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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2013-CP-23-05389

Appellate Case No. 2014-001401

In the Matter of James Trippe, III Deceased

Gene D. Morin, Conservator for Katelin Trippe Respondent-Appellant

v.

James Trippe, Jr., individually and as Personal Representative
of the Estate of James A. Trippe, III Appellant-Respondent

**RESPONDENT'S FINAL BRIEF
OF RESPONDENT-APPELLANT**

Jacqueline H. Patterson, I.D. # 12090
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D. Morin, Conservator for Katelin Trippe*

May 4, 2015

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STATEMENT OF ISSUES ON APPEAL

1. The Probate Court's finding of contempt against Appellant-Respondent, James A. Trippe, III (the "PR") was proper and should be upheld because the PR made no legitimate efforts to comply with the Settlement Agreement and numerous Court Orders in the time periods set by the Probate Court.

2. The Probate Court's award of attorney's fees to Respondent-Appellant, Gene D. Morin as Conservator for Katelin Trippe ("Conservator"), was proper because (i) the PR was in contempt of court and (ii) Conservator, as the prevailing party, was entitled to such award pursuant to Paragraph 14 of the Settlement Agreement incorporated into the Probate Court's Order dated April 27, 2012.

STATEMENT OF THE CASE.

This matter arises from the administration of the probate estate of James A. Trippe, III (“Decedent”). Decedent died intestate on March 26, 2009. (R. p. 3). Appellant-Respondent, James A. Trippe, Jr. (“PR”), was appointed as Personal Representative of Decedent’s Estate. (R. p. 4). The heirs of Decedent’s Estate are his two children, James Trippe, IV (“James IV”) and Katelin Trippe (“Katelin”). (*Id.*). Because Katelin is a minor child, Conservator was appointed by the Probate Court to act on Katelin’s behalf. (*Id.*).

The original deadline for distributing Decedent’s assets and closing the Estate was April 16, 2010. (R. p. 55, ¶ 14). On June 6, 2011, more than one year after such deadline, Conservator, acting on behalf of Katelin, filed a petition with the Probate Court to remove PR as personal representative on the grounds that PR had acted wrongfully, unreasonably and in bad faith in his dealings with Katelin by, among other things, failing to distribute the Estate in a timely manner and by proposing to distribute the Estate contrary to law¹ and in unequal shares with Katelin receiving less than her rightful inheritance. (R. pp. 56-57, ¶ 23 and R. pp. 59-60, ¶ 30).

At mediation, Conservator and PR reached an agreement as to the allegations set forth in the petition. The terms of such settlement were more fully set forth in a Mutual Release and Settlement Agreement (“Settlement Agreement”)² which was incorporated into the Order of the Probate Court dated April 27, 2012. (R. pp. 1-7).

¹ PR attempted to distribute approximately 1/3 of the Estate to Decedent’s brother, Paul Trippe. (Petition; Deed of Distribution to Paul Trippe; Proposal for Distribution to Paul Trippe).

² Although not parties to the action, James IV and JAT, Inc. were signatories to the Settlement Agreement because they obtained certain rights and obligations under the Settlement Agreement. However, neither James IV nor JAT, Inc. have any rights or obligations relating to issues raised in this Appeal.

The Decedent owned two lots located in the Bahamas (the "Lots"). (R. p. 5, ¶ 4).

Pursuant to Paragraph 4 of the Settlement Agreement, PR agreed to convey the Lots to Conservator. Paragraph 4 of the Settlement Agreement states as follows:

Bahamas Lots. Within sixty (60) days following the execution of this Agreement, Respondent PR shall transfer to Petitioner the two (2) lots located in the Bahamas (the "Lots") and identified on Schedule A.1. of the Second Supplemental Inventory and Appraisement dated December 9, 2011. The Lots shall be transferred free and clear of all liens, mortgages or other encumbrances. In connection herewith, **Respondent PR shall perform all acts and execute all documents required by the Greenville County Probate Court to transfer the Lots to Petitioner.** (Emphasis added) (*Id.*)

On May 1, 2012, Conservator filed a first contempt action against PR for failing to make a payment under the terms of the Settlement Agreement. (R. p. 8). After a hearing on the matter, PR was held in contempt of court for nonpayment. (R. p. 12). The Probate Court, understanding the difficulties of transferring foreign properties, extended the time for transferring the Lots by stating that such lots were to be "conveyed as soon as possible." (*Id.*).

On October 4, 2012, Conservator filed a second contempt action, this time seeking to enforce Paragraph 4 of the Settlement Agreement (as altered by the June 15, 2012 Probate Order). (R. p. 17). In its Order dated December 21, 2012, the Probate Court, after hearing testimony in the matter, held PR in contempt of court for failing to transfer the Lots to Conservator as required by the Settlement Agreement and prior Court orders. (R. p. 21). The Probate Court found that PR and/or his counsel had received at least ten (10) different letters stating that the Probate Court required copies of recorded deeds of distribution. (R. p. 19, ¶¶ 7-8). In its Order, the Probate Court did provide PR a grace

period to transfer the Lots, such transfer having to be completed on or before February 1, 2013. (R. p. 22).

On February 7, 2013, Conservator filed a third contempt action against PR because PR had again failed to timely transfer the Lots as required by the Settlement Agreement and numerous Court Orders. (R. p. 23). At the hearing on April 24, 2013, PR presented no admissible evidence that he attempted to transfer the Lots prior to the February 1, 2013 deadline. (R. p. 28). By Order dated June 25, 2013, the Probate Court found PR to be in contempt of court for failing to make legitimate efforts to transfer the Lots. (R. pp. 28-29). The Court sentenced PR to ninety (90) days incarceration which could be suspended if PR transferred the Lots (or paid the equivalent value of the Lots) and paid Conservator's attorney's fees by July 12, 2013. (*Id.*).

At the April 24, 2013 hearing, PR attempted to present communications it had with Bahamian counsel, but the Probate Court refused to admit such evidence on the grounds that Attorney Bannister had failed to comply with Rule 45, SCRCP, in responding to a subpoena from Conservator's counsel relating to such documents. (R. p. 210, line 8 – p. 216, line 4). The Probate Court did, however, allow PR the opportunity to proffer such evidence. Although the proffered evidenced was not admitted, a review of such evidence clearly indicates that PR did not retain Bahamian counsel until March 2013, well after the deadline given by the Probate Court to transport the Lots. (R. p. 223, line 6 – p. 224, line 23).

On July 8, 2013, Attorney Bannister, attempting to act on behalf of PR filed a Motion to Reconsider ("Motion") the Probate Court's Order dated June 25, 2013. (R. pp. 72-74). By Order dated September 30, 2013, the Probate Court denied Attorney

Bannister's Motion on the grounds that (i) Attorney Bannister did not represent the PR and (ii) the evidence in the record supported a finding of contempt. (R. pp. 31-33). Furthermore, the Probate Court, relying upon the factors in *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), upheld its prior award of attorney's fees to Conservator in the amount of \$12,920.53³ and granted to Conservator additional attorney's fees in the amount of \$6,159.18 in defending against the Motion. (R. pp. 33-34).

On October 4, 2013, PR served his Notice of Appeal on opposing counsel. PR filed his Grounds for Appeal with the Probate Court on November 15, 2013.

On February 18, 2014, oral arguments were presented before the Honorable D. Garrison Hill of the Greenville County Circuit Court. (R. p. 37). On June 4, 2014, the Circuit Court issued an Order partially upholding the Probate Court's finding of contempt. (R. pp. 41-42). The Circuit Court found that PR was not in contempt prior to December 21, 2012. (*Id.*). The Circuit Court also partially reversed the Probate Court's Orders by reducing the amount of attorney's fees to Four Thousand, Five Hundred (\$4,500.00) Dollars. (R. p. 44).

On or about June 24, 2014, PR served a Notice of Appeal upon opposing counsel.

On June 19, 2014, Conservator filed a Motion to Alter or Amend Judgment with the Circuit Court. (R. pp. 105-108). On July 31, 2014, the Circuit Court issued an Amended Order, generally affirming the findings of fact and conclusions of law as found in its Order dated June 4, 2014 (R. pp. 45-52). On August 21, 2014, Conservator served his Notice of Appeal on Attorneys Coulter and Bannister.

³ One Thousand Five Hundred (\$1,500.00) Dollars of this amount was reimbursement for attorney's fees paid to Bahamian counsel.

STANDARD OF REVIEW

The appeal filed by PR involves the following questions: (i) whether the evidence presented by PR was sufficient to establish his defense for failing to comply with numerous orders of the Probate Court and (ii) whether Conservator is entitled to recover his attorney's fees in seeking to enforce the Settlement Agreement and the Probate Court orders. For reasons more fully set forth below, Conservator would show the Probate Court's finding of contempt and award of attorney's fees should be upheld.

"Contempt results from the willful disobedience of an order of the court." *Miller v. Miller*, 375 S.C. 443 (2007) (citations omitted). "The power to punish for contempt is inherent in all courts." *Id.* "It is within the [Court's] discretion to punish by fine or imprisonment every act of contempt before the court." *Ex parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (2009). The standard of proof for civil contempt is clear and convincing evidence. *Poston v. Poston*, 331 S.C. 106, 502 S.E.2d 86 (1998). Once the moving party shows noncompliance with the Court's Order, the burden shifts to the offender to establish his defense and inability to comply. *Brasington v. Shannon*, 288 S.C. 183, 341 S.E.2d 130 (1986); *Pratt v. South Carolina Dept. of Social Services*, 283 S.C. 550, 324 S.E.2d 97 (Ct. App. 1984). "On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." (citations omitted) *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct.App. 2005), *overturned on other grounds by 2008 S.C. Acts 211, § 1.*

A review of attorney's fees awarded is governed by an abuse of discretion standard. *Blumberg v. Nealco*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). An appellate court will not reverse an award unless it is based on an error of law or is without

any evidentiary support. *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) ("An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support.").

ARGUMENT

A. The Probate Court properly found the PR to be in contempt of Court because the PR failed to make legitimate efforts to comply with the deadlines set by the Probate Court.

In this case, the Probate Court found PR to be in contempt of court for failing to make legitimate efforts to comply with the Settlement Agreement and three Orders of the Probate Court. (R. pp. 26-28; R. pp. 32-33). On appeal, the Circuit Court upheld the finding of contempt but partially reversed the finding by stating that the PR was not in contempt prior to December 21, 2012. (R. pp. 49-50). For the reasons set forth below, Conservator would show that the Probate Court's finding of contempt should be upheld.⁴

1. Conservator met his burden by showing that the PR failed to comply with the Settlement Agreement and three Court Orders.

As noted in the Standard of Review above, South Carolina law is clear that, in contempt actions, the moving party bears the initial burden to show that the contemnor failed to comply with a court order. Once the moving party shows noncompliance with the Court's Order, the burden shifts to the offender to establish his defense and inability to comply. *Brasington*, 288 S.C. at 184; *Pratt*, 283 S.C. at 551.

In this case, there is no dispute that Conservator met his burden by showing that the PR failed to comply with the following:

- Paragraph 4 of the Settlement Agreement incorporated into the April 27, 2012 Probate Court Order (R. p. 5, ¶ 4) – “Within sixty (60) days following the execution of this Agreement, Respondent PR shall transfer to Petitioner the two (2) lots located in the Bahamas (the “Lots”).”
- June 15, 2012 Probate Contempt Order (R. p. 12) – “[T]he two lots located in the Bahamas . . . shall be conveyed as soon as possible.”
- December 21, 2012 Probate Order (R. p. 22) – “The [PR] must file all documents necessary to close this Estate including but not limited to a recorded copy of the Bahamas deed, no later than February 1, 2013.”

⁴ For reasons more fully set forth in Respondent-Appellant's Initial Brief (as Appellant), Conservator would show that the Circuit Court's partial reversal of the contempt finding was in error.

In the June 25, 2013 Probate Order, the Probate Court made the following finding: “To date, the Personal Representative has not conveyed the Bahamas Lots to Petitioner and has not filed the documents necessary for closing Decedent’s Estate.” (R. p. 27, ¶ 14). The PR has not appealed this finding and does not dispute the fact that the Lots have not been transferred in accordance with Bahamian law. In fact, the PR still has not conveyed the Lots to Conservator, nearly three (3) years after he agreed to do so.

2. The PR failed to meet his burden because he failed to make legitimate efforts to comply with the Settlement Agreement.

Because Conservator met his burden of showing noncompliance by the PR, the burden shifted to the PR to show why he was unable to comply. *Brasington*, 288 S.C. at 184; *Pratt*, 283 S.C. at 551.

In PR’s Initial Brief, the only case cited was *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970). In *Edwards*, the South Carolina Supreme Court upheld a finding of contempt resulting from the contemnor’s failure to transfer real property as required by a court order. *Id.* Despite the ruling in *Edwards*, PR argues, without any legal support, that he should not be held in contempt because the Probate Court set an arbitrary date as the deadline for transferring the Lots. PR further argues that he could not comply with the “arbitrary date” because he was dependent upon a foreign court to act within the deadline.

In making this argument, PR fails to recognize the basis for why the Probate Court found him to be in contempt. The contempt was not the result of his failure to meet the deadline. Instead, contempt was the result of the PR’s failure to attempt to meet his requirements prior to the deadline. In other words, the PR failed to comply with those

requirements which he could control. This fact is evidenced by the following finding in the June 25, 2013 Probate Order:

Despite having agreed to convey the property in March of 2012 and despite having three Court Orders directing the Personal Representative to convey the Bahamas Lots, it was not until February, 2013, that the Personal Representative took the initiative to identify counsel in the Bahamas and begin the process of conveying the Bahamas Lots. Further, the Personal Representative did not hire counsel until March, 2013, after Petitioner had filed the present action. (R. p. 27, ¶ 16).

In *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002), the Court of Appeals held that a finding of contempt may be predicated upon a violation of a settlement agreement approved by a Court where it was determined that the offender made no legitimate efforts to comply with the settlement agreement even though he had the ability to comply at least in part. This case is clear that even if the contemnor cannot fully comply with the requirements of a court order, he must make efforts to comply to the extent he is able.

Here, the PR had the ability to comply in part by beginning the ancillary probate process but instead chose not to do so prior to the Probate Court's deadline. As evidenced by the numerous contempt hearings, the PR continues to delay the administration of this Estate (now nearly six years after Decedent's death) by exhibiting a conscious disregard for the Orders of the Probate and the rights of the minor child.

For this reason, this Court should uphold the Probate Court's finding as to contempt.

3. The PR presented no competent evidence or legal authority in defense of his non-compliance.

In his Initial Brief, PR admits that he was "slow in getting started" but argues that the Probate Court should not have found him in contempt because of the actions he took

between January 30, 2013 (two days before the Court-ordered deadline) and the April 24, 2013 hearing. The PR's argument fails for two reasons. First, PR presented no competent evidence at the hearing which would excuse his non-compliance. Second, PR has presented no legal authority that post-deadline actions excuse his non-compliance with the Court-ordered deadline.

a. The PR cannot rely upon inadmissible evidence as a defense for his non-compliance.

In his Initial Brief, PR states that a "cursory review of the correspondence and documents furnished from January 30, 2012 until the contempt hearing reflects a maximum effort to comply with the Probate Court's Order." However, PR fails to note that the correspondence and documentation on which he relies in his Brief was deemed to be inadmissible evidence, a ruling which he did not appeal.

At the April 24, 2013 hearing, Attorney Bannister attempted to introduce the communications which he had with Bahamian counsel. Conservator's counsel objected to the introduction of this evidence on the grounds that Attorney Bannister had failed to comply with Rule 45, SCRCP, in responding to a subpoena requiring him to produce these documents prior to hearing. Below is an excerpt from the April 24, 2013 hearing:

THE COURT: Okay. So did you give her what the rule says about which ones of these were "protected by privilege"? So that she could then know what to expect or what to –

MR. BANNISTER: I did not.

THE COURT: Okay. All right. Then under the rules, if you did not do that, then I don't know if I have a choice other than to exclude it. I mean, if you didn't do that, she didn't know what was coming in. And all of this was for this hearing today?

MS. PATTERSON: Yes, Your Honor.

(R. p. 214, line 20 – p. 215, line 9). The Probate Court further stated:

THE COURT: Well, what I'm going to do is I'm going to exclude it under that rule. But I'm going to let him proffer it to make a record. But I'm not going to consider it for my ruling. But I'm going to let him make it in case he appeals. So I'm going to let him do a proffer. (R. p. 215, line 21 – p. 216, line 4).

All of the documents upon which PR relies in his Initial Brief are the documents proffered by Attorney Bannister at the April 24, 2013 hearing. The PR submitted no testimony regarding any attempts to transfer the Lots other than acknowledging the proffered documents: (*See*, R. p. 215, line 1 – p. 233, line 9).

Because PR did not appeal the inadmissibility of these documents, the law of this case is that the documents are inadmissible. *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544 (S.C. 1970) (an unappealed ruling, “right or wrong, is the law of this case and requires affirmance.”); *In re Morrison*, 321 S.C. 370, 468 S.E.2d 651 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Watkins v. Hodge*, 232 S.C. 245, 247-48, 101 S.E.2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). As such, the proffered documents should not be considered on appeal. Furthermore, PR has presented no other evidence in defense of his non-compliance.

b. The PR has presented no legal authority to support his contention that post-deadline actions excuse his non-compliance with the Probate Court's Orders.

As noted in the Standard of Review above, “a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion.” (citations omitted) *Floyd*, 615 S.E.2d at 473. As noted above, the evidence in this case is clear that the PR has not conveyed the Lots to the Conservator as required by

the Settlement Agreement and Orders of the Court. Thus, the only question which remains is whether the Probate Court abused its discretion in finding the PR in contempt. “An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support.” *Gooding*, 326 S.C. at 252.

On appeal, the appellant bears the burden of convincing the appellate court that the lower court committed error. *Cook v. Eller*, 298 S.C. 395, 380 S.E.2d 853 (Ct.App. 1989) (“On appeal there is a presumption in favor of the correctness of a decree and the burden of showing error by the trial judge is on the appellant.”). Here, PR has presented no legal authority to show that the Probate Court erred as a matter of law by failing to consider the post-deadline actions of the PR. As such, the presumption should be that the Probate Court did not abuse its discretion in finding PR in contempt.

B. The Probate Court properly awarded attorney’s fees to Conservator in accordance with the Settlement Agreement and as a result of the PR’s contempt.

In this case, the Probate Court awarded Conservator attorney’s fees in the amount of \$19,079.91 for work performed as a result of PR’s failure to comply with the Settlement Agreement and three Probate Court Orders. (R. pp. 35-36). On appeal, the Circuit Court arbitrarily reduced the award of attorney’s fees to \$4,500.00. (R. p. 52). For the reasons stated below, this Court should uphold the Probate Court’s award of attorney’s fees to Conservator.⁵

It is well settled in South Carolina that attorney’s fees are recoverable if authorized by contract or statute. *Baron Data Systems, Inc.*, 297 S.C. at 383. In this case,

⁵ For reasons more fully set forth in Respondent-Appellant’s Initial Brief (as Appellant), Conservator would show that the Circuit Court’s partial arbitrary reduction of the attorney’s fee award was in error.

Paragraph 14 of the Settlement Agreement incorporated into the April 27, 2012 Probate Order provides, in pertinent part, the following:

Attorneys' Fees. If an action is commenced to enforce any provision of this Settlement Agreement, the prevailing party as determined by a final court judgment shall be entitled to recover from the other party such reasonable attorneys' fees and costs incurred in the action as the court may award. (R. p. 6, ¶ 14).

Based upon the agreement between the parties, the prevailing party is entitled to recover its attorney's fees. Conservator would show that he is the prevailing party in his attempts to enforce Paragraph 4 of the Settlement Agreement. As such, Conservator is entitled to recover his attorney's fees.

Conservator would also show that he is entitled to recover his attorney's fees as a result of the PR's contempt. In *Cheap-O's Truck Stop, Inc.*, 350 S.C. at 609, the Court of Appeals stated that compensatory contempt is available when a party has violated a previous court order. The goal of compensatory contempt is "to indemnify the [non-breaching party] directly for harm the contemnor caused by breaching the injunction" (e.g. failure to transfer the Lots). *Id.* "The compensatory award should be limited to the complainant's actual loss. Included in the actual loss are the costs in defending and enforcing the court's order, including litigation costs and attorney's fees." *Id.*

Based upon the foregoing, Conservator would show that the Probate Court's award of attorney's fees to Conservator was proper.

CONCLUSION

For the reasons stated herein, Conservator respectfully requests that this Court uphold the findings of fact and conclusions of law of the Probate Court. Specifically, Conservator requests that this Court (i) uphold the findings of contempt against PR, and

(ii) grant to Conservator the full amount of his attorney's fees, including the fees incurred on appeal.

Respectfully submitted,



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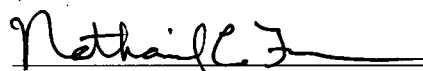
v.

James Trippe, Jr., individually and as Personal Representative
of the Estate of James A. Trippe, III Appellant-Respondent

**RESPONDENT-APPELLANT'S
RULE 211 CERTIFICATION**

The undersigned counsel for Respondent-Appellant hereby certify that (i) Appellant's Final Brief of Respondent-Appellant and (ii) Respondent's Final Brief of Respondent-Appellant comply with Rule 211(b).

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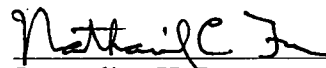
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of the Estate of James A. Trippe, III Appellant-Respondent

PROOF OF SERVICE

I certify that I have served (i) Appellant's Final Brief of Respondent-Appellant and (ii) Respondent's Final Brief of Respondent-Appellant on all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on May 6, 2015, addressed as follows:

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