

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2015-001056

Pamela Richey,

Appellant,

v.

Shirley W. Booth, Thomas J. Booth, and Estate of Lee C.
Williams,

Respondents.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED IN GRANTING THE ESTATE SUMMARY JUDGMENT WHERE THE DECEDENT'S WILL REQUIRES THE ESTATE'S PERSONAL REPRESENTATIVE TO SEEK THE MONEY AT ISSUE FOR RICHEY AS A NAMED BENEFICIARY.

STATEMENT OF THE CASE

Appellant ("Richey") commenced this action against Respondent ("the estate"), Shirley W. Booth, and Thomas J. Booth ("the Booths") by filing a summons and complaint against them on Sept. 23, 2013. (R. pp. 14-17.) Richey subsequently served all parties. Richey's complaint alleged that each party converted money that belonged to her. (R. p. 15, ¶10-p. 16, ¶18.) The estate and the Booths each denied Richey's conversion allegations. (R. 24, ¶9; p. 19 ¶8.) The estate also raised several affirmative defenses, including res judicata; collateral estoppel; and accord, satisfaction, and release. (R. p. 19, ¶12-p. 20, ¶19.) The Booths also raised collateral estoppel and res judicata among several affirmative defenses. (R. p. 25, ¶¶17-20.) The Booths counterclaimed against Richey for defamation and intentional infliction of emotional distress. (R. p. 26, ¶29-p. 27, ¶41.)

The estate and the Booths filed a motion for summary judgment on Nov. 10, 2014, and Nov. 18, 2014, respectively, based upon the above-listed affirmative defenses. (R. pp. 29-36.) The circuit court held a hearing on Feb. 5, 2015, to decide these motions. The court granted summary judgment on all issues for the estate but denied it for the Booths. It issued a formal order on Feb. 20 that was filed Feb. 24. (R. pp. 1-12.)

Richey filed and served a motion to alter or amend on Mar. 9, 2015, that asked the court to reconsider its order granting summary judgment in the estate's favor. (R. pp. 37-

53.) On the same date, Richey filed a petition with the Abbeville County Probate Court requesting the personal representative of the Estate to pursue the funds at issue. (R. pp. 46-50.) A copy of this petition was attached to Richey's motion to alter or amend. The court issued a form 4 on Apr. 2 that summarily denied Richey's motion. (R. p. 13.) Richey served the notice of appeal on all parties on May 11, 2015.

FACTS

This case arises from a long-running family dispute between Richey, her uncle Lee C. Williams ("Lee"), and Lee's daughter and son-in-law, the Booths. Richey and Lee engaged in litigation against each other in Case No. 2007-CP-01-169.¹ In that case, Richey filed a counterclaim, which alleged Lee wrongfully took approximately \$400,000.00 from Richey's father and Lee's brother, Hugh A. Williams ("Hugh"), when Hugh died. Richey alleged Hugh intended for this money to go to Richey. Lee denied these allegations.

The parties engaged in pre-trial discovery where Lee continued to deny the accusations that he took money at Hugh's death that belonged to Richey. Prior to trial, the parties entered into a mutual release and settlement agreement. The release dated May 11, 2011, settled each party's claims against the other in exchange for Lee paying Richey \$32,500.00 and releasing his interest in certain motor vehicles to Richey. (R. pp. 115-16.) The parties executed a stipulation of dismissal with prejudice on May 27, 2011. (R. p. 117.)

¹ Claims from Case No. 2006-ES-01-169 between these parties were consolidated with Case No. 2007-CP-01-188 and also litigated in the common pleas case.

Late in his life, Lee decided to clear his conscience and admit he did take money from Hugh at Hugh's death, most of which Hugh intended for Richey. Lee claimed that his daughter and son-in-law, the Booths, had then taken all of the money from him. On March 1, 2012, Lee signed and had notarized a handwritten document that admitted he had taken between \$400,000.00 and \$500,000.00 that belonged to Hugh. (R. p. 89.) The document claims Hugh instructed Lee to use one-third of that money for Lee's personal expenses and to give the remaining two-thirds to Richey at Lee's death. (R. p. 89.) In the statement, Lee also claimed the Booths took this money from his house despite his objections before he issued it to Richey. (R. p. 89-90.)

Lee signed an affidavit on March 6, 2012, that confirmed and added detail to the prior written statement. (R. pp. 96-97.) In this affidavit, Lee clarified that he took the cash from Hugh despite previously denying throughout the 2007 case against Richey that he had taken the money. (R. p 96, ll. 6-14.) Lee stated he took between \$400,000.00 and \$500,000.00 at Hugh's death because Hugh wanted Lee to keep one-third of the money for Lee and his disabled wife and then give the remaining two-thirds to Penny at Lee's death. (R. p. 96, ll. 10-14.)

Lee's affidavit further stated he and Richey were hiring attorney Billy Garrett, who represented Richey in the 2007 case, to represent them in attempting to recover the between \$400,000.00 and \$500,000.00 the Booths had taken from Lee's house. (R. p. 96, l. 19-R. p. 97, l. 2.) Lee stated that should he die before litigation concluded, "it's my desire that my personal representative continue the litigation." (R. p. 97, ll. 3-4.) The affidavit further specified that Lee wanted Richey to continue the litigation after his death and for the money to be split between Richey and the estate. Lee further stated he wanted

his personal representative to pay any of the proceeds from litigation against the Booths remaining at the time of his death to Richey. (R. p. 97, l. 3-12.) The estate's personal representative, Samuel Jeans, witnessed Lee's signature on the affidavit. (R. p. 97.)

Garrett signed an affidavit dated February 3, 2015, that stated Lee came and told him Lee had taken between \$400,000.00 and \$500,000.00 from Hugh's safe prior to Hugh's death because Hugh wanted Lee to give two-thirds of that money to Richey upon Lee's death. (R. p. 93, ¶¶5, 7.) Lee told Garrett the Booths took the money from his house Oct. 29, 2010. (R. p. 93, ¶¶8-10.) Lee reported the theft to the police, but the municipal judge in Abbeville determined not enough evidence existed to bring criminal charges against the Booths. (R. p. 94, par. 11-16.) Garrett interviewed Lee's caregiver, who verified she witnessed the Booths take the money from Lee's house in 2010. (R. p. 97, ¶¶ 17-18.)

Lee, along with Richey, hired Garrett to represent him in an attempt to collect the money taken from him by the Booths. Lee informed Garrett he wanted his estate to pursue the litigation if he died before the litigation concluded. (R. p. 95, ¶20.) If he died before the conclusion of litigation, Lee wanted the estate to distribute any money recovered to Richey. (R. p. 95, ¶20.) Lee hired Paul Agnew, Esq., of Abbeville County prior to his death to prepare a new will. Agnew prepared the deed and Lee properly executed it. Item II of Lee's Last Will and Testament ("will") states:

I give and bequeath the proceeds, if any, from a lawsuit filed by me against Shirley W. Booth and Thomas J. Booth for the recovery of money which belonged to Hugh A. Williams taken from me to PAMELA "PENNY" RICHEY.

(emphasis in original). (R. p. 41, ¶2.) Lee's will is dated April 5, 2012. (R. p. 44.) Lee died on August 18, 2013, prior to the commencement of any litigation. (R. p. 95, ¶24.)

ARGUMENT

- I. THE CIRCUIT COURT ERRED IN GRANTING THE ESTATE SUMMARY JUDGMENT BECAUSE THE ESTATE HAS AN OBLIGATION TO OBTAIN THIS MONEY FOR RICHEY, WHO IS A NAMED BENEFICIARY OF THE ESTATE.

Richey concedes that because of the result of the judgment in the 2007 case between her and Lee, she had no claim, as a matter of law, to the money in Lee's possession regardless of how he actually obtained it. Lee gave her a claim to the money taken from him by the Booths, though. He gave her this claim through the estate by naming her as a beneficiary in his will, which was prepared and executed after settlement of the 2007 case. The Court's ruling granting the estate summary judgment because of Richey's release, collateral estoppel, res judicata, and Rule 60(b), SCRPC, is error because Richey has a separate claim to the money allegedly taken from Lee by the Booths as a named beneficiary of the will.

Lee's will requires that the estate seek the money taken from him by the Booths and distribute that money to Richey, a named beneficiary. The circuit court, therefore, erred in granting the estate summary judgment from Richey's lawsuit against the Booths because that ruling would allow the personal representative to shirk the duty he owes to the estate and Richey who is a named, intended beneficiary.

Summary judgment should be granted where there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. See Rule 56, SCRPC; Shelton v. LS&K, Inc., 374 S.C. 294, 297, 648 S.E.2d 307 (Ct. App. 2007).

A personal representative is a fiduciary who "has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will...."

S.C. Code Ann. § 62-3-703(a) (2014). A personal representative also has the duty to take possession of assets that rightfully belong to the estate. See § 62-3-709 (2014) (“every personal representative has a right to, and shall take possession or control of, the decedent’s property...”) and § 62-3-711(a) (2014) (“Until termination of his appointment or unless otherwise provided in Section 62-3-910, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate.”). The express terms of the will control the testator’s intent and the disposition of the assets acquired by a testator’s estate. See § 62-2-601 (2014) and -602 (2014).

Lee’s will, therefore, controls the estate and the distribution of its assets. He further clarified his intention that his estate and Richey pursue the money taken from him by the Booths in his affidavit:

If I die before any litigation is concluded, it’s my desire that my personal representative continue the litigation. If necessary, I desire that Penny continue the litigation so that she can attempt to recover one-third (1/3) of money for my estate and one-third (1/3) of the money for her. I want this affidavit to be attached to my Last Will and Testament. If I die before litigation is concluded, or if any of my one-third (1/3) share of the money is left at the time of my death, it’s my desire that my personal representative pay my share or the remainder of my share of this money directly to Penny.

It’s my intention that Penny inherit any money that I receive on account of litigation against my daughter and son-in-law. I intend to amend my will to add this provision, but in case I don’t have time to amend my will, I want everyone to know my intention.

(R. p. 97, ll. 3-10.) The probate code specifies that the personal representative of an estate has the same standing to sue or be sued as the decedent had immediately prior to death. § 62-3-703(c) (2014).

The Court questioned Richey's counsel at the summary judgment hearing as to why Richey had not filed a claim against the estate in the probate court rather than in circuit court. (R. p. 68, l. 15-p. 69, l. 10.) The Court erred in finding that the proper forum for Richey to seek relief against the estate was through a claim in the probate court. Richey is not a creditor of the estate but a named beneficiary in the will so the personal representative of the estate owed her a fiduciary duty to obtain the money allegedly taken from Lee by the Booths. See § 62-3-703(a). Richey, therefore, had no obligation to file a claim against the estate to pursue the lawsuit proceeds left to her in the will, but after the circuit court granted the estate summary judgment she filed a petition with the probate court. This petition requested an order requiring the personal representative to help participate in the lawsuit against the Booths to seek recovery of Lee's money that he wished to devise to Richey. (R. p. 49, ¶1.)

Alternatively, Richey's petition asked the probate court to remove the estate's personal representative and appoint a successor personal representative or special administrator to fulfill the estate's duty of seeking to acquire the money from the Booths for Richey and the estate. (R. p. 49, ¶2) Richey also asked the probate court to remove jurisdiction of the construction of Item II of Lee's will to the circuit court pursuant to Section 62-1-302(d)(2), which allows a party to remove jurisdiction of the construction of wills to circuit court. (Id.) §62-1-302(d)(2) This motion, thus, responded to the circuit court's concerns that any claims Richey would have against the estate should be heard by the probate court despite the circuit court's concerns being an error of law. (R. p. 68, l. 19-p. 69, l. 6; R. p. 12, ¶2.)

The circuit court's order also contemplated further litigation in probate court. "It is therefore hereby ORDERED that [the estate's] motion for summary judgment is granted, with leave to file a claim against [the estate], if available...." (R. p. 12, ¶2.) Richey's petition is still pending before the probate court following a motion for a stay filed by the estate's personal representative because of this appeal.

While Richey is precluded from bringing an action against the estate based on Lee's alleged taking of her father's money that was intended for her, she is a named beneficiary who has a right to force the estate to attempt to recover the money from the Booths. A claim calling for Lee or his estate to return the money to Richey only because he wrongfully took it would be barred for the reasons above, but this claim to force the estate to obtain this money and distribute it to Richey as a named beneficiary is a separate claim and not barred.

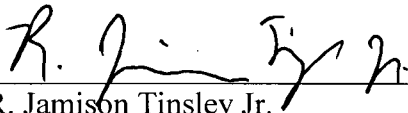
Collateral estoppel does not allow a party to re-litigate an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The issue litigated in the first lawsuit between Richey and Lee was whether Lee had wrongfully taken money at the time of Hugh's death that belonged to Richey. In the current lawsuit, Richey alleges Lee later admitted to taking the money but that it was then wrongfully taken from him by the Booths. (R. p. 15, ¶¶7-8.) This contention is supported by Lee's affidavit and will, which each specify that Richey will receive the proceeds his estate is entitled to from a lawsuit with the Booths. (R. pp. 96-97; R. p. 41, ¶2.) As a named beneficiary of Williams' estate, Richey, therefore, has a claim for the money taken from Lee by the Booths.

Lee's will left proceeds from a potential lawsuit against the Booths to Richey so the personal representative has a legal obligation to pursue that money. The circuit court, therefore, erred in granting the estate summary judgment against Richey. In the alternative, the Court should remand the matter to the circuit court pending the outcome of Richey's probate court petition.

CONCLUSION

The Court should overturn the circuit court's ruling granting the estate summary judgment against Richey's claims for the aforementioned reasons.

Respectfully submitted,



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Pamela Richey,

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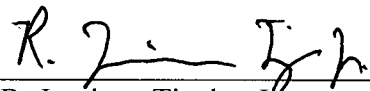
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CERTIFICATE OF COUNSEL

Counsel for the Appellant hereby certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b).



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