THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

J.C. Nicholson, Circuit Court Judge

CASE NO. 2014-CP-10-5355
Appellate Case No. 2016-000748

In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Appellants,

v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents.

Appellants' Initial Brief

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STATEMENT OF THE CASE

In 2004, relations between Norman R. Knight, Jr., Mildred C. Knight, and their daughters, Chloe Knight-Tonney and Linda Jones became adversarial. In 2004, Mr. and Mrs. Knight revoked their Power-of-Attorney to their daughters. In 2004, the Charleston County Department of Social Services investigated the Knight home pursuant to allegations of elder abuse. In 2004, the investigation was terminated and the allegations were classified as unfounded.

Relations between the parties continued to deteriorate, becoming litigious and contentious. While an appeal was pending in the Circuit Court, Mr. Knight was removed from the home in 2006.

On January 20, 2009, Respondent Tonney filed a claim for reimbursement of moneys expended allegedly for the care of her father, Norman R. Knight, Jr. The Special Administrator, Beatrice E. Whitten, disallowed the claim and on or about April 20, 2009, Respondent filed a petition to allow the claim. After several years of litigation and appeals, on November 28, 2012, Beaufort County Probate Judge, Kenneth E. Fulp, Jr. was appointed Special Probate Judge for Charleston County exclusively for the Estate of Norman R. Knight Jr.

On May 29, 2013, Appellants filed a Summons and Complaint seeking the removal of the Special Administrator. On July 17, 2013 the initial set of motions were argued and an order filed on July 29, 2013. Appellants were the only movants; all motions were denied. On December 13, 2013, Appellant filed and served an Amended Complaint to Remove the Special Administrator. Numerous pre-trial motions were filed

and argued. Appellant filed two series of Motions to Dismiss, Motion to Compel Discovery with issues of redaction, Motion to Amend Complaints and other motions regarding venue, all filed in pre-trial. On December 17, 2013, a motion hearing by phone was held and an order issued on December 23, 2013. This hearing was significant because the Court held certain documents had to be unredacted to comply with Appellants' motion to Compel. A second set of pre-trial motions were argued by telephone on January 6, 2014 and an order was filed on January 17, 2014. Appellants' Motion to Amend Special Administrator's Complaint was granted. Bishop Gadsden was allowed to withdraw its claim.

On April 22, 2014, Judge Fulp quashed Appellants' subpoena duces tecum to the Morgan Stanley Company, Morgan Smith-Barney. The subpoena required Morgan Stanley to provide information on the "deposit and withdrawal activity/records including identity of depositors and payees for the years 2004 through 2009 involving account holders: Linda Jones, Chloe Tonney, and Queenie."

This matter was tried before the bench in non-jury for two separate days, March 31, 2014 and April 28, 2014. Including post-trial proceedings, i.e. written closing arguments, a final order was filed on July 11, 2014. After post-trial motions, a Notice of Intent to Appeal was filed on September 3, 2014 by the Estate of Mildred C. Knight and Bobby Knight. Appellants are appealing the award of $23,914.73 plus 8.75% interest beginning May 11, 2009. This is an appeal of the orders of Special Probate Judge for Charleston County, Kenneth E. Fulp, Jr. and Common Pleas Court Judge, J.C. Nicholson, Jr. Judge Nicholson denied a Motion to Appeal on January 27, 2016 although Appellants did not file a "motion to appeal." Post-trial motions were denied with Notice of Entry of Judgment being received by Appellants on March 11, 2016.

ARGUMENTS

I. LOWER COURTS ERRED BY ACTING ON A PETITION FILED AND SERVED WITHOUT SUMMONS

"Although quite elementary to an audience of lawyers, the Constitution of the State and the United States, requires due process of law. Article I, Sec. 3 of our State constitution provides as follows:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life liberty or property without due process of law, nor shall any person be denied their equal protection of the laws." Summons Subcommittee, Probate, Estate Planning and Trust Section, Summons in Probate Court, p.4 (January 21, 2010).

"The sanctity and importance of a cohesive, uniform set of procedural court rules, which begins with process, is to ensure that all parties who come before the court enjoy their constitutional right to due process. Summons in Probate Court, at 4, Id.

In her attempt to process a claim against the estate of her father, Tonney has never filed and served a Summons upon the Special Administrator or any other party. The consequence of her failing to file and serve the required process is that this case has not been commenced and the court does not have jurisdiction of this matter.

In their report to the South Carolina bar, the Summons Subcommittee cited the following case: McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994) (per curium). The McLain Court held as follows: "The language of Rule 5(d) is clear: the summons and complaint must be filed prior to their service. Here, service preceded filing and thus this action was not properly commenced before expiration of the statute of limitations. *We recognize the harsh result reached in this case, and take this opportunity to remind practitioners that the*

interrelationships between various court rules are not always readily apparent." McLain *at 360 [emphasis added].* See, Summons in Probate Court, at 5 Id.

The major conclusion of the Summons Subcommittee Report is as follows: since 1985 the South Carolina Rules of Civil Procedure, through Rules 1 and 81 and pursuant to S.C. Code sec.14-23-280 as well as S.C. Code sec. 62-1-304, have always required the filing of a summons and complaint in Probate Court matters. See, In Re: Estate of Timmerman, 331 S.C. 455, 502 S.E. 2d 920, 922 (Ct.App. 1998); Weeks v. Drawdy, 495 S.E. 2d 454 (Ct. App. 1997); Truluck v. Snyder, 362 S.C 108, 606 S.E.2d 792 (Ct.App. 2004); LaFaye v. Timmerman, 502 S.E. 2d 920 (Ct.App. 1998).

Before a ...court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. Omni Capital Int'l Ltd. V. Rudolf Wolff & Co., 484 U.S. 97,104 (1987); Service of summons is the procedure by which a court...asserts jurisdiction over the person of the party served. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-445 (1946). "Where a court has jurisdiction, it has a right to decide any question which occurs in the cause, and whether its decision be correct or otherwise, its judgments, until reversed, are regarded as binding in every court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification, and all persons concerned in executing such judgments or sentence are considered in law as tresspassers. Elliott v Perisol, 1 Pet. 328, 340, 26 U.S. 328, 340, 7 L.Ed. 164 (1828).

The McLain decision sets the tone for applying these precepts. The orderly, fair operation of the courts is extremely important to the fundamental constitutional protections required by the Federal and State constitutions;

and harsh consequences may accompany the failure to recognize certain requirements.

This claim must be dismissed because it never was properly filed and served, and that requirement existed before July 2010.

II. LOWER COURTS ERRED BY ALLOWING THE PROBATE COURT TO ACT WITHOUT A QUALIFIED ELECTOR SERVING AS THE SPECIAL JUDGE

A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court. Old Wayne Mut. L. Assoc. v McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907). The Law provides that once State and Federal jurisdiction has been challenged, it must be proven. Main v. Thiboutot, 448 U.S. 1, 100 S.Ct.2502, 65 L.Ed.2d 555 (1980).

S.C. Code 14-23-1040 states: "No person is eligible to hold the office of judge of probate who ...has not become a qualified elector of the county in which he is to be a judge..." The Special Judge appointment must conform to the same standards and legal requirements as applied to the Probate and Associate Probate Judge relative to residency and territorial jurisdiction. Despite orders to the contrary, the statute is clear and unambiguous, and does not provide for exceptions. The Special Judge herein is not a qualified elector of Charleston County and therefore all orders issued by him are void and a nullity.

This present action has been affected by the Special Judge appointment and venue considerations since the fall of 2008 when Dorchester County Probate Court Judge, Mary Blunt, was assigned to the matter. The initial claim (2009) was appealed on the basis that the appointment of a Special Probate Judge is not transferable to others by order of that

Special Probate Judge. The issues were reviewed at that time based on the South Carolina Supreme Court Order assigning the judge, and her appointment of associate judges. The Orders of the Associate Judges were determined to be void. Now, this issue returns with broader, more profound consequences for this case.

Beaufort County Probate Judge Kenneth E. Fulp, Jr., is a Beaufort County resident. He was assigned to this matter by the South Carolina Supreme Court Administration Director on November 28, 2012. In fact, this exercise of discretion by the Court Administration viewed through S.C. Code sec. 14-23-1040 creates a status that is dual office holding. The appointment of Judge Fulp, who is elected pursuant to 14-23-1040, to the Probate Court for Charleston County, expands his office to another county. Dual office holding is patently incorrect. Richardson v. Town of Mt. Pleasant 350 S.C. 291, 566 S.E. 2d 523 (2002). S.C.Code sec. 14-23-1040 cannot be construed as limited in its scope, as it occupies a location among the statutes cited by the Order appointing Kenneth E. Fulp, Jr. as Special Judge for Charleston County. This statute is not incongruent, but gives parameters on who is qualified to serve on the probate court even when managing conflicts and failures. Astoria Federal Savings and Loan Association v. Soliminmo, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). (Similar superior values, of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws, prompt the kindred rule that legislative repeals by implication will not be recognized, insofar as two statutes are capable of co-existence "absent a clearly expressed congressional intention to the contrary" citing Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed 2d 290 (1974); Palmettonet, Inc. v. South Carolina Tax Com'n, 318 SC.102, 456 S.E.2d 385 (1995). Obviously, the legislature wants the Probate Judge to be an official, native to that county, and tied to the county

with the kind of intimacy and accountability a resident elected official brings to his/her local institutions and population.

The venue issue was raised during Judge Blunt's assignment. Judge Blunt required all apprearances to occur in Dorchester County. Judge Blunt's approach was error. The appointment of a Special Probate Judge is not a transfer of venue. S.C. Code sec. 62-3-201 Venue is proper in formal/informal probate proceedings in the county where the decedent resided and died. S.C. Nat. Bank of Charleston v. May, 211 S.C. 290, 44 S.E. 2d 836 (1947) For Mr. Knight, venue was proper in Charleston County. The venue standards are another emphasis to the qualified elector requirement. Probate intestacy and testacy proceedings are provincial matters. Per the S.C. Nat. Bank of Charleston Court, "If any interested party had seasonably made application to the Probate Court of Charleston to have the order admitting the will to probate set aside or the appointment of the executor revoked upon the ground that the testator was a resident of Dorchester County, such party would have been entitled to a hearing on the latent jurisdictional question. Such a proceeding would have constituted a direct attack upon the jurisdiction of the Court. This was the procedure followed in the recent case of *Reed v. Lemacks*,204 S.C. 26, 28 S.E.2d 441." S.C. Nat. Bank of Charleston v. May, Id.

The orders issued by Judge Fulp and Judge Blunt must be vacated.

III. LOWER COURTS ERRED BY FAILING TO UNREDACT DOCUMENTS AND ADMITTED INTO EVIDENCE

Appellants sought to obtain information on a bank account showing Claimant Tonney's name.

The account was informally named the "Queenie Account." This account was

held by Smith-Barney who has now become Morgan Smith-Barney. Specifically, the subpoena requested information on the "deposit and withdrawal activity/records including identity of depositors and payees for the years beginning 2004 through 2009 involving account holders: Linda Jones, Chloe Tonney, and Queenie." Early in the discovery stage of this case, Respondent Tonney had redacted the names of Jones and Queenie so there would be no inquiry. (R.P.) "Queenie" is a nickname for an elderly lady whose legal name is Louise Reynolds. During her testimony, Tonney would not say where Ms. Reynolds lived or give information on her status. (R.p. 95; tr.p. 186 L. 4 – p. 187 L. 4) Ms. Reynolds was known to possess a large sum of money. (R.p. 135)

Ms. Reynolds has known all of the Knight siblings for more than thirty (30) years. She was their next-door neighbor, and someone for whom Mr. and Mrs. Knight cared. Appellants needed information on this "Queenie" account. Respondent, Tonney, filed a motion to quash the subpoena, the motion was denied and Respondent Tonney withdrew her claim based on this account. The trial court then granted the motion to quash Appellant's subpoena on the grounds that Tonney's withdrawal of the claim made the information irrelevant (R.p. 16) This ruling is incorrect because Tonney did not move for a protective order per Crawford v. Henderson, 356 SC 389, 589, S.E.2d 204 (Ct.App. 2003). This material would have made the origin of funds used to pay Mr. Knight, Jr's expenses certain and set the record straight as to who is the true claimant.

In another request to unredact a letter used to establish Respondent Tonney's claim for attorney fees, the trial court refused to unredact the letter (R.p. 152) written by the decedent's attorney to Tonney and a third party. The trial court characterized this letter as attorney client privilege relative to the redacted material.

The Appellants should have access to the blocked information. The fact that the letter was written to Tonney and a third party, not a co-client, means there is no attorney-client privilege, and the letter was produced as a response to discovery. Floyd v. Floyd 365 S.C. 56, 615 S.E.2d 465 (2005) (attorney-client privilege does not protect communications with non-clients). (Tr. 11/9/15). To see this letter fully would provide a basis for establishing with certainty the character of this particular redacted item. This item would have led to a relevant and influential line of inquiry for discovery and trial purposes. (R.p. 152) The Respondent Tonney should not be allowed to obfuscate the trial process in this way. The trial court did not protect the truth-finding process. The jurisprudence of South Carolina protects 'trial on the merits', not pro forma machinations designed to thwart the full and comprehensive examination of the facts. Knight v. Lee, 262 S.C. 17, 202 S.E.2d 19 (1974).

IV. LOWER COURTS ERRED BY FAILING TO APPLY THE LAW OF UNCLEAN HANDS TO A CLAIM FOR EQUITABLE RELIEF

This claim clearly sounds in equity and seeks equitable relief. There is no contract involved between any party or principal. Respondent only gave notice to the Conservator and the Guardian that she would be seeking restitution of funds used for expenses incurred by her father. (R.p. 54; tr. p. 22; 56: tr. p. 31; 78: tr. p. 1991; 69: tr. p. 83/84). She did not give notice to any other party. At best, this claim is based upon quasi-contract. Characterization of an action as equitable or legal depends on the 'main purpose' in bringing the action. Ins. Fin. Services., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247, S.E.2d 315, 318 (1978). "The main purpose of the action should generally be ascertained from the body of the complaint." Id. "However, If necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light

upon the main purpose of the action. Id. The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. Bell v. Mackey., 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939). Tonney testified that she wanted to be reimbursed. (R.p. 92: tr. p. 174 L. 7-13; 94: tr.p. 182 L. 13-19) Moreover, Tonney submitted an exhibit entitled reimbursement breakdown. (R.p. 92: tr. p. 173, L 18-19). During oral argument in the Circuit Court, Claimants' attorney repeatedly said that his client wanted to be reimbursed. (Tr. 11/9/15)

"In the case of actual contracts, the agreement defined the duty; while in the case of quasi-contracts, the duty defines the contract." In quasi-contracts the obligation arises, not from the consent of the parties as in the case of contracts express or implied in fact, but from the law of natural immutable justice and equity." 66 Am.Jur.2d Restitution and Implied Contracts Section 2 (1973). Restitution is an equitable remedy. Wallace v. Milliken & Co., 305 S.C. 118, 120,406 S.E. 2d 358, 359 (1991); restitution and disgorgement are equitable remedies. See, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215-16, 122 S. Ct. 708 (2002).

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. Ingraham v. Kasey's Associates, 340 S.C. 367, 559 S.E. 2d 287 (S.C. 2000). A party ... "who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." Emery v. Smith, 361 S.C. 207,220,603 S.E. 2d 598, 605 (Ct. App. 2004).

Tonney cannot present clean hands. In 2004, Tonney allowed her sister to file a

bogus charge of adult abuse with the Department of Social Services. The charge was investigated and determined to be unfounded. (R.p. 51: tr. p. 12 L. 10-24). Also, in 2003/2004, Tonney and his sister, Linda Jones, simultaneously, argued that the decedent was incapacitated while accepting his Power of Attorney appointment. (R.p. 284-289) In January, 2006, Tonney alleged that the decedent was being abused (collaborated with the supposed guardian) and caused Mr. Knight to be removed from his home and testified in this action that one of the major motives was a feud over visitation. Tonney has never offered evidence of abuse, not a scintilla.

Tonney had Mr. Knight removed from his home without any of his clothing or toiletries. She never sought to obtain any of his personalty from his home, although she had an order to remove him. She then set-out to buy hundreds of dollars worth of items, place Mr. Knight in the most expensive home in this region and now seeks restoration of her money. "The doctrine of unclean hands precludes a plaintiff from recovering in equity if she acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." First Union National Bank of S. C. v. Soden, 333, S.C. 554, 568, 511 S.E. 2d 372, 379 (Ct. App. 1998). This litigation saga[1] became hyperdriven after Mr. and Mrs. Knight revoked powers of attorney once held by Defendant Tonney and her sister. (R.p.227-228, 238). This particular battle started during Mrs. Knights' lifetime, i.e. Respondent Tonney filed the claim while her 80 year old mother was living in the marital home. Her initial claim was $60,000+. In fact, she did not spend that amount and the claim had to be reduced. In one of the items claiming repayment for attorney fees,

[1] At the death of Mr. Knight (3/ 2008) Linda Jones and Chloe Tonney filed a civil action to take control of Mr. Knight's remains from his wife, their mother, Mrs. Knight. The suit was not served and later dismissed by their attorney C. Mac Gibson.

Tonney maintained a $5,000.00 figure for five (5) years, until the attorney was summoned to court. The claim was instantly reduced to $3,200.00 to reflect a refund that occurred more than six (6) years ago. Because of proceedings in the Probate Court and the Family Court financial declarations, Respondent Tonney knew that her parents could not afford the lifestyle she had forced on them: residency at a nursing home whose costs were far above their means, and protracted family court litigation to establish what was already agreed upon. For Respondent Tonney to collaterally contest the Probate Court settlement knowing the limitations in her parents' income, shows insensitivity and willful disregard for the general welfare of either parent.

Tonney wanted to be reimbursed for items that she kept or converted to her use such as a wall clock, office furniture, wall pictures, reclining chair, television, and a therapeutic bed. (R.p. 93: tr. p. 179 L. 2-5; 94: tr p. 181 L. 1-4). Through redaction, Tonney attempted to hide the fact that furniture purportedly bought for Mr. Knight was delivered to her sister's home. (R.p. 199).

Finally, Respondent Tonney did not deposit money with the Conservator, Family Services, Inc., but instead, she made payments outside of the structure established by the Probate Court. Hence, her actions were insulated from Court oversight and notice to Mrs. Knight and her son. All of this was arranged without notice to the Probate Court.

Credibility should matter in this claim. Respondent Tonney is a cotenant on a joint account with an elderly lady named Louise Reynolds. That relationship was not revealed until the Court ordered her to unredact the exhibit that was evidence of that relationship. In order to block discovery of what proportion of this account belonged to Louise Reynolds, Respondent Tonney withdrew her claim for reimbursement on a check

from the joint account with Louise Reynolds. Allowing Tonney's withdrawal of the claim to end the inquiry regarding the source of funding for that account was error. Crawford v. Henderson, supra. (Tr. 11/9/15).

Respondent Tonney did not offer any evidence that she notified her mother about her intentions to file a claim against her father's estate. She offered evidence of communication with the Conservator and the Guardian. The Record is clear about the depth of estrangement in this family. The record is clear that Respondent Tonney was advised to look at the estate for reimbursement as indicated by the testimony of the Guardian, Walter Kaufman. (R.p. 79: tr. p. 121 L. 25- p. 122 L. 6) (R.p. 81: tr. p. 130 L. 16-20) (R.p. 92: tr. p.174 L. 7-13). Tonney made no effort to inform her mother of her plans to force her father's estate to reimburse those expenses she {alleged} were necessary, beneficial, and reasonable. At its highest value, notice is constitutionally required when a taking of property is at hand. Timmons v. South Carolina Tricentennial Commission 175 S.E. 2d. 805 254 S.C. 378 (1970) Although the immediate relationship of the parties in this case does not include a governmental actor, South Carolina courts hold the issue of notice to be substantively material to matters in equity. In EllisDon Construction, Inc. v Clemson University, 391 S.C. 552, 707 S.E. 2d 399 (2011), the Court found that the Appellant had an adequate remedy at law, and, in order to avail itself of an equitable remedy, Appellant had to give a notice to the payor as required by law. The Court held that "a party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy," Id. at 555.

Respondent Tonney had an adequate remedy at law in the legal principles of contract. She chose not to avail herself of these tenets: Offer, acceptance, and

consideration. She never negotiated with her mother or her brother, who was the onsite caretaker for her parents. She did not insist that the Conservator or the Guardian negotiate or inform her mother that she would look to liquidate her father's estate in order to obtain reimbursement. Tonney's actions are more consistent with her contempt for Mrs. Knight and disdain for her brother. (R.p. 92 tr. p. 175 L. 14-18). Ms. Tonney had filed suit to take control of her father's remains and admitted on the record that she wanted her brother removed from their parents' home, despite his caretaker status. The EllisDon Construction, Inc., supra, holding is a further declaration by our Court that a party in equity must not come to the court with unclean hands. See, Webb v. First Federal Savings & Loan Association of Anderson, 300 S.C. 507, 388 S.E.2d 823(1989).

Equity cannot assist this type of behavior. Respondent Tonney carries too much responsibility for the destabilization of her parents' home, and her approach to settling her father's estate is vindictive. "The law will never impute a promise to pay for a benefit conferred where it would be unjust to the party to whom it would be imputed and contrary to equity." 66 Am.Jur.2d Restitution and Implied Contracts Section 2 (1973); Webb, 300 S.C. 507.

V. LOWER COURTS ERRED BY FAILING TO RECOGNIZE THE LAW OF AUTOMATIC STAY PURSUANT TO S.C. CODE SEC. 62-1-308(c)

When an appeal, according to the law, is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. S.C. Code Sec. 62-1-308(c)(1999).

In August 2005, the Probate Court issue two orders that were timely appealed. In

October, 2005, the Circuit issued an Order clarifying the stay and directly enjoining the parties in order to give directions for responsibilities during the stay. The Circuit Court order essentially left the matter in the status existing prior to the August, 2005 orders. The most noteworthy item was Mildred C. Knight retained guardianship of her husband.

The Appeal was argued in the fall/early winter of 2005 and a decision was issued in January 2006 dismissing the appeal but a timely Motion for a New Trial was filed and served on all parties. Respondent Tonney knew that the matter was under review as indicated by her Motion to Dismiss. (R.p.216) The automatic stay was still in place at the time Respondent Tonney and Kaufman acted to remove Mr. Knight from the home. (R.p.79: tr. p. 124 L. 22-125 L. 11)

According to the response to a letter from the Guardian Ad Litem to the Circuit Court Judge, the Guardian ad Litem was advised to prepare a Rule to Show Cause (R.p. 212), an approach more consistent with the automatic stay. There were two guardians hovering around the case at that time, but according to the October, 2005 circuit court order, the Guardian (Kaufman) who participated in removing Mr. Knight from his home was relieved of any authority during the appeal. (R.p. 261). A series of exhibits substantiate the appeal status. (R.p. 211-216)

Because of Respondent Tonney's contempt for her mother and her brother, she and her representatives did not confirm or discuss the case status with anyone associated with Mrs. Knight or Bobby Knight. While away from home, important obligations, such as doctors' appointments, chemotherapy, medications, haircuts, routine excursions to see family and friends that she or her sister as non-custodial relatives did not have to contend with, became flash points of contention and offense because they were not oriented to be caretakers. Their behavior was the actual harm Mr. Knight endured.

Respondent Tonney and advisers sought leverage on controlling Mr. Knight, Jr. but are tangled in the protections of the automatic stay.

In 2007, Bobby Knight appealed the appointment of Tonney as Conservator and the automatic stay was never lifted. (Resp.Trial Exh. 19). The stain of disregarding the automatic stay can be purged only by rescinding all acts undertaken without proper authority and restoring Mr. and Mrs. Knight to their 2004 status. Turner v. Malone, 24 S.C. 398, 401-02 (1885) ([J]udicial proceedings are void, when the court, in which they are taken, is acting without jurisdiction . . . If the jurisdictional defect appears in the record itself ... the judgment may be disregarded as a nullity whenever and wherever it is encountered, any proceeding direct or collateral.) These failures by Respondent Tonney cannot be disregarded.

VI. LOWER COURTS ERRED BY FAILING TO APPLY THE DOCTRINE OF FRAUD IN THE INDUCEMENT TO ENTER A CONTRACT

During the probate proceeding, two individuals were appointed as guardian and conservator, respectively, for Norman R. Knight, Jr. The certificates of appointments/ orders directed each individual to discuss all major decisions regarding the decedent with Mrs. Knight. Upon cross-examination, they admitted that they did not consult with Mrs. Knight before any action they undertook.

The guardian and the conservator acted intentionally. At the time of this incident, Mrs. Knight was a recognized participant in the management of her husband's estate and well-being. She was a stakeholder in his estate, and a third party beneficiary of the management of Mr. Knight's estate. She relied on her status and co-participants to her detriment. (Tr. p. 11/9/15).

In order to establish a claim of fraud in the inducement to enter a contract, the

proponent must demonstrate the following: (1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of it falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to reliance on it truth (9) the consequent and proximate injury. M.B. Kahn Const. Co. v South Carolina Nat Bank of Charleston, 275 S.C. 381, 271 S.E. 2d 414 (1980). The representation in this fact pattern was a non-statement, an omission, that caused Mrs. Knight to think that she was not in jeopardy. The unstated representation began the inducement. Certainly, the existence of a loan is material to Mrs. Knight as an heir to Mr. Knight. The guardian and conservator in this case handled the knowledge of the existence of this "loan" with disregard for the truth or falsity of the representation. The intent that the representation be acted upon is clear. Mrs. Knight was totally ignorant regarding the falsity of her and her husband's situation. Mrs. Knight relied on what was not, and she had a right to rely on the presenters.

The consequential and proximate injury is well established at this point. See M.B. Kahn Const. Co. v. South Carolina Nat. Bank of Charleston, Id. See Restatement of (Second) of Contracts 161 and 173 (when the parties are in a fiduciary relationship, there is a duty to disclose material facts; failure to do so may constitute fraud).

In failing to discuss their issues with Mrs. Knight, the guardian and the conservator failed to perfect their authority to act as appointed. Perfect authority, i.e. perfect duty, is a duty that is not merely recognized by the law but is actually enforceable. See, Bryan A. Garner, Black's Law Dictionary at 522 & 1157 (7th ed. 1999). Not having the proper authority created void understandings, particularly for Respondent Tonney who urged these actions and now seeks to be compensated on the

basis of these void "agreements."

"Fundamental fairness" says that Mrs. Knight was due some notice that a claim against her inheritance was being created and certain to be launched. Due process was sorely lacking in the way Mrs. Knight was treated: no notice, no confrontation, no voluntary waiver. These are the consequences of fraudulent inducement or negligent misrepresentation. Tonney's claim against this estate should be disallowed. Webb v. First Federal Savings & Loan Association of Anderson, 300 S.C. 507, 388 S.E. 2d 823 (1989)

VII. LOWER COURTS' ALLOWANCE OF RESPONDENTS' CLAIM IS AGAINST THE GREATER WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION

Appellants placed in evidence two letters from reputable physicians that found Norman R. Knight, Jr. not to be incapacitated at the time relevant to Respondent Tonney's efforts to cast him as being gravely ill and abused. (R.p. 203, 204). These letters are a clear indication that Mr. Knight, Jr. was doing fine and was expected to progress and thrive. Both letters are written to Mrs. Knight's attorney and detail specifics of his condition. Dr. Derrick said, "I find him to be more alert and talkative than usual and feel that his general mental and physical health is improved." Dr. Smith found his "iron deficiency to be abated," his mental status intact," and "his energy level dramatically improved, "with adequate therapy, he has done extraordinarily well." This evidence is a direct conflict with the allegations of Tonney and they highlight inconsistencies in Tonney's own testimony. In the March 31, 2014 hearing, Tonney testified that her father was subject to a number of what she "deemed atrocities in terms of physical, financial, and psychological abuse" and in the same line of questioning, she admitted that as a result of her [petition] her mother, Mildred C. Knight was appointed

guardian for her father. (R.p. 51: tr.p. 12 L.10-24) Later she admitted her sister made allegations that were determined to be unfounded. There is no conclusive evidence in the entire record for all these years of litigation that substantiate physical, financial, and psychological abuse.

The only evidence offered by Respondent Tonney was to propose the existence of expenditures. Respondent offered nothing to establish the need to remove Mr. Knight from his home. The Respondent did offer an opinion on the status of the facility where Mr. Knight died. There was no evidence offered to establish that Mr. Knight's removal from his home delivered him from death. Tonney offered no evidence of abuse. Tonney offered no evidence that Mr. Knight's removal from his home was necessary for his care. Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993).

The failure to establish necessity to remove Mr. Knight from his home means that any expenditure for his shelter outside of his home is unreasonable. Merely declaring that funds were expended or presenting the existence of expenditure in this context will not satisfy the reasonableness requirements. 66 Am.Jur.2d Restitution and Implied Contracts Section 2 (1973) The only professional to testify on Mr. Knight's home situation was Cary Fechter, M.D. who thought that his home placement was supportive and preferable to outside placement. (R.p. 144: tr.p. 383 L.18 – tr. p. 384 L.1-20) Dr. Fechter had attended to Mr. Knight for several years. Moreover, a reasonable expenditure will not be exorbitant. Appellants offered professional testimony that, medically and ethically, less expensive care was available for Mr. Knight's outside placement. Gloria Johnston, Community Residential Care Facility Administrator for the Disability Board of Charleston County, testified that appropriate care was available for $3,000.00 to $4,000.00 per month, a figure significantly below

the $6,000.00 minimum that Tonney was spending. Ms. Johnston made it clear that Mr. Knight could have been cared for at home. (R.p. 126-127: tr. p. 309 L.3- p. 312 L.8) Mr. Knight was cared for at home. (R.p. 102: tr.p. 212 L.2-8; 104: tr. p. 221 L.10-p.221 L.23)

In his final order, the trial judge excluded an item because it "was not reasonably necessary for Mr. Knight's maintenance." The trial judge also excluded expensive furniture because "such. . . . exceeded that which was reasonably necessary for Mr. Knight's support and comfort." (R.p.6). In light of the totality of circumstances, this same standard should have been applied to all aspects of Tonney's claim. These kinds of inconsistencies indicate the trial court's failure to exercise the appropriate level of discretion. See, Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct.App.2001)

Appellants objected to the use of copies of receipts and checks, especially copies of checks that showed no indication of being presented. The trial court overruled the objections. In Appellant's presentation, Appellants offered copies of transcripts without the sealed original, no one contended that the hearings did not take place. Bobby Knight and Respondent Tonney were part of a hearing where the parties settled issues of resources and support in the Probate Court. (R.p. 103: tr.p. 217 L.6-17)

The agreement was that all resources would be split "50/50." Bobby Knight was an eyewitness. Claimant was present. The agreement on marital assets was set-out in an October 20, 2004 hearing per the Probate Court. (R.p. 103:tr.p.217 L 6-17) The trial Court refused to consider this evidence. The trial court required the sealed copies and sustained an objection to the testimony. (R.p. 104: tr. p. 220 L. 4-25) Seventy-five percent of Tonney's exhibits were mere photocopies and financial instruments that were not certified.

A court's ruling on the admission of testimony constitutes an "abuse of discretion" where the ruling is manifestly arbitrary, unreasonable, or unfair. Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001)

The trial court's rulings on the redaction issues (discussed separately) also were inconsistent and prejudicial to Appellants. Appellants were not allowed to determine with reasonable certainty what funding sources were involved with Respondent's alleged contributions. The term "abuse of discretion" means only that [a] ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore amounted to error of law. Bridges v. Wyandotte Worsted Co., 239 S.C. 37, 121 S.E.2d 300 (1963).

Even though the guardian (Kaufman) and the conservator (Albright) testified forthrightly that they transgressed the restrictions placed in their certificate of appointments and included in the August 25, 2005 order appointing them, the trial court assigned no consequences to their contempt of a court order and the violation of their breach of duty per their certificate of appointments. (Tr. 11/9/15).

These restrictions and order required that each of them consult with Mrs. Knight regarding major medical care decisions (Kaufman) and major financial decisions (Albright). These individuals gave no testimony to excuse their behavior or lead to a conclusion other than they failed in their duties and responsibilities to inform Mrs. Knight of these major decisions. Their actions prevented Mrs. Knight and her son from utilizing the courts and other options to protect the estate. A trial court cannot allow fiduciaries to spurn their principals. See, Restatement, Second, of Contracts, Sections 161 and 173, supra, (there is a duty to disclose material facts...) The evidence is complete and palpable on this issue. To not rule to sanction a clear breach of duty is nothing less than a failure in discretion.

This behavior must not support the Respondent's claim. Bridges v. Wyandotte Worsted Co., Id.

VIII. LOWER COURTS ERRED IN HOLDING THAT RESPONDENT TONNEY'S CLAIM FOR REPAYMENT WAS TIMELY FILED

At the time of filing a claim against our decedents' estate, the proper court for filing the claim was the Dorchester County Probate Court. On January 20, 2009, Defendant filed her claim at the Charleston County Probate Court. January 20, 2009 was the final day for filing claims against the estate, if you were a creditor. Clearly, Defendant Tonney did not satisfy the requirement for filing the claim within the eight months after the date of the first publication of the notice to creditors. S.C. Code sec. 62-3-801(a) (1990).

The record indicates that after receipt of the claim by Charleston County Probate Court, an estate clerk subsequently delivered the claim to Dorchester County Probate Court and the Special Administrator by letter dated January 21, 2009. (R.p. 290) This measure cannot satisfy the statutory requirement that the Creditor file the claim within the eight month period. The proper procedure would be to return the claim to the maker with notice that the claim was sent to the incorrect court. Because the claim is untimely, the Probate Court cannot take jurisdiction of the claim and this matter must be dismissed. Beach First National Bank v. Estate of Gurnham (In re: Estate of Gurnham), 407 S.C. 194, 754 S.E.2d 875 (2014)

IX. LOWER COURTS ERRED IN HOLDING THAT RESPONDENT CHLOE TONNEY HAD SATISFIED THE LEGAL REQUIREMENTS FOR CASE-IN-CHIEF

Respondent failed to establish the required foundation for properly presenting her Case-in-chief, i.e. eligibility for the relief she sought. The "case-in-chief" is the evidence presented at Trial by the party with the burden of proof. See Beck v. Clarkson, 300 S.C. 293, 387 S.E.2d 681 (1989) The "burden of proof" is a party's duty to prove a disputed assertion, allegation or claim. Black's Law Dictionary, supra, at 190. To fulfill this duty **at trial** all elements of the claim must be established **at trial**. Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993) note 7 citing In re Estate of Kruger, 235 Neb. 518 455 N.W.2d 809 (1990) (in probate court, burden of proof is upon claimant against decedent's estate.) The validity of a claim upon an estate begins with the statutory requirement that the claim is (a) filed within a certain period of time, (b) delivered to specified entities and individuals, (c) presented in a particular format, (d) occurred at a point in time, (e) identified as necessary, reasonable, and beneficial, (f) and contained a particular value. These factors must be presented at trial. Defendant Tonney only presented evidence on items (d) through (f). S.C. Code Sec. 62-3-801,et seq. (1988).

X. LOWER COURTS ERRED BY REIMBURSING RESPONDENT TONNEY FOR ATTORNEY FEES IN PARENTS' FAMILY COURT MATTER AND ALLOWING FULL INTEREST ON JUDGMENT

The Family Court did not award attorney fees in the case of Knight vs. Knight. Mrs. Knight had to file an action in Family Court in order to obtain the resources promised through agreements made in Probate Court. Testimony as to the agreement to split the marital property "50/50" was incontrovertible. (R.p. 103; tr. p. 217 L. 6-19)

Mrs. Knight was successful in securing that support and successful in obtaining temporary relief. Please note that Mr. Knight died during the Family Court litigation. An attorney's conduct constituted misconduct where she filed a lien for unpaid fees against her clients' property for services incurred in a dissolution of marriage action even though no attorney's fees had been awarded pursuant to Sec. 20-3-145. Matter of Jennings, 321 S.C. 440, 468 S.E.2d. 869, rehearing denied (1996). Further, in Huff v. Jennings, 319 S.C. 142, 459 S.C. 2d. 886, rehearing denied, appeal dismissed (S.C. App. 1995), the Court said a lien filed by an attorney against a client for attorney's fees under Sec. 20-3-145 was invalid where, in the action on which the fees were based, there was no request that the client be ordered to pay her own fees, and the Family Court simply declared that each party would be responsible for his or her own fees. These Jennings standards apply to claims attorney fees in Family Court matters and the thrust of these standards should not be avoided by raising the non-attorney shield. Family Court litigation is exclusive jurisdiction and provides its on procedures for resolution of attorney fee issues. See, S.C. Code sec. 20-3-125, -145, -670. S.C. Code sec. 20-3-670 is applicable because it provides a level of consideration for third parties. Mr. Knight's passing introduced third party concerns when he left a widow and three children. According to 20-3-670(C), "the statutory lien created by section 20-3-145 is not effective as against third parties unless this section has been complied with." In other words, no fee award, no statutory lien; if there is a statutory lien and no section 670 proceeding, then there is no priority against third parties.

Respondent Tonney offered no evidence to establish that her expenditures on attorney fees benefitted her father, was necessary for his care and sustenance, and was a reasonable expenditure of his resources. Howard, Matter of, supra, note 7. Moreover, her approach to the family court matter cannot be justified by any of the circumstances existing at the time the money was spent.

Mr. Knight's net monthly income was never more than $5,728.27. (R.p. 74; tr. p. 102 L.4). Attorney fees in this family court matter are not a part of the care scenario. This expenditure did nothing for her father's health. See, Dowaliby v. Chambless, 344 S.C. 558, 554 S.E.2d. 646 (S.C.App.2001) (...Because we find no statutory basis for an award of attorney's fees...Probate Court award of attorney fees must be reversed); Anderson v. Tolbert, 322 S.C. 543, 473 S.E.2d 456 (Ct.App.1996)

The first judgment (2010) on this claim was appealed to the Circuit Court on the basis that the appointment of a Special Probate Judge is not transferable to others by order of that Special Probate Judge. The orders of the associates were voided and the matter was restarted. The Special Probate Judge in this version granted judgment interest on the claim beginning 14 months after the date of the decedent's death. If there is a lawful claim against the estate, then this interest formula must be adjusted to reflect the date upon when the claim first was allowed by a judge with the authority to make that ruling. Appellants contend that Judge Fulp is not the duly authorized judge. The attorney fee award to Chloe Knight-Tonney must be denied and if interest is awarded, that interest must be adjusted as argued by Appellants.

XI. LOWER COURTS ERRED BY NOT REMOVING BEATRICE WHITTEN AS SPECIAL ADMINISTRATOR

S.C. Code 62-3-611(b) states that, inter alia, cause for removal of a [special administrator] exists when removal would be in the best interest of the estate...or the [special administrator] has disregarded an order of the Court...

On July 17, 2013, the Court concluded the hearing by saying: "So, I'm going to allow 30 days for release of the Lis Pendens, okay? If you would provide evidence to the Court and counsel, Ms. Whitten, [that] that has been done." The Special Administrator responded: "I will, Your Honor." At present, nothing has been received on the removal of the Lis Pendens. (R.p. 139: tr p. 363 L. 11-21) (7/17/13 Tr.p 57 L. 21-p.58 L24)

Mr. Knight left most (95%) of what he owned to his wife, Mildred C. Knight, including all of his motor vehicles. Mr. Knight died March 11, 2008; Mrs. Knight died June 22, 2010. Mrs. Knight left most (95%) of what she owned to her son, Bobby Knight. Bobby Knight has no knowledge of how Mr. Knight's 1995 Mitsubishi is now owned by the son of Linda Jones, Mr. Knight's daughter, even though Bobby has custody of the initial paperwork required for transferring title to that automobile.

Mrs. Knight owned the AIG annuity whose proceeds were paid to the estate of Mr. Knight. The Special Administrator did not inform the Knights regarding any issues concerning the right of Mr. Knight vis a vis those proceeds. According to Bobby Knight's testimony, the annuity was owned by Mildred C. Knight. Mrs. Knight's status as the widow of a very modest estate required more attention and discussion about that AIG annuity. S.C. Code sec. 62-3-703 (2005).

There is no question as to Mr. Knight's intention in his Will. The issues of this litigation do not involve a determination of heirs and it does not involve a Will contest. Mr. Knight's Will had been in the custody of the probate court for nearly three (3) years prior to his passing. Mr. Knight's clear and direct instructions left nearly his entire estate to Mrs. Knight.

Because of these clear objectives, the Special Administrator cannot act to diminish the intentions of the testator and must not become detached from the testator to the extent she acts against his desires. Her behavior cannot revise or rewrite his will. S.C. Code Sec. 62-3-703 (2005). The evidence and record clearly indicate that this Special Administrator cannot serve the testator in effecting the aims of his devise. Norman R. Knight, Jr. clearly decided that his wife would be the sole beneficiary of his will. The Special Administrator had no relationship with Mrs. Knight. Consequently, the Special Administrator was oblivious to the expectations of Mr. and Mrs. Knight relative to their testamentary plans. The status of Norman Knight, Jr.'s (Mr. Knight) estate at the moment of her appointment calls attention to the issue of locating assets, and locating assets is a priority aspect of the responsibility of the Special Administrator. The key assets were the annuities that were co-owned by the Knights. The record shows no contact with the Special Administrator and Mrs. Knight regarding her interest in those annuities. Moreover, the record shows no efforts by the Special Administrator to discuss or resolve the funeral expenses for Mr. Knight. Even with an outstanding balance, there has been no inquiries or reports to Mrs. Knight regarding the existence, status or accounting for these expenses. Funeral expenses are a top priority under the probate code. S. C. Code sec. 62-3-805 (1994)

Additionally, Beatrice E. Whitten as the Special Administrator cannot appear in her professional capacity as an attorney, i.e. her status as the Special Administrator must in all ways, appear only as a non-attorney individual.

Any references to Beatrice E. Whitten as the attorney for the Special Administrator is not permissible as she cannot appear for the estate as the Special Administrator and the Special Administrator's attorney of record.

To disregard this professional conflict is error. S.C. Code 62-3-610 (1997 The trial judge erroneously concluded that the special administrator appointment should remain unchanged.

CONCLUSION

The trial Court's decision should be reversed and the Respondent's claim denied in full, and the special administrator should be removed.

Respectfully Submitted
WHIPPER LAW FIRM

July 29, 2016

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

J.C. Nicholson, Circuit Court Judge

CASE NO. 2014-CP-10-5355
Appellate Case No. 2016-000748

In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Appellants,

v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents,

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on Beatrice E. Whitten, Esquire and C. Mac Gibson Jr., Esquire by depositing a copy to them in the United States Mail, postage prepaid, on July 29, 2016, addressed to attorneys of record, Beatrice E. Whitten, Esquire 1110 Queensborough Blvd, Mt. Pleasant, SC 29464 and C. Mac Gibson Jr., Esquire 1118 Savannah Highway Charleston, SC 29407.

July 29, 2016

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July 29, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Appellants,**
v.
Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents

Appellate Case No.: 2016-000748
Initial Brief – For Filing
Designation of Matter – For Filing
Proof of Service – For Filing

Dear Ms. Kitchings:

Find enclosed one original and one copy each of the above-referenced documents for filing and conforming. Please return the conformed copies to me in the self-addressed, stamped envelope enclosed for your use in this regard.

By copy of this letter, I am serving a copy of the same on C. Mac Gibson, Esq. and Beatrice E. Whitten, Esq. attorneys for Respondents.

Sincerely,
WHIPPER LAW FIRM

J. Seth Whipper, Esquire

JSW/lds

Enclosures
xc: Bobby Knight
Judith A. Brown
C. Mac Gibson, Jr.
Beatrice E. Whitten

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