

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Judge Perry M. Buckner, III, Circuit Court Judge

CASE NO. 2012-CP-25-402

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SC Court of Appeals

Angel Y. Gary as Personal Representative of the Estate of
Blondell M. Gary, Respondent,

v.

Lowcountry Medical Transport, Inc., American Medical Response, Inc.,
d/b/a Access2care, and Eugene A. Kirkland, In re: Charles Gary, Purported
Surviving Spouse, Defendants,

Of Whom Charles Gary, Purported Surviving Spouse, is Appellant.

**INITIAL REPLY BRIEF OF APPELLANT CHARLES GARY,
PURPORTED SURVIVING SPOUSE**

Joseph Dawson, III
Post Office Box 41367
North Charleston, South Carolina 29423
(843) 207-9004

Attorney for Appellant Charles Gary,
Purported Surviving Spouse

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LAW/ARGUMENT

I. RESPONSES TO ARGUMENTS BY THE ESTATE

A. Marriage by Estoppel

The Estate mistakenly believes that Mr. Gary's appeal is based on the concept of marriage by estoppel. After making this unfounded declaration, the Estate concludes that South Carolina courts have never created a marriage based on this legal theory. (Resp't Br. p.6). This declaration and conclusion is a misstatement of the facts and law of this case. The basis of Mr. Gary's claim is the fact that the Estate, through its personal representative Angel Y. Gary ("Angel"), the decedent and Mr. Gary's daughter, represented to four South Carolina courts over four years of litigation, that Mr. Gary is the surviving spouse and a beneficiary of the Estate. In addition, despite knowledge of the alleged defects, the Estate complains of in its Petition, Angel never sought to contradict that position, until after the Wrongful Death Case settled and settlement funds were disbursed to the other beneficiaries.

South Carolina law is clear, "[t]he Estate is judicially bound by the admissions in its pleadings in the Wrongful Death Case and in two other companion cases where it admitted that Mr. Gary is the surviving spouse and a beneficiary of the Estate of Blondell M. Gary." (Appellant Br. p.7); see also, Postal v. Mann, 308 S.C. 385, 418 S.E.2d 322 (Ct.App.1992). Mr. Gary is not asking this Court to find that he is married by estoppel. Rather, Mr. Gary is asking this Court to find that the Estate is judicially bound by its pleadings and it cannot contradict its previous position that Mr. Gary is the decedent's spouse and a beneficiary of the Estate in this case to subvert payment to him. South Carolina law provides that:

It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 418 S.E.2d 322 (Ct.App.1992).¹

The Estate concedes, as it must, that it was aware of the defects it alleges on or before July 28, 2014, when Counsel for the Estate raised this issue to the Appellant's Counsel.² Despite this knowledge and belief, the Estate chose to proceed without amending its pleadings in the Wrongful Death Case and the Declaratory Judgment Action in the United States District Court. Furthermore, the Estate continued to assert its position that Mr. Gary and Blondell were in fact married, and that Mr. Gary was compelled to pursue his loss of consortium claim in the Estate's case. The Estate's persistence with this claim necessitated the filing of a Declaratory Judgment Action in Circuit Court to determine the proper venue for Mr. Gary's loss of consortium claim. Now that the other beneficiaries have been compensated for their loss, the Estate is asserting this claim to avoid paying Mr. Gary his share of the settlement.

B. Misstatement of Facts

Respondent contends that the Appellant has offered no evidence of his status as a beneficiary and surviving spouse. That is incorrect, "allegations in pleadings are

¹ Respondent attempts to marginalize the application of Postal v. Mann, by stating the case does not apply here, because Mr. Gary is not a party to the Wrongful Death Case; and therefore, its admissions in the pleadings are not binding. The fallacy of this argument is the Estate chose to file its Petition under the Wrongful Death Case adding Mr. Gary as a party to that matter. Therefore, this argument lacks merit.

² On July 28, 2014, Co-Counsel for the Estate indicated at the Summary Judgment Hearing in the United States District Court that Angel told him that a relative claimed there was a defect with Mr. Gary's marriage certificate and that Counsel for Lowcountry Medical Transport Inc., had contacted him about this same issue. Co-Counsel for the Estate then asked if the issue had been raised in Mr. Gary's Personal Injury Case, which Counsel for Mr. Gary responded that he was unaware of the problem and that it had not been raised in Mr. Gary's Personal Injury Case.

conclusive against the pleader.” Mellon Bank, N.A. v. Carroll, 314 S.C. 468, 445 S.E.2d 466 (1994). Appellant introduced into the record at the Petition to Determine Heirship hearing: 1) the Estate’s Wrongful Death Case pleadings; 2) the Estate’s Probate Court Application stating that Mr. Gary is a beneficiary; 3) the Decedent’s Death Certificate stating that Mr. Gary is the surviving spouse; 4) Mr. Gary’s Declaratory Judgment Complaint asserting he was married to Blondell; and 5) the Estate’s Answer to Mr. Gary’s Declaratory Judgment Complaint. All five of these documents assert and/or admit that Mr. Gary is the surviving spouse and a beneficiary of the Estate. Therefore, the Estate cannot escape the grasp of its own statements.

The Estate misconstrues the Appellant’s arguments on appeal. The Estate claims that Mr. Gary’s sole argument in opposition to its Petition is that the Estate should be estopped to deny Blondell’s marriage to Mr. Gary. (Resp’t Br. p.5). To the contrary, Mr. Gary’s contention is that Blondell and Mr. Gary’s own daughter, who is the Personal Representative of the Estate, knew they remarried twelve years ago, and that they cohabitated for the twelve years before her untimely death. Likewise, Angel made this representation before the Beaufort County Probate Court, Beaufort County Circuit Court, the Hampton County Circuit Court, and the United States District Court over the course of four years of litigation and that she should be judicially bound by these statements.

Estate’s Counsel misrepresents what Mr. Gary’s Counsel said in a conversation with another attorney in his office. See, Footnote 2. First, “[i]t is well established that counsel’s statements regarding the facts of a case and counsel’s arguments are not admissible evidence.” Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006). Nevertheless, the Estate’s Counsel offers these alleged statements (which were

communicated to someone else) as evidence to support why the Estate waited nearly 18 months before it attempted to correct what it considers to be significant, only after the Wrongful Death Case settled. (Resp't Br. p.10). Counsel for the Estate then quotes what he said during the Petition to Determine Heirship hearing in the Estate's brief. Presumably, this is done because he believes that his statements made during the hearing about what he claims someone else said, should be taken for the truth of the matter asserted. This defies logic and common sense.

The Estate's excuse for waiting to change its position regarding Mr. Gary is that "[a]t that point in the litigation, whether Charles was married to Blondell was not material to the wrongful death or survival claims." (Resp't Br. p.4, Footnote 3).³ To the contrary, South Carolina law mandates its materiality, because it requires the Personal Representative to identify "the statutory beneficiaries of the wrongful death or survival action" prior to Court approval of a Wrongful Death settlement. See, S.C. Code Ann. § 15-51-42. Equally, the Estate's "not material" defense is weak. On one hand, the Estate demanded that Mr. Gary waive his rights in his Personal Injury Case to claim loss of consortium, so that the Estate could make that claim in its case. But on the other hand, the Estate claims he is not the surviving spouse. These contradicting positions cannot be reconciled.

³ The Estate's materiality defense is dubious at best. The parties discussed and agreed that the best way to resolve which case should address the loss of consortium issue was a Declaratory Judgment action. If Mr. Gary's marriage was truly immaterial and in question, then the Estate would not have admitted that the Estate intended to compel Mr. Gary to seek recovery of certain damages in the Wrongful Death Case that he sought to recover in his Personal Injury Case and that a justiciable case or controversy exists between the parties. (R.p. ____ Declaratory Judgment Action Complaint ¶ 7 and ¶ 10). The assertion that Mr. Gary's marriage was not material to the Wrongful Death Case is erroneous in light of the Estate's conduct.

The Estate's explanation for its duplicity and admissions are two-fold. First, the Estate believes this Court should not consider Angel's mistaken statements. (Resp't Br. p.7). Second, the Estate claims that this issue is not as important as pursuing the underlying case against the tortfeasors and that it did not become significant until the conclusion of the litigation. (Resp't Br. p.10). Stated in light of its admissions, the Estate wanted Mr. Gary as a surviving spouse and beneficiary in its Wrongful Death Case to develop its damages, but it did not want him to benefit after it used him. The fact of the matter is that the Estate has known about the Marriage Certificate in relation to the Final Order of Divorce issue during the pendency of its Wrongful Death Case in Hampton County, the Beaufort County Probate Court proceedings, and this case. However, the Estate has elected to press its claim that Mr. Gary is a beneficiary of the Estate in the Wrongful Death Case to bolster the Estate's potential damages. Now that it has achieved its goal, the Estate wants to contradict that position.

C. Unclean Hands

The Estate incorrectly asserts that Mr. Gary is attempting to benefit from his own wrong which in all respects was cured when his divorce was final in 2001, twelve years before Blondell's death. (Resp't Br. p.11).⁴ Rather, it is the Estate that should not benefit from its own misconduct. "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others. [Citation Omitted]. The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in

⁴ Respondent attempts to analogize Ex parte Nimmer with the facts of this case, to suggest that Mr. Gary has unclean hands. Ex parte Nimmer, 212 S.C. 311, 47 S.E.2d 716 (1948). However, unlike in Ex parte Nimmer, it is undisputed that Mr. Gary's divorce from his second wife in 2001, was valid in all respects, twelve years before Blondell's death.

a court of equity.” Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010). On September 3, 2015, at a Probate hearing to Remove Angel Y. Gary as Personal Representative, Counsel for the Estate indicated during a pre-hearing conference in the Probate Judge’s conference room that there was no need to proceed with the hearing, because the Wrongful Death Case had settled on September 1, 2015. Estate’s Counsel represented that it would be disbursing settlement funds to Mr. Gary as a beneficiary of the Estate as a result of the settlement after the Settlement and Release Agreements were signed and settlement funds were received. Based on these representations, the parties agreed to dismiss the Petition to Remove the Personal Representative.

From September to November, Mr. Gary’s Counsel sought updates from Counsel for the Estate regarding the status and payment of settlement funds. On or about November 25, 2015, Counsel for Mr. Gary learned that Judge Buckner had signed an Order of Dismissal in the case and that settlement funds had been delivered to the Estate’s Counsel. On December 2, 2015, Counsel for the Estate and Counsel for Mr. Gary spoke to discuss when Mr. Gary could pick up his settlement funds. Counsel for the Estate indicated that the only outstanding issue it needed to resolve before it disbursed settlement funds to Mr. Gary and the other beneficiaries was to obtain a Release from Eugene Kirkland, the driver of the ambulance. Counsel for the Estate indicated that he would call Counsel for Mr. Gary to pick up Mr. Gary’s check when he obtained the signature. (R.p. ____). At no time during that meeting or during the previous three

months, did Counsel for the Estate indicate that it claimed Mr. Gary was not the surviving spouse or that he would not disburse any funds to Mr. Gary.⁵

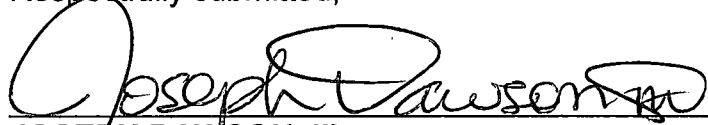
"The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." Straight v. Goss, 383 S.C. 180, 678 S.E.2d 443 (Ct.App.2009). The actions and conduct of the Estate regarding its assertions that Mr. Gary waive his rights to claim loss of consortium in his Personal Injury Case; to the parties consent to dismiss the Petition to Remove Angel under the guise that the matter was moot and that Mr. Gary would receive his spousal share; to waiting until December 11, 2015, after settlement funds were disbursed to the other beneficiaries to claim that Mr. Gary is not a beneficiary of the Estate is unduly prejudicial, inequitable, and unclean.

CONCLUSION

This Court should find that the Estate is judicially barred from asserting that Mr. Gary is not the surviving spouse of the decedent and an heir of the Estate, because the Estate is bound by its pleadings and it cannot take a position contradictory of, or inconsistent with the pleadings in the Wrongful Death Case.

⁵ On Friday, December 11, 2015, the Estate's Counsel informed Mr. Gary's Counsel for the first time that the Estate disputes whether Mr. Gary was the decedent's spouse as the basis for establishing a fee dispute to withhold settlement funds from Mr. Gary.

Respectfully submitted,

A handwritten signature in cursive script that reads "Joseph Dawson, III". The signature is written in black ink and is positioned above a horizontal line.

JOSEPH DAWSON, III

Post Office Box 41367

North Charleston, South Carolina 29423

(843) 207-9004

**ATTORNEY FOR APPELLANT CHARLES GARY,
PURPORTED SURVIVING SPOUSE**

North Charleston, South Carolina
May 13, 2016