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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Court of Common Pleas, as an Appellate Court

R. Scott Sprouse, Circuit Court Judge

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SC Court of Appeals

Circuit Court Case No. 2015-CP-46-00466
On Appeal From the York County Probate Court

Appellate Case No. 2016-000096

Mary Jean Tucker Swiger, by and through
her Attorney-in-Fact, Carol DeHaven ..... Appellant,

v.

Ben R. Smith and Margaret P. Kelly, as
Personal Representatives of the Estate
of Vinton Willis Tucker ..... Respondents.

Respondents' Motion to Dismiss Appeal

Please take notice that Respondents, through their undersigned counsel, move the Court to dismiss the appeal herein on the following grounds:

(1) the Notice of Appeal has been signed, filed and served by Carol DeHaven, a non-lawyer resident of the State of Maryland who is acting solely in her capacity as attorney-in-fact for her principal, the true party-in-interest, Mary Swiger, and in so acting has engaged in the unauthorized practice of law. (See signature block on Notice of Appeal).

(2) The appeal has not been properly and effectively perfected and, consequently, the Court lacks subject matter jurisdiction, specifically, the Notice of Appeal identifies only one Order for appeal, to wit: the Order of Judge Sprouse that decided the Appellant's appeal from a Probate Court Summary Judgment Order. The Notice of Appeal does not identify the Probate Court Summary Judgment Order as a subject of the appeal.

Ground 1. A nonlawyer attorney-in-fact, appointed under a durable power of attorney, may not act as an attorney on behalf of the principal.

This precise question has not been addressed by our courts, but analogous situations in South Carolina case law illustrate the principles governing the question. The power to regulate the practice of law rests exclusively with the South Carolina Supreme Court. S.C. Const. art. V, § 4; S.C. Code Ann. § 40-5-10 (2011); In re Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (1992). S.C. Code Ann. § 40-5-80 (2011) provides that a person may prosecute or defend his own cause; however, S.C. Code Ann. § 40-5-310 (2011) provides that no person may either practice law or solicit the legal cause of another person or entity unless he or she is a member of the South Carolina Bar or is otherwise authorized to perform legal activities by action of the Supreme Court. South Carolina case law precedent holds that a nonlawyer personal representative of an estate cannot represent the estate on appeal. Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705 (2005), clarified S.C. , 620 S.E.2d 323 (2005); a nonlawyer may not prepare a legal document for others to present in family court, State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995); a nonlawyer cannot represent a corporation in circuit or appellate courts but may appear pro se in magistrate's court, Renaisance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999); prosecution of an appeal for a corporation by its nonlawyer president is the unauthorized practice of law, Travelers Ins. Co. (NC) v. Roof Doctor, Inc., 325 S.C. 614, 481 S.E.2d 451 (Ct.App. 1997).

The question of an attorney-in-fact's appearance in court proceedings on behalf of the principal as constituting the unauthorized practice of law has been addressed by other jurisdictions: Jones v. Brooks, 97 A.3d 97 (D.C 2014), citing and relying on Ross v. Chakrabarti, 5 A.3d 135 (Md.App. 2010) and Haynes v. Jackson, 744 A.2d 1050 (Me. 2000) to hold that a valid power of attorney does not provide the right to practice law without meeting the requirements of the jurisdiction's bar; Fernando v. Sapukotana (In re Estate of Sapukotana), No. 2013-CA-01900-SCT, (Miss. December 17, 2015) (execution of a power of attorney does not authorize an unlicensed attorney-in-fact to practice law in Mississippi). See also In re Conservatorship of Riebel, 625 N.W.2d 480 (Minn. 2001) (the attorney-in-fact may make decisions concerning litigation for the principal but a nonlawyer attorney-in-fact is not authorized to act as a attorney to implement those decisions); Fravel v. Stark Cty. Bd. of Revision, 728 N.E.2d 393 (Ohio 2000) (person not admitted to the bar cannot represent another in court on the basis of a power of attorney assigning pro se rights); Christiansen v. Melinda, 857 P.2d 345 (Alaska 1993) (a principal cannot use a power of attorney as a device to license a layman to act as an attorney in a court of record).

In the above-captioned case, Carol DeHaven appeared solely in her capacity as attorney-in-fact for Mary Swiger. Ms. DeHaven, a nonlawyer, by her unauthorized practice of law has filed and served a Notice of Appeal. Respondents submit that the Notice of Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed. In Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705 (2005), the court addressed the question of whether the unauthorized practice of law renders the proceedings a nullity or if it is an amendable defect. The court made clear that its ruling in Brown was case and fact specific. It concluded that "on the facts and circumstances of this case" a notice of appeal filed and served by the nonlawyer personal representative would not trigger an outright dismissal of the appeal, and the appellant was given the

opportunity to retain an attorney. Of particular importance to the court in Brown was the unique fact that the nonlawyer personal representative had "represented the estate in three previous appellate proceedings [without objection] leading her to believe that such was acceptable." No such situation is presented herein. Appellant Swiger was represented by a licensed attorney in both the probate court and the circuit court proceedings. A notice of appeal is a critical legal document that is the very foundation for perfecting an appeal as illustrated by the facts that the 30-day deadline for serving the Notice of Appeal is fixed and definite and cannot be extended by the court. Rules 203(a) and (b)(1), and 263(b), SCACR, and that without a properly filed and served notice of appeal, the appellate court has no jurisdiction to entertain the appeal, and the appeal should be dismissed. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied. Where the essential legal document for the appeal is the product of the unauthorized practice of law, and is deficient as well (see ground no. 2 below), the very result sought to be avoided by requiring licensed attorneys, the court should be most reluctant to excuse this unauthorized practice of law.

Ground 2. Appellant's Notice of Appeal dated January 19, 2016, but purportedly served on January 15, 2016, expressly referred to the Order being appealed as "the order [judgment] of the Honorable R. Scott Sprouse dated December 22, 2015." The Notice of Appeal filed with this Court and served on the undersigned was accompanied by only one Order - a copy of Judge Sprouse's December 22, 2016 Order Affirming Decision of Probate Court. See Rule 203(d)(1)(B)(ii), SCACR. The Order of the York County Probate Court dated February 2, 2015, being the order that is the subject of the appeal to circuit court that was decided by Judge Sprouse's Order dated December 22, 2015, was neither identified in the Notice of Appeal nor submitted with the Notice of Appeal. Admittedly, a copy of the probate judge's letter directing the preparation of the summary judgment order was attached to the Notice of Appeal, but this does not comply with requirements

of the appellate rules. Consequently, the Appellant has not timely perfected an appeal from the **trial court's final order** that granted summary judgment in favor of the Respondents. That order is now the law of the case.

A closely analogous issue was considered in Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000). In Weatherford, the appellant's Notice of Appeal referred only to the order that denied the appellant's motion for reconsideration. However, this Court was lenient to the appellant in Weatherford and did not dismiss the appeal only because the underlying judgment order, although not referred to in the Notice of Appeal, was nevertheless attached to the Notice of Appeal that was submitted to the Court for filing. The circumstance that saved the appellant in Weatherford is not present in the above-captioned case. Failure to refer to the summary judgment order in the Notice of Appeal and failure to file with the Notice of Appeal a copy of the trial court's summary judgment order, as required by rule, cannot fairly be labeled as a mere clerical error.

The failure to timely serve and file a proper Notice of Appeal, meaning in this case to serve a Notice of Appeal from the probate court's February 2, 2015 summary judgment order, divests the appellate court of subject-matter jurisdiction and results in dismissal of the appeal. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied. Likewise, Rule 203(d)(3), SCACR, provides that if the Notice of Appeal, and by implication all required attachments to the Notice of Appeal, are not timely filed, "the appeal shall be dismissed. . ." (Emphasis added.)

Having not timely appealed from the final summary judgment order (including both service and filing of a notice of appeal with required accompanying documents), this Court lacks subject-matter jurisdiction, the probate court summary judgment is now the law of the case, and the appeal must be dismissed.

Conclusion

The grounds argued above, either independently or jointly, call for the dismissal of this appeal.

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February 1, 2016

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IN THE COURT OF APPEALS

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Respondent's Certificate of Service

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondents in the above-captioned matter, do hereby certify that I have served Appellant, pro se, with a copy of **Respondents' Motion to Dismiss Appeal** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 1st day of February, 2016 at the following address:

Carol DeHaven
6600 Hawkins Gate Rd.
LaPlata, MD 20646

Linda T. Abernethy

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February 1, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Swiger v. Smith and Kelly, as Personal Representatives
Appellate Case No. 2016-000096

Dear Ms. Kitchings:

Enclosed for filing please find the original (unbound) and six copies of Respondents' Motion to Dismiss Appeal, together with the customary Certificate of Service.

By copy of this letter, copies of the enclosed motion and certificate are being mailed to the pro se Appellant's attorney-in-fact at her address of record.

My check in the amount of $25.00 is enclosed for the motion fee. Please return a clocked copy of the face page of the motion using the envelope provided.

Very truly yours,

B. Michael Brackett

Enclosures

cc: Margaret Kelly
Ben Smith
Carol DeHaven