Sojourner rendered to Hollis. (Aff. of W. Steven Johnson, filed April 16, 2015.)

LEGAL STANDARD

Both Plaintiff and Defendant have moved for summary judgment. Summary judgment is appropriate if the pleadings and other supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

¹ At the hearing, counsel for Deborah challenged the Affidavit of Ashley C. Cone and its exhibits on the grounds (1) that it contained exhibits that are not authenticated and (2) that it was not served with the motion for summary judgment. However, the documents attached were authenticated *by Deborah* in her deposition, as evidenced by the deposition transcript attached to Ashley's memorandum in support of his motion and the copy of Deborah's deposition transcript that was handed up to this Court at the hearing by Ashley's counsel. Moreover, the deposition transcript contains the same facts that were offered in the Affidavit of Ashley C. Cone. Consequently, Deborah could not be surprised by the information in the affidavit, eliminating any prejudice that Deborah may have had by not receiving the affidavit with the motion for summary judgment. The Affidavit of Ashley C. Cone, therefore, is properly considered by this Court.

Rule 56(c), SCRPC. In determining whether to grant summary judgment, a court must view the evidence and its reasonable inferences in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 438 (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

In determining whether a genuine issue of fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). At the summary judgment stage, "the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (citing case). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

Applying this standard to the present case, I find that there are no genuine issues of material fact that must be submitted to a fact finder and that the undisputed evidence establishes as a matter of law that the funds at issue passed to Ashley and Deborah, upon the death of Hollis, pursuant to Section 62-6-203 of the South Carolina Code. Consequently, Deborah's claims for declaratory judgment, conversion, and constructive trust fail as a matter of law. Therefore, this Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

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LAW/ANALYSIS

I. **ASHLEY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE FUNDS PASSED TO BOTH ASHLEY AND DEBORAH.**

As provided in Section 62-6-203(a) of the South Carolina Code, the rights of Ashley and Deborah were determined by the terms of the account, upon Hollis's death. The terms of the BB&T Account clearly provide that the funds passed to both Ashley and Deborah, upon Hollis's death. Moreover, Deborah has waived any claims to any spousal rights in the Waiver. Finally, the discovery sought by Deborah cannot change the result that the terms of the BB&T Account control. Ashley and Deborah are entitled to the funds, as a matter of law.

A. **The Terms of the BB&T Account Govern, Not Section 62-6-202.**

Pursuant to the terms of the BB&T Account, the funds passed to Ashley and Deborah – not solely Deborah – upon Hollis's death on January 26, 2014. Specifically, the BB&T Account states as follows:

We understand that BB&T may pay any or all of the funds in the account on the order of any one person named on the account. *Upon the death of a party to the account, the deceased party's ownership in the account passes to the surviving party or parties in the account.*

(Emphasis added.) Consequently, upon Hollis death on January 26, 2014, Hollis's ownership in the BB&T Account (which was the all of the funds in the account) passed to Ashley and Deborah. Notably, Hollis, Deborah, and Ashley signed directly underneath this language. Even if their signatures were not placed in such immediate proximity, Deborah is still bound by this term and had a duty to read it, along with every other term. *See Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39-40, 340 S.E.2d 786, 789 (1986) ("As early as 1924, this Court recognized that every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.")

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Section 62-6-202 of the South Carolina Code does not absolve Deborah from her duty to read the BB&T Bank Agreement or relieve her from being bound by it. Specifically, Section 62-6-202 provides as follows:

Except as otherwise provided in this subpart, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. . . .

However, the terms of the BB&T Account trump this statute. Section 62-6-203(a), which immediately follows Section 62-6-202, states "[r]ights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party." The terms of the BB&T account provide that Ashley and Deborah share in Hollis's ownership of the account. Section 62-6-202 is of no legal moment when the parties contract otherwise. The terms of the BB&T Account control, not Section 62-6-202. Hollis's interest passed to both Ashley and Deborah, and Deborah has received her rightful share. (See Aff. of Ashley C. Cone & Deposition Transcript of Deborah Dubose.) Consequently, all of Deborah's claims – (1) declaratory judgment that she is the owner of the BB&T joint bank account funds, (2) conversion, and (3) constructive trust – cannot be sustained as a matter of law. Ashley Cone therefore is entitled to summary judgment.

B. Deborah Waived All Spousal Rights in the Waiver.

This Court does not find that Deborah had any operable rights under Section 62-6-202 because Section 62-6-203(a) provides that "[r]ights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party." However, even if Section 62-6-203(a) did not exist, Deborah waived all spousal rights by entering into the Waiver. In the Waiver, Deborah "irrevocably renounces, releases, and forever waives" all spousal rights in exchange for receiving (a) \$2.8 million from Hollis's life insurance policies and (b) possible

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proceeds from Hollis's Buy-Sell Agreement with his former business partner. (Waiver ¶¶ A-C.) Section 62-6-202(a) allows for a surviving spouse (over any other joint account owner) to receive the deceased spouse's interest in the joint account, provided the terms of the joint account do not provide otherwise. This is a spousal right. Deborah waived this spousal right in the Waiver. She cannot rely on Section 62-6-202(a) to circumvent the Waiver.

C. The Discovery Sought by Deborah Cannot Avoid Granting Summary Judgment to Ashley.

The purported evidence sought by Deborah is either inadmissible or irrelevant and is of no moment with respect to the cross motions for summary judgment. Deborah, through her attorneys Pope D. Johnson, III and W. Steven Johnson, contends she needs to depose Ashley, his siblings, Catherine H. Kennedy, Esquire, and David Sojourner, Esquire. Pope Johnson claims he needs to depose Ashley and his siblings to ascertain Hollis's intent regarding the BB&T Account and another joint account at TD Bank, along with the reasoning behind Ashley's decision to pay funeral and estate expenses and to pay some of the funds to Deborah. (Aff. of Pope D. Johnson, III ¶ 5.) Steve Johnson claims he needs to depose Catherine H. Kennedy, Esquire because he believes² that Kennedy will testify as to the legislative intent and public policy behind that Section 62-6-202. (Aff. of W. Steven Johnson ¶¶ 4-5.) Finally, Steve Johnson claims that he needs to depose David Sojourner, Hollis's estate planning attorney, to obtain Sojourner's advice to Hollis and understand his intent with respect to the BB&T Account.

² Affidavits that rely on statements based upon information and belief do not comply with Rule 56 and are insufficient to raise an issue of material fact. *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 831 (1950); *see also Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (“Allegations made upon information and belief do not meet the ‘personal knowledge’ requirements of Rule 56(e).”) The Affidavit of W. Steven Johnson is riddled with statements made “upon information and belief” (*see* Aff. of W. Steven Johnson ¶¶ 4, 6-8, 10), and therefore, fails to meet the requirements of Rule 56, SCRPC.

Most of this information sought by Deborah is inadmissible, and none is relevant for purposes of these cross motions for summary judgment. Regarding Ashley's and his siblings' possible testimony, his conversations with Hollis are inadmissible under the Dead Man's Statute. See S.C. Code Ann. § 19-11-20; see also *Hanahan v. Simpson*, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997) ("The rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted."). As for Ashley's reasons to pay estate and funeral expenses and Deborah's personal expenses, such testimony is unrelated to the ownership of the funds, which is the underpinning for each cause of action. Ashley's reasoning has nothing to do with any of the causes of action, and therefore, the alleged need for his deposition offers no support to prevent this Court from granting summary judgment in favor of Ashley.

Kennedy's purported testimony would be inadmissible because it would be improperly offered to establish legislative intent. "It is a settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, *resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law*, for the purpose of ascertaining the intent of the legislature." *Kennedy v. S. Carolina Ret. Sys.*, 345 S.C. 339, 353-54, 549 S.E.2d 243, 250-51 (2001) (emphasis in original) (quoting *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942)). Section 62-6-202 is not ambiguous. Even if it were, Kennedy cannot testify as to the reasons behind the statute's enactment. Such testimony would be excluded, and therefore, her purported testimony would not further or detract from either motion for summary judgment.

Similarly, Sojourner's purported testimony does not support or oppose either motion for summary judgment. First, the attorney-client privilege would prevent Sojourner from testifying

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about any privileged communications he had with Hollis. See *S.C. State Highway Dept. v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 621 (1973) ("The attorney-client privilege is owned by the client and survives his death . . ."). Sojourner has an obligation to assert the privilege on his deceased client's behalf. See *State v. Doster*, 276 S.C. 647, 653, 284 S.E.2d 218, 220 (1981) (recognizing "appropriateness" of attorney asserting attorney-client privilege on behalf of deceased client). Even if the attorney-client privilege did not bar Sojourner from testifying, his testimony would be irrelevant and inadmissible because Hollis's clearly expressed his intent when he signed the BB&T signature card. See *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (providing a court is constrained to the four corners of an unambiguous contract to determine the parties' intent and contract's meaning). To the extent Sojourner could avoid the attorney client privilege, Deborah cannot look to extrinsic evidence to challenge the BB&T Account terms.

In sum, summary judgment is not premature.³ The discovery sought by Deborah does not preclude this Court from granting Ashley summary judgment. None of the alleged testimony is relevant to the issues before this Court. Moreover, the majority of the evidence is inadmissible and cannot be considered. The parties submitted cross motions for summary judgment. There is no issue of material fact, and the purported testimony would not raise any issues of material fact. Summary judgment is properly granted to Ashley.

II. SUMMARY JUDGMENT IS DENIED TO DEBORAH BECAUSE THE RECORD IS DEVOID OF ANY ADMISSIBLE EVIDENCE THAT HOLLIS INTENDED FOR THE ENTIRE FUNDS TO PASS TO DEBORAH.

Deborah argues that she is entitled to all of the funds because (1) Section 62-6-202(a) of the South Carolina Code states that she is entitled to the BB&T Account funds because she is the

³ It is noted that this action has been pending for almost a year, providing abundant time for discovery.

surviving spouse; and, (2) the Waiver provides that she is entitled to all jointly held property with Hollis. Both of these reasons are fatally flawed, precluding summary judgment in favor of Deborah.

A. **Section 62-6-202(a) of the South Carolina Code Does Not Apply Because Section 62-6-203 Makes the BB&T Account Terms Govern.**

As discussed above in this Order, Deborah cannot rely on Section 62-6-202(a) of the South Carolina Code to avoid the terms of the BB&T Account. Section 62-6-203(a), which immediately follows Section 62-6-202, states "[r]ights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party." The terms of the BB&T Account provide that the funds passed to Deborah and Ashley, upon the death of Hollis. All of Deborah's claims are premised on the supposition that she is the sole owner of the funds. Because both she and Ashley are the owner of the funds, all of Deborah's claims fail as a matter of law. Therefore, Deborah is not entitled to summary judgment.

B. **The Waiver's Provision Concerning Jointly Held Property Does Not Address the BB&T Account.**

Deborah's reliance on the Waiver, as an expression of Hollis's intent, is misguided because the Waiver's discussion of jointly held property has no application in the present matter.

With respect to jointly held property, the Waiver states as follows:

D. **Jointly Held Property.** Upon Hollis's death, any property held or acquired in the form of ownership known as joint tenants with rights of survivorship, or treated as joint tenants with rights of survivorship under the laws of South Carolina, *as between Hollis and Deborah*, shall be distributed to Deborah.

(Waiver (Emphasis added).) This provision governs solely property held jointly by Hollis and Deborah. The BB&T Account, however, was not held solely by Hollis and Deborah; it was held jointly among Hollis, Deborah, and Ashley. Consequently, this Waiver does not affect Ashley's rights. Rather, the Waiver serves to show that Deborah waived all spousal rights, including those

described in Section 62-6-202. (See Waiver ¶ C (providing Deborah "irrevocably renounces, releases, and forever waives" her spousal rights, in exchange for \$2.8 million in life insurance proceeds and possible proceeds from a buy-out agreement)). While Hollis was living, he could not have waived any rights Ashley had in the BB&T Account. In the Waiver, Hollis only could have contracted with respect to *his* rights, not Ashley's.

Even if the Waiver's language regarding jointly held property were applied here, it was amended when Hollis and Deborah signed the BB&T signature card, indicating their intent to be bound by the terms of the BB&T Account. The Waiver provides that it can be amended or modified by a writing signed by both parties. (See Waiver ¶ J) The BB&T Signature Card is a writing that alters the terms of the Waiver by stating that the jointly held funds are to pass to the surviving joint owners, upon the death of one joint owner. It was signed by Hollis and Deborah. Therefore, it amends and modifies the terms of the Waiver – to the extent the Waiver could reach to property jointly held among Hollis, Deborah, and Ashley. The Waiver's discussion of jointly held property is of no legal moment with respect to this issue. Consequently, this Court denies Deborah's Motion for Summary Judgment.

CONCLUSION

Pursuant to the terms of the BB&T Account, Ashley and Deborah are the owners of the funds that were in the BB&T Account on the day that Hollis died. Consequently, Deborah is not the sole owner. There was no conversion of the funds, and no constructive trust ever arose. Moreover, Deborah has received her rightful share. Defendant's Motion for Summary Judgment is granted, and Plaintiff's Motion for Summary Judgment is denied.

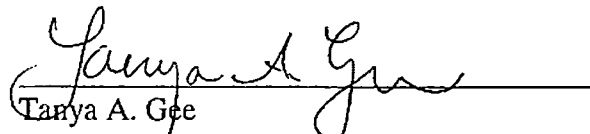
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that a) Plaintiff's Motion for Summary Judgment is denied; b) Defendant's Motion for Summary Judgment is

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granted; and c) judgment shall be entered for Defendant on all causes of action set forth in Plaintiff's Complaint.

IT IS SO ORDERED.


Tanya A. Gee
Presiding Judge, Fifth Judicial Circuit

April 24, 2015

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