

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

RECEIVED

JUN 27 2016

Court of Appeals

CASE NO. 2012-CP-25-402

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.

FINAL BRIEF OF APPELLANT CHARLES GARY,
PURPORTED SURVIVING SPOUSE

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err when it failed to find that the Estate was judicially bound by the allegations in the Estate's pleadings; and therefore, estopped from asserting that the Appellant was not the surviving spouse of the decedent and heir of the Estate?
2. Did the lower court err when it failed to find that the consent order of dismissal with prejudice was an adjudication on the merits of the case, which precludes subsequent litigation on whether the Appellant was the surviving spouse of the decedent?

STATEMENT OF THE CASE

The Respondent Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary (the "Estate") filed a lawsuit on November 9, 2012, against several defendants, alleging Wrongful Death and Survival causes of action in this case (hereinafter "Wrongful Death Case") after Angel Y. Gary, filed an Application for Appointment as Personal Representative for the Estate of Blondell M. Gary on February 14, 2012, Estate of Blondell M. Gary, Case Number 12-CP-07-00140. The Estate obtained a Judgment by Default against one of the defendants, American Medical Response Inc., d/b/a Access2Care pursuant to Rule 55, SCRCP.

The Wrongful Death Case was set for a jury trial on September 1, 2015. The parties settled the case that day and an Order Approving Wrongful Death and Survival Action Settlement was signed by Judge Brooks P. Goldsmith, on September 14, 2015, and filed on September 15, 2015. On November 13, 2015, Judge Perry M. Buckner, III, signed an Order of Dismissal, with the consent of the parties dismissing the case with prejudice. The Order of Dismissal was filed on November 30, 2015.

On December 14, 2015, the Respondent filed a Petition to Determine Heirship challenging whether Charles Gary was an heir and spouse of the decedent. The Appellant served its Answer/Return to the Petition to Determine Heirship on January 12, 2016. The trial court held a motions hearing on January 13, 2016, to decide the Respondent's Petition.

On January 21, 2016, the trial court entered its Order finding that Charles Gary was not Blondell Gary's husband at the time of her death, and therefore, not an heir of the Estate. The Appellant timely filed and served its Notice of Appeal on February 5,

2016.

STATEMENT OF THE FACTS

This appeal challenges whether the Estate should be estopped from taking a position contradictory of and/or inconsistent with its pleadings in the Wrongful Death Case that Mr. Gary is the surviving spouse and an heir of the Estate. After nearly four years of litigation, a settlement with disbursal of funds, and a dismissal with prejudice of the Wrongful Death Case; the Estate claims for the first time that Mr. Gary is not the surviving spouse and an heir of the Estate.

On or about January 31, 2012, Low Country Medical Transport was operating an ambulance that was transporting Mr. Gary, who is a paraplegic and Blondell Gary to and from their home in Yemassee, South Carolina for Mr. Gary's medical appointment. Mr. Gary was strapped to a stretcher in the back of the ambulance and Blondell Gary, was riding in the front passenger seat with her seat belt secured. Low Country Medical Transport's ambulance suddenly and un-expectantly ran off the shoulder of the road and struck a tree causing Mr. Gary to suffer serious injuries and killing Blondell Gary.

On February 14, 2012, Angel Y. Gary, Mr. Gary and the decedent's daughter, filed an Application for Appointment as Personal Representative for the Estate of Blondell M. Gary. (R. pp. 081-086, Estate of Blondell M. Gary, Case Number 12-ES-07-00140). In that matter and on the decedent's Death Certificate, Angel Y. Gary identified Mr. Gary as the spouse of the decedent Blondell M. Gary. (R. pp. 081-086, Application for Appointment of Personal Representative and R. p. 087, Death Certificate of Blondell Gary). The Beaufort County Probate Court appointed Angel Y. Gary as Personal Representative for the Estate.

As a result of the Estate's injuries and damages, on November 9, 2012, the Estate of Blondell M. Gary filed a lawsuit against several defendants, alleging Wrongful Death and Survival causes of action, in a case styled Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary v. Lowcountry Medical Transport, Inc., American Medical Response, Inc., d/b/a, Access2Care, and Eugene A. Kirkland, 2012-CP-25-402.¹ (R. pp. 074-080, Wrongful Death and Survival Action Complaint). In the Estate's Wrongful Death Case complaint, the Estate alleged that "Blondell Gary (hereinafter "Blondell"), on behalf of her husband, Charles Gary, contracted with American Medical Response to provide non-emergency medical transport on the day in question." (R. p. 076, Wrongful Death and Survival Action, Complaint ¶5). In the Wrongful Death Case, the Estate claimed among other things that "the beneficiaries of Blondell have endured and continue to endure grief, sorrow, shock, loss of companionship, wounded feelings, and mental anguish." (R. p. 077, Wrongful Death and Survival Action Complaint ¶12).

While the Estate's Wrongful Death case and Mr. Gary's Personal Injury case were pending in both Hampton County and Beaufort County Circuit Courts, the Estate's counsel informed Mr. Gary's counsel that Mr. Gary must and/or it intended to compel him to seek recovery of certain damages in the Wrongful Death Case that he was also seeking to recover in his Personal Injury Case. Due to this controversy over damages recoverable

¹ As a result of Mr. Gary's injuries and damages, on October 16, 2012, he filed a lawsuit against several defendants alleging Negligence, Negligence Per Se, Gross Negligence, Loss of Consortium/Companionship of Spouse, and Negligent Infliction of Emotional Distress, in a lawsuit styled Charles Gary v. Hattie M. Askew, Will Outlaw, and Deboria Outlaw, individually and D/B/A Low Country Medical Transport, Low Country Medical Transport Inc., Eugene A. Kirkland, and American Medical Response Inc., (D/B/A Access2Care), 2012-CP-07-3595 (hereinafter "Personal Injury Case").

Mr. Gary has obtained an Order on Summary Judgment in his Personal Injury Case against several defendants on his Negligence and Loss of Consortium/Companionship of Spouse causes of action. The Personal Injury Case Summary Judgment Order is on appeal in the South Carolina Court of Appeals.

in the two cases, Mr. Gary filed a Declaratory Judgment Action against the Estate in the Beaufort County Circuit Court to resolve this dispute, on October 20, 2014. (R. pp. 088-096, Declaratory Judgment Action Complaint).

In the Declaratory Judgment case, Mr. Gary alleged in his Complaint that “Mr. Gary is a beneficiary of the Estate of Blondell M. Gary.” (R. p. 092, Declaratory Judgment Action Complaint ¶ 1). He also alleged that Blondell Gary was his wife. (R. p. 092, Declaratory Judgment Action Complaint ¶ 4). Mr. Gary also alleged in his Complaint that the Estate claimed that Mr. Gary must and/or intended to compel him 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. pp. 093-094, Declaratory Judgment Action Complaint ¶ 7 and ¶ 10). The Estate admitted these allegations in its Answer. (R. pp. 097-100, Declaratory Judgment Action Answer of Defendant ¶ 2, ¶ 4, ¶ 7, and ¶ 10).²

The Wrongful Death Case was set for a jury trial on September 1, 2015. The parties settled the case that day and an Order Approving Wrongful Death and Survival Action Settlement was signed by the Honorable Brooks P. Goldsmith, on September 14, 2015, and filed on September 15, 2015.³ On November 13, 2015, the Honorable Perry

² As recent as September 3, 2015, the parties were present for a hearing on Mr. Gary's Petition for Removal of Angel Y. Gary as Personal Representative for the Estate of Blondell M. Gary, before the Beaufort County Probate Court. (R. pp. 0101-0105, Notice of Hearing, Petition for Removal of Angel Y. Gary as Personal Representative for the Estate of Blondell M. Gary). Mr. Gary filed the petition because he believed (among other things) that Angel Y. Gary was being dilatory in her efforts to resolve the Estate's claims against the defendants in the Wrongful Death Case. Mr. Gary and his daughter Angel Y. Gary, as Personal Representative agreed to dismiss the Petition for Removal, because the Estate notified him at the hearing that the Wrongful Death Case had been settled. The Estate never asserted during that proceeding that Mr. Gary was not a beneficiary of the Estate or that he would not receive his spousal share of the settlement.

³ At the time the Estate agreed to the Order Approving Wrongful Death and Survival Action Settlement, the Estate identified Mr. Gary as the surviving spouse in its probate filings. Pursuant to S.C.

M. Buckner, III, signed an Order of Dismissal, with the consent of the parties dismissing the case with prejudice. The Order of Dismissal was filed on November 30, 2015.

On December 11, 2015, Respondent's counsel informed the Appellant's counsel for the first time that the Estate disputes whether Mr. Gary was the decedent's spouse, and that this contention created a fee dispute regarding his spousal share of the settlement. Respondent's counsel claimed this fee dispute prevented them from disbursing Mr. Gary's spousal share to him. On December 14, 2015, the Respondent filed a Petition to Determine Heirship challenging whether Charles Gary was an heir and spouse of the decedent. (R. pp. 014-033, Petition to Determine Heirship). The Estate claimed that Mr. Gary's November 30, 1999, marriage certificate to the decedent predates his January 22, 2001, Final Divorce Decree to his previous wife; and therefore, the marriage to the decedent was void, despite the Estate's knowledge of this issue during the pendency of its Wrongful Death Case.

Prior to filing the Petition and the dismissal of the Wrongful Death Case, the Estate maintained and contended that Mr. Gary was the surviving spouse of the decedent Blondell M. Gary on the date of her death, which was January 31, 2012, notwithstanding the Estate's knowledge of the issues it raises in its Petition. Accordingly, the Estate continued to press its claim that Mr. Gary was a beneficiary of the Estate in the Wrongful Death Case to bolster the Estate's potential damages. Nevertheless, a hearing was held on the Estate's Petition on January 13, 2016. At the hearing, the Estate admitted that it knew about the Marriage Certificate in relation to the Final Order of Divorce issue during

Code Ann. § 15-51-42 (B) and (C) the Personal Representative was required to identify "the statutory beneficiaries of the wrongful death or survival action" to obtain Court approval of a Wrongful Death settlement.

the pendency of its Wrongful Death Case in Hampton County, the Beaufort County Probate Court proceedings, and the Beaufort County Circuit Court Declaratory Judgment Action.⁴

On January 21, 2016, the trial court issued an Order ruling that because Mr. Gary was still married to his former spouse when he purportedly married the decedent in 1999, his purported marriage to the decedent was void from its inception. (R. pp. 001-003, Order on Petition to Determine Heirship). Mr. Gary contends that this Court should reverse the trial court's January 21, 2016, Order for the following reasons.

LAW / ARGUMENT

I. THE ESTATE IS JUDICIALLY BOUND BY THE ALLEGATIONS IN ITS PLEADINGS; AND THEREFORE, THE TRIAL COURT ERRED WHEN IT FOUND THAT THE APPELLANT WAS NOT THE SURVIVING SPOUSE AND HEIR OF THE ESTATE

A. The Estate admitted in its pleadings that Mr. Gary is the decedent's spouse.

The trial court erred when it failed to exclude all evidence and arguments of the Estate's counsel asserting that the Appellant was not the spouse of the decedent and an heir of the Estate. It is undisputed that the Estate in its Wrongful Death Case complaint alleged that "Blondell Gary (hereinafter "Blondell"), on behalf of her husband, Charles Gary, contracted with American Medical Response to provide non-emergency medical transport on the day in question." (R. p. 076, Wrongful Death and Survival Action,

⁴ Counsel for the Estate stated during the hearing he was not sure when the Estate discovered this issue, but he stated that the attorneys for the Estate and the attorney for Mr. Gary discussed the matter while attending a partial summary judgment hearing in a companion case filed in the Federal District Court styled, Selective Insurance Company of South Carolina v. Charles Gary, Angel Gary as Personal Representative of the Estate of Blondell Gary, 9:12-cv-02774-SB. That hearing occurred on July 8, 2014, which predates the filing of the Declaratory Judgment Action in the Beaufort County Circuit Court.

Complaint ¶5). The Estate maintained this position throughout the Wrongful Death Case, despite knowledge of a possible defect in the decedent and Appellant's marriage license in 1999. See Footnote 4. In fact, the Estate conceded Mr. Gary's marital status before the Beaufort County Probate Court and in the Beaufort County Circuit Court in a Declaratory Judgment action arising out of a dispute over the division of damages for loss of consortium. Under South Carolina law, the Respondent 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. 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).

The 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. The trial court erred when it considered the 1999 marriage license, the 2001 Divorce Decree, and the arguments of the Estate's counsel contradicting its own pleadings. "Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions. . . . Evidence contradicting such pleadings is inadmissible." Johnson v. Alexander, 413 S.C. 196, 775 S.E.2d 697 (2015). "While it is true, as a general rule, that an admission in a pleading is taken as conclusive of the fact admitted, and, so long as it remains in the pleading, evidence to the contrary will be excluded, still

even such an admission, though made under oath, may be withdrawn by leave of the court.” Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964). The Estate’s admissions have not been withdrawn by leave of the court. Therefore, the Estate should be precluded from asserting a position contradictory of, or inconsistent with, its pleadings and the facts which are admitted by the pleadings are taken as true against the Estate for the purpose of this action.

Conversely, the Respondent claims that all marriages contracted while either of the parties remains married to a living spouse are void. Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct.App.1992). The trial court mistakenly relies on Johns as a safe harbor to the Estate’s judicial admissions, concluding that res judicata is the basis for the judicial admissions doctrine. Consequently, the trial court found that res judicata is trumped by the public policy against bigamy. The Johns court found:

The application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies. The public policy underlying res judicata may have to yield to other public policies, even in consent orders. *Id.* citing 47 Am. Jur.2d, Judgments § 1090 (1969). Here, the public policy expressed in S.C. Code Ann. § 20-1-80 (1985) overrides the public policy of res judicata. Although the parties’ consent order is not void, the marriage it affirms is void. In balancing the relevant public policies (i.e., the public policy of finality of judgments versus the public policy of not recognizing bigamous marriages) the consent order should not be given res judicata effect.

Id.

Even if the trial court correctly concluded that the judicial admissions doctrine is founded in res judicata, Johns is not analogous to the facts and law of this case. The paramour claimant in Johns was asserting spousal rights at the same time her common law husband was married to another woman, which is not present here. In

Johns, Mr. Johns and his paramour began living together in 1983, while Mr. Johns was married to a third party. The parties knew Mr. Johns' divorce would not be final until a year later but they chose to live together as husband and wife and had a child. Mr. Johns and his paramour separated in 1986 and Mr. Johns began living with another woman in 1987. Mr. Johns obtained a divorce from his third party wife in 1988, two years after he separated from his paramour.

In 1989, Mr. Johns and his paramour consented to an Order finding that they were married at common law and legally separated. Thereafter, Mr. Johns' paramour sought a divorce, child custody, increased child support, alimony and attorney fees on the basis of their alleged common law marriage, pursuant to the consent order. On appeal, the Johns Court found that "[a]t the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy." Id. Accordingly, the Johns Court found that although the parties' consent order is not void, the marriage it affirms is void because the public policy expressed in S.C. Code Ann. § 20-1-80 (1985) overrides the public policy of res judicata. Id.

The case at bar is distinguishable from the Johns case. First, Mr. Johns' paramour sought costs and remedies against Mr. Johns' under the doctrine of common law marriage for the same time period Mr. Johns was married to another woman. In fact, Mr. Johns' paramour stopped cohabitating with him before he obtained his divorce. Therefore, at no time during their relationship was Mr. John's unmarried. Conversely, Mr. Gary's divorce decree with his former wife occurred in 2001. Blondell M. Gary died on

January 31, 2012, more than a decade after the events alleged by the Respondent in its Petition. The Estate does not allege that Mr. Gary was married to another woman at the time of the decedent's death. Therefore, no public policy conflict exists in this case.

Instead, the pleadings on file with the court clearly show that Mr. Gary had only one wife on the date of the decedent's death (January 31, 2012) and that the Respondent cannot contradict this judicial admission based on its pleadings. Therefore, this Court should find that the trial court erred when it allowed the Respondent to argue and introduce documents that sought to contradict its pleadings.

B. The consent order of dismissal with prejudice is an adjudication on the merits which precludes subsequent litigation.

In addition, the trial court erred when it failed to dismiss the Estate's Petition based on the fact that the Estate consented to an Order of Dismissal with prejudice prior to filing its Petition challenging Mr. Gary's spousal status. The Appellant asserted at the Petition hearing that the trial court should dismiss the Petition as it relates to Mr. Gary, because the Court's earlier dismissal of the underlying case bars subsequent litigation on the issues raised in the Estate's complaint. South Carolina law provides that:

A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. [Citations Omitted]. Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, 'so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.'

Nunnery v. Brantley Constr. Co., 289 S.C. 205, 345 S.E.2d 740 (Ct.App.1986)

It is undisputed that the Estate alleged that Mr. Gary was the husband of Blondell

Gary. (R. p. 076, Wrongful Death and Survival Action, Complaint ¶5). Equally, it is undisputed that American Medical Response failed to Answer the Respondent's Complaint within 30 days of service; and therefore, it was held in default. The Estate objected to American Medical Response's motion to answer out of time. Moreover, the Estate did not seek to amend its pleadings to strike the reference that Mr. Gary was the decedent's spouse, over the course of the litigation in the Wrongful Death Case.⁵ South Carolina law is clear:

It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.

Laughon v. O'Braitis, 360 S.C. 520, 602 S.E.2d 108 (Ct.App.2004).

Again, unlike the Johns Court, there is no public policy conflict here, because there is no allegation that Mr. Gary was married to another woman at the time of the decedent's death. Therefore, the material fact that Mr. Gary was the spouse of the decedent was admitted and judicially determined. That fact is conclusively settled by Judge Buckner's November 13, 2015, Consent Order of Dismissal with Prejudice. Mr. Gary's spousal status becomes res judicata and may not again be litigated in a subsequent action, regardless of the form that the issue may take.

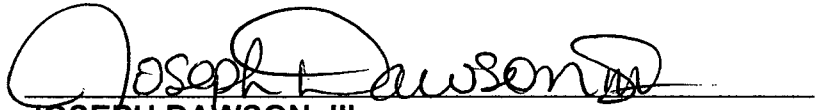
CONCLUSION

This Court should find that the Estate is judicially barred from asserting that Mr.

⁵ It is interesting to note that had the Estate amended its Complaint to strike the reference to Mr. Gary being the decedent's spouse it would have afforded American Medical Response the opportunity to file an Answer removing its default.

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.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph Dawson, III", written over a horizontal line.

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North Charleston, South Carolina
June 21, 2016

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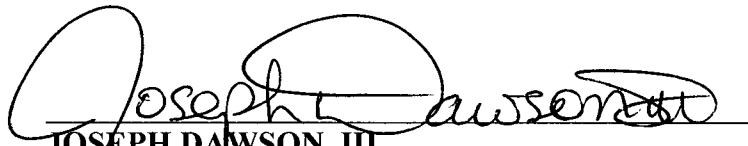
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule
211(b), S.C.A.C.R.


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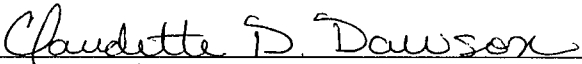
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Of Whom Charles Gary, Purported Surviving Spouse, is Appellant.

PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellant** on the all counsel of record by
depositing a copy of the same in the United States Mail, postage prepaid, on June 23, 2016,
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