THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-10-5355

IN RE: ESTATE OF NORMAN ROBERT KNIGHT, JR., (deceased), ESTATE OF MILDRED C. KNIGHT (deceased) and NORMAN ROBERT "BOBBY" KNIGHT, III,

Appellants,

-versus-

BEATRICE E. WHITTEN, AS SPECIAL ADMINISTRATOR, and CHLOE KNIGHT-TONNEY, CLAIMANT,

Respondents.

FINAL BRIEF OF RESPONDENT CHLOE KNIGHT-TONNEY

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STATEMENT OF THE CASE

Norman Robert Knight, Jr. died on March 11, 2008, in Charleston County, South Carolina. The Estate of Norman Robert Knight, Jr. "(Knight Estate") was commenced on March 19, 2008, at the Charleston County Probate Court. The creditors' claim notice for the Knight Estate was first published in a local newspaper on May 21, 2008.

On July 30, 2008, the Honorable Irvin C. Condon and Honorable Tamara C. Curry, Judges for the Charleston County Probate Court, submitted a request to the South Carolina Court Administration for recusal from all matters pertaining to the Knight Estate. On August 5, 2008, the South Carolina Court Administration issued an Order of the Chief Justice for the appointment of the Honorable Mary Blunt, Probate Court Judge for Dorchester County, as the special Probate Court Judge to handle the Knight Estate. Further, the Order from the South Carolina Court Administration stated the Honorable Mary Blunt "shall have all the powers and duties appertaining to a probate court judge for Charleston County for the handling of the" Knight Estate.

On December 15, 2008, Judge Blunt as the special Probate Court Judge for Charleston County appointed Respondent Beatrice Whitten ("Respondent Whitten") as the special administrator for the Knight Estate.

On January 20, 2009, Respondent Chloe Tonney ("Respondent Tonney") filed at the Charleston County Probate Court a

creditor's claim against the Knight Estate for loans and reimbursement of expenses that she incurred for her father, Norman Robert Knight, Jr. Respondent Whitten filed a notice of disallowance of Respondent Tonney's claim on April 14, 2009. Respondent Tonney filed at the Charleston County Probate Court a Petition for Allowance of Claim on April 24, 2009.

On November 28, 2012, the South Carolina Court Administration issued an Order of the Chief Justice for the appointment of Kenneth E. Fulp, Jr., Probate Court Judge for Beaufort County, as the special probate court judge for Charleston County Probate Court in regards to the Knight Estate.

On or about May 27, 2013, Appellants Mildred Knight and Norman Robert Knight, III ("Appellants") filed a Summons and Complaint to remove Respondent Whitten as the special administrator for Knight Estate.

On the same date, Appellants filed Amended Motions to Recuse, Dismiss and Change Venue. Appellants contended Respondent Tonney's claim was time barred on the basis Respondent Tonney did not file her claim within one year after the death of Norman Robert Knight, Jr. Upon oral argument by the parties' attorneys on July 17, 2013, Judge Fulp denied Appellants' motions per an Order dated July 29, 2013.

On December 6, 2013, Appellants filed Motion to Dismiss and Motion to Dismiss, Deny, or Reduce Creditor's Claim. Further, on December 10, 2013, Appellants filed a corrected Motion to Amend Complaint regarding Respondent Whitten. Upon oral argument by

the parties' attorneys on January 6, 2014, Judge Fulp as the Special Probate Court Judge for Charleston County issued an Order dated January 17, 2014, which he concluded the applicable 2008 South Carolina Probate Code did not require Respondent Tonney to file a Summons with her petition for allowance of claim against the Knight Estate.

On March 31, 2014, and April 28, 2014, Judge Fulp presided over the hearing regarding Respondent Tonney's claim against the Knight Estate and Appellants' Complaint to remove Respondent Whitten as the special administrator for the Knight Estate. On July 11, 2014, Judge Fulp issued an Order, which he concluded Respondent Tonney was allowed to receive a sum of $23,914.73 plus interest against the Knight Estate. Further, Judge Fulp held Respondent Beatrice Whitten would remain as the special administrator for the Knight Estate.

On July 14, 2014, Appellants filed Motion for Relief from Judgment pertaining to an Order dated July 29, 2013. Judge Fulp denied the Motion per an Order dated August 15, 2014.

On July 28, 2014, Appellants submitted a Motion for New Trial and to Alter or Amend Judgment. Judge Fulp denied the Motion per an Order dated August 21, 2014.

The Appellants filed a Notice of Intent to Appeal with the Charleston County Clerk of Court on September 3, 2014. The Honorable J.C. Nicholson as the appellate judge denied the Appellants' motion for appeal on January 27, 2016.

The Appellants filed a Notice of Motion and Motion for New

Trial or to Alter Judgment at the Charleston County Clerk of Court on February 9, 2016. On March 4, 2016, the Honorable J.C. Nicholson as the appellate judge denied the Appellants' motion without a rehearing.

The Appellants filed the Notice of Intent to Appeal on April 19, 2016.

ARGUMENT AND AUTHORITY

ARGUMENT I

STANDARD OF REVIEW FOR AN ACTION AT LAW IS THE APPELLATE COURT MAY NOT DISTURB THE PROBATE COURT'S FINDINGS OF FACT UNLESS THERE IS NO EVIDENCE TO SUPPORT THEM.

"An appellate court's determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity." Rider v. Estate of Charles G. Rider, 407 S.C. 386, 391, 756 S.E.2d 136, 139 (2014) and Dean v. Kilgore, 313 S.C. 257, 437 S.E.2d 154 (Ct.App. 1993). "To make this determination, the appellate court must look to the essential character of the cause of action alleged by the Petitioners in the court below." Dean, 313 S.C. at 259, 437 S.E.2d at 155. An appeal that is derived from a probate court's decision that involved an action in law, the circuit court and appellate court may not disturb the probate court's findings of fact unless a review of the record disclosed indicates there is no evidence to support them. Id., Tollison v. Anderson Area Medical Center, Inc., 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct. App. 1995).

A petition to allow claims against an estate for money due is "ordinarily triable at law[; therefore] if there is any evidence which reasonably supports the factual findings of the probate judge", then the presiding probate judge's order must be affirmed. Tollison, 320 S.C. at 135, 463 S.E.2d at 613.

On January 20, 2009, Respondent Chloe Tonney ("Respondent Tonney") filed at the Charleston County Probate Court a creditor's claim against the Knight Estate. (S.R.p. 58, line 25- p. 59, line 19). Per Tollison, Respondent Tonney's cause of action is an action at law on the basis that she sought reimbursement from Knight Estate for funds that she expended on behalf of her father Norman Knight Jr. (R.p. 94; R.pp. 120-135; S.R.p. 58, line 17- p. 59, line 19).

ARGUMENT II

THE PROBATE COURT JUDGE HELD CORRECTLY RESPONDENT CHLOE TONNEY WAS NOT REQUIRED TO SUBMIT A SUMMONS WITH HER PETITION FOR ALLOWANCE OF CLAIM PURSUANT TO S.C. CODE ANN. §62-3-806(b)(2008).

Judge Fulp concluded in his Order dated January 17, 2014 that the requirement for the filing of the summons along with a petition to commence a formal proceeding in Probate Court did not take effect until June 7, 2010. Such requirement for the filing of the summons was effective after Respondent Tonney filed her petition for allowance. (R.p. 25).

The Estate of Norman Robert Knight, Jr. commenced on March

19, 2008; therefore, the Knight Estate was subject to the 2008 South Carolina Probate Code.

Respondent Tonney's petition for allowance of claim against the Knight Estate was subject to S.C. Code Ann. §62-3-806(b)(2008). Such statute as existed in 2008 stated:

> "Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the court in due time." (emphasis added).

The language in S.C. Code Ann. §62-3-806(b)(2010) concerning the commencement of the proceeding as related to the creditor's claim was not changed until June 7, 2010 as written:

> "Upon service of the summons and petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the court in due time." (emphasis added).

"When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. (citations omitted). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning." University of Southern California v. Moran, 365 S.C. 270, 617 S.E. 135, 138 (Ct. App. 2005).

Furthermore, "[i]n the construction of statues there is a

presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt:… the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt…."(emphasis added). Hyder v. Jones, 271 S.C. 85, 87-88, 245 S.E.2d 123, 125 (1978)(The Court held Section 15-5-210 did not show a specific provision that mandated retroactive application, and the Court did not find any legislative intent to make the statute retroactive.)

The amendment to S.C. Code Ann. §62-3-806(b)(2010), which required the filing of the summons with petition for allowance of claim, did not become effective until one year after Respondent Tonney filed the petition for allowance of claim.

Also, the disallowance of claim form that Respondent Whitten as special administrator mailed to Respondent Tonney stated the claimant had to file a petition for allowance in the Probate Court if the claimant wanted to contest the disallowance of claim. The disallowance of claim did not mention the filing of the summons with the petition for allowance because it was not required at the time Respondent Tonney received such disallowance of claim.

The Appellants did not prove that at the time the

Legislature amended S.C. Code Ann. §62-3-806(b)(2010) that the Legislature intended for the amendment to be applied retroactively. Consequently, Respondent Tonney complied with the applicable 2008 statute when she filed the petition for allowance of her claim against the Knight Estate.

ARGUMENT III

THE CHIEF JUDGE OF THE SOUTH CAROLINA SUPREME COURT HAS THE POWER TO APPOINT A SPECIAL PROBATE COURT JUDGE TO PRESIDE OVER A PROBATE PROCEEDING IN ANOTHER JURISDICTION.

"The probate court of each county is part of the unified judicial system of this State." S.C. Code Ann. §14-23-1010. As enumerated in S.C. Const. art. V, §4, "[t]he Chief Judge shall … have the power to assign any judge to sit in any court within the unified judicial system…. The Supreme Court shall make rules governing the administration of all the courts of the State." (emphasis added).

Additionally, the Chief Judge of the Supreme Court has the authority to appoint a special judge when the Chief Judge has determined there is cause to remove the sitting judge. S.C. Code Ann. §14-23-1080(1976).

On July 30, 2008, the Honorable Irvin G. Condon, the Judge of Charleston County Probate Court, and the Honorable Tamara C. Curry, the Associate Judge of the Charleston County Probate Court, filed a request to the South Carolina Court Administration for recusal on all pending and subsequent matters relating to the

Estate of Norman Robert Knight, Jr. Consequently, on behalf of Chief Justice Jean Toal, the South Carolina Court Administration issued an Order dated August 5, 2008, appointing the Honorable Mary Blunt, the Judge of Probate for the Dorchester County, as the special probate judge for the Charleston County Probate Court concerning the Knight Estate. (S.R.p. 01). After six years of litigation and appeals, the South Carolina Court Administration on behalf of Chief Justice Toal, appointed Kenneth E. Fulp, Jr., the Probate Court Judge for Beaufort County, as the special probate court judge for Charleston County regarding all matters of the Knight Estate. Such appointment occurred on November 28, 2012. (R.p. 45). Judge Fulp as the special probate court judge for the Knight Estate had the authority to preside and issue orders as related to the motions and trial.

Further, Judge Fulp noted in his Order dated January 17, 2014 that Appellants' attorney "confirmed at the July 17, 2013 hearing that he did not challenge my authority [per Chief Justice's Order to serve as the special probate court judge for Charleston County] in the matter, and appeared to concede the issue on the record during the January 6, 2013 hearing." (R.p. 27). Such action constitutes as a waiver of the right to challenge the authority of Judge Fulp.

The Appellants raised the issue of venue as an additional ground for the appeal. Yet, the Appellants' attorney withdrew his objection to the issue of venue at a motion hearing per an Order dated December 23, 2013; therefore, such issue should be

deemed abandoned. (R.p. 31).

ARGUMENT IV

THE PROBATE COURT JUDGE RULED CORRECTLY THE UNREDACTED DOCUMENTS WERE NOT ADMISSIBLE.

"The admission of evidence is within the trial court's discretion. (citations omitted). The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. (citations omitted). The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision." Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465, 479 (Ct. App. 2005).

Additionally, relevant evidence has to be of such nature which tends to make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Irrelevant evidence is not admissible per Rule 402, SCRE.

Judge Fulp ruled certain checks and receipts pertaining to Respondent Tonney's claim against Knight Estate had to be "produced in unredacted form, *except that* all but the last four digits of the account and credit card numbers and all payment-authorization codes may be redacted. Such limited redactions would appear to allow proper identification of the accounts from which the claimed expenses were paid, without compromising the security of the accounts." (original emphasis) (R.pp. 32-33).

Respondent Tonney sought a sum of $1,622.22 as a reimbursement for payments she made to Bishop Gadsden Rehab, Inc. for her father Norman Robert Knight, Jr. The payments were made from a Morgan Stanley account that she and her sister established. (S.R.p. 53, line 8- p. 57, line 5).

Appellants issued a subpoena to Morgan Stanley for copies of checks that were issued from the Morgan Stanley account which had been referred to as "Queenie Account". Respondent Tonney filed a motion to quash Appellants' subpoena. (R.p. 19). Judge Fulp refused to quash Appellants' subpoena; therefore, Respondent Tonney informed Judge Fulp that she would withdraw a part of her claim in the amount of $1,622.22 as a reimbursement for payments she made from the Morgan Stanley account to Bishop Gadsden Rehab, Inc. for her father Norman Robert Knight, Jr. (R.p. 20). As a result of Respondent Tonney's withdrawal of her claim in the amount of $1,622.22 pertaining to the payments she made to Bishop Gadsden Rehab., Inc., Judge Fulp quashed Appellants' subpoena. (R.p. 22).

Judge Fulp stated in his Order dated April 22, 2014 that "[n]o checks from the [Morgan Stanley] account were introduced in support of any other expenses claimed by Tonney, so the withdrawal of that portion of her claim pertaining to expenses paid from the [Morgan Stanley] account renders the subpoenaed documents irrelevant to the remainder of the Tonney claim which is subject to adjudication. Enforcement of the subpoena, under these circumstances, would require the disclosure of otherwise

confidential personal financial information, protected by law, to no purpose relevant to the matter before the Court." (R.p. 21).

Also, Judge Fulp opined in the same Order that "[a]llowing [Respondent Tonney] to further reduce her claim by withdrawing the amounts paid from the [Morgan Stanley] account to Bishop Gadsden Rehab, Inc., eliminates those payments as a matter for trial or defense by [Appellants], and does not prejudice [Appellants]." (R.p. 21).

The Appellants asserted Respondent Tonney should have sought a protective order in regards to the [Morgan Stanley] account. (Appellants' Brief, p. 9). The Appellants did not raise such contention until the filing of this Appeal; therefore such contention should not be considered per Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) (such contention must be raised and ruled upon the circuit court to be preserved).

Appellants further contended the letter dated October 16, 2007 from Thad Vincent to Respondent Tonney and Walter Kaufmann should not have been redacted. (Appellants' Brief, p. 9, R.p. 105).

Such letter is not relevant as defined in Rule 401, SCRE. Respondent Tonney filed a claim for expenses that she paid/loaned for the benefit of her father. Thad Vincent's letter regarding the fault of the party in a domestic action did not have any bearing or relevancy pertaining to Respondent Tonney's claim; therefore, such letter was irrelevant and not admissible per Rule

402, SCRE.

Even assuming, *arguendo*, which is denied, that Thad Vincent's letter was not protected per attorney-client privilege as held by the trial judge, such error is not reversible unless there is a showing of prejudice to the complaining party. JKT Co., Inc, v. Hardwick, 274 S.C. 413, 265 S.E.2d 510 (1980). As previously stated, redaction in Thad Vincent's letter did not have a bearing on Respondent Tonney's claim; therefore, such exclusion was not prejudicial to the Appellants.

ARGUMENT V

DOCTRINE OF UNCLEAN HANDS IS NOT APPLICABLE IN A CASE THAT IS AN ACTION AT LAW.

The doctrine of unclean hands prevents a party from "recovering *in equity* if he acted unfairly in a matter that is the subject matter of the litigation to the prejudice of the defendant. (citation omitted). The equitable doctrine of unclean hands, however, has no application to an action at law." (original emphasis). Aaron v. Mahl, 381 S.C 585, 674 S.E.2d 482, 487 (2009). (The Court held the trial court erred in applying the doctrine of unclean hands because the Appellant was not seeking to recover in equity.)

"Petitions to allow claims against an estate are treated the same as any other proceeding for the purposes of ascertaining their legal or equitable nature. Tollison v. Anderson Area Medical Center, Inc., 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct.

App. 1995). When the proceeding involves a claim for money, such proceeding is "ordinarily triable at law." Id.

Respondent Tonney purchased items for her father's benefit when he was removed from his residence to an assisted living facility and later to a skilled nursing facility. (S.R.p. 36 - p. 52, line 17). The Appellants would not permit Iris Albright as an authorized agent for the court appointed conservator to retrieve Norman Knight, Jr.'s hospital bed from his home; therefore, a hospital bed had to be purchased. (S.R.p. 27, lines 15-22). Mrs. Albright discussed with Respondent Tonney about the need to purchase items for Norman Knight, Jr. Respondent Tonney treated the purchase of items as a loan. (S.R.p. 20, lines 12-16, R.pp. 136-137). Respondent Tonney presented receipts of items that she purchased for her father. (R.pp. 120-135).

Additionally, Respondent Tonney paid for the legal fees for her father arising out of a domestic law action. Family Services through Iris Albright as the court appointed conservator and Walter Kaufmann as the court appointed guardian believed Norman Knight, Jr. needed legal representation. (S.R.p. 32, line 22- p. 35, line 18). Respondent Tonney sent a letter dated October 27, 2007 to Iris Albright to confirm that all payments for attorney's fees for her father should be treated as a loan. (R.p. 113).

Mrs. Albright testified that an Order from Family Court required Norman Knight, Jr. to pay half of his civil service funds to his wife Mildred Knight. (S.R.p. 21, lines 13-17). Such

Order impacted Mr. Knight's financial ability to live at Savannah House, an assisted living facility, and at Bishop Gadsden, a skilled nursing facility, so Mrs. Albright contacted Respondent Tonney for financial assistance. Respondent Tonney agreed to provide assistance. (S.R.p. 21, line 18- p.22, line 3).

At one point, Mrs. Albright had to contact Respondent Tonney for money because she only had 67 cents in his conservatorship account, and she needed funds to pay for Mr. Knight's prescription and hygiene items. Respondent Tonney sent a check in the amount of a thousand dollars to Mrs. Albright. (S.R.p. 24, line 16- p.25, line 11; R.p. 141).

Since Respondent Tonney's claim sought money from the Knight Estate for the loans and expenses that she incurred for the benefit of her father, such claim is treated as an action at law, not as an action in equity, per Tollison v. Anderson Area Medical Center, Inc.

The Appellants argued Respondent Tonney did not provide notice of her intent to file a creditor's claim to them. The South Carolina Probate Code does not mandate the creditor to notify family members of its intent to file a creditor's claim. The creditor is required to file a creditor's claim in the probate court that is administering the estate. Further, the creditor may send a copy of such creditor's claim to the personal representative of such estate that is subject to the claim. S.C. Code Ann. §62-3-804(1)(a)(2008).

The Appellants raised the issue of credibility to advance

their argument of unclean hands. The appellate courts have issued plethora of cases in holding that a presiding judge is in a better position to see and hear the witnesses, judge their credibility and determine the weight to give to such testimony. Weathers v. Bolt, 293 S.C. 486, 361 S.E.2d 773 (Ct. App. 1987) and Ex Parte Blizzard, 185 S.C. 131, 193 S.E. 633 (1937).

Judge Fulp heard the testimony of the parties, and he weighed the credibility of the parties. Judge Fulp did not find Appellants' arguments including the purported facts regarding the doctrine of unclean hands to be persuasive.

ARGUMENT VI

THE LAW OF AUTOMATIC STAY WAS NOT APPLICABLE TO THE CASE.

"Section 62-1-308(c) of the South Carolina Probate Code does not apply to all orders of the probate court concerning the parties. The only proceedings required to cease are those proceedings addressed in the orders from which an appeal was taken." Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858, 861 (2006).

On August 30, 2005, Appellants appealed to the Charleston County Clerk of Court an Order dated August 25, 2005 issued by Judge Tamara Curry, the presiding judge of the Charleston County Probate Court. The appeal was given a case number that being 2005-CP-10-3573. (Appellants' Notice of Appeal dated August 30, 2005). The Appellants asserted Judge Curry erred in appointing Walter Kaufmann as the Guardian for Norman Robert Knight, Jr.

Judge Roger Young in his capacity as the appellate judge issued an Order dated October 5, 2005, wherein he decreed that Mildred Knight was to remain as Guardian and Conservator pending appeal. (R.p. 219). Judge Young further ordered the Clerk of Court to expedite the appeal during the October 31, 2005 term of court. (R.p. 220). The Order showed case number 2005-CP-10-3573.

The appeal was heard by the Honorable Kenneth Goode on December 15, 2005. Judge Goode concluded in his Order dated January 16, 2005 (should have been January 16, 2006 as the year was a typographical error) that Appellants failed to timely appeal case numbers 2005-CP-10-2603 and 2005-CP-10-2569. Also, Judge Goode held Appellant Mildred Knight did not preserve her appeal for case number 2005-CP-10-3573, and such appeal was dismissed with prejudice. (R.p. 226).

Judge Goode opined that the appeal concerning Judge Curry's Order dated August 25, 2005, to be timely filed. (R.p. 226). In regards to Judge Curry's Order, Judge Goode held the "Charleston County Probate Court did not err in its findings of fact nor was there any abuse of discretion, the appeal is dismissed with prejudice[;]" therefore, the appeal of the Order dated August 25, 2005 was adjudicated and dismissed with prejudice. (R.p. 228).

The Appellants filed a Notice of Motion and Motion for New Trial on January 30, 2006, concerning Judge Goode's Order. The Appellants did not state in their Motion for a New Trial that Judge Goode erred in holding that the Charleston County Probate

Court did not abuse its discretion or its findings of facts were incorrect. (R.pp. 161-162). As a result, Judge Goode's ruling became the law of the case.

"An unappealed ruling is the law of the case and requires affirmance." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). If the appealing party fails to raise all of the grounds upon which a lower court's decision was based, then such unappealed findings, even if incorrect, become the law of the case. Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009).

Additionally, the appeal of the August, 2007 Order is not applicable to the present case per Ulmer. The appeal of such Order involved Judge Curry's appointment of Respondent Tonney as the successor conservator for her father, Norman Robert Knight, Jr., upon the request of Family Services, Inc. to be relieved. Upon the appeal, the Charleston County Probate Court replaced Respondent Tonney with the re-appointment of Family Services, Inc. as the conservator. Family Services, Inc. served as the conservator for Mr. Knight until his passing. Therefore, the appeal of the 2007 Order was moot since Respondent Tonney never undertook the role of the conservator for her father. Moreover, the 2005 and 2007 Orders dealt with the conservatorship and guardianship of Norman Robert Knight, Jr., not with the administration of the Estate of Norman Robert Knight, Jr. The administration of the estate is not subject to a stay arising from unrelated cases as held in Ulmer.

ARGUMENT VII

APPELLANTS' ARGUMENT CONCERNING THE DOCTRINE OF FRAUD FAILS FOR LACK OF EVIDENCE AND CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

It is axiomatic that a party cannot raise an issue for the first time on appeal, and such issue "must have been raised to and ruled upon the trial judge to be preserved for appellate review." Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 563, 762 S.E.2d 693,695 (2014).

Appellants did not raise the issue of fraud in their defense in any of numerous motions or during the trial. The issue of fraud was raised for the first time in the Appellants' appeal from the probate court to the circuit court.

In the alternative, the issue of fraud fails for lack of proof. A "fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment." Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766, 770 (2011).

The Appellants made allegations regarding Mildred Knight and her purported reliance on alleged statements in their initial brief. However, Appellants did not provide any proof of fraud. Mildred Knight died prior to the trial. The Appellants did not take the deposition of Mildred Knight prior to her death. Consequently, the Appellants failed to prove fraud by a clear and convincing evidence as required per Turner.

ARGUMENT VIII

APPELLANTS' ARGUMENT CONCERNING THE GREATER WEIGHT OF THE EVIDENCE AND ABUSE OF DISCRETION AS TO RESPONDENT TONNEY'S CLAIM IS THE INCORRECT STANDARD OF REVIEW.

"The rules governing appeals at law and in equity are well settled. If a proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court's finding of fact unless a review of the record discloses there is no evidence to support them. (citations omitted). If the probate court proceeding is equitable in nature, the circuit court, on appeal, may make factual findings according to its own view of the preponderance of the evidence." Howard v. Mutz, 315 S.C. 356, 361-262, 434 S.E.2d 257-258 (1993). The appellate court has to consider the essential character of the petitioner's cause of action in the lower court. Dean v. Kilgore, 313 S.C. 257, 437 S.E.2d 154 (Ct.App. 1993).

Petition to allow claims against an estate for money due is "ordinarily triable at law[; therefore] if there is any evidence which reasonably supports the factual findings of the probate judge", then the presiding probate judge's order must be affirmed. Tollison v. Anderson Area Medical Center, Inc., 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct. App. 1995).

Appellants contend Judge Fulp as the presiding probate court judge allowed Respondent Tonney's claim against the greater weight of the evidence, and she had failed to satisfy the legal requirements of her case. (Appellants' Brief p. 19). Such

contention is not the requisite standard of review as espoused in Howard. As previously stated, Respondent Tonney's claim is an action at law per Tollison. Therefore, the circuit court as appellate court is to affirm Judge Fulp's Order since the record supports his findings of fact.

Judge Fulp in his Order outlined specific findings of fact. He concluded there was evidence of discussion between Respondent Tonney, Walter Kaufman and Iris Albright of Family Services, Inc., guardian and conservator for Norman Robert Knight, Jr, respectively, about the need for clothes, medicine, food, and furniture for Mr. Knight. (S.R.p. 19, line 23- p. 20, line 5; S.R.p. 31, lines 9-21; R.pp. 136-137). Further, Iris Albright testified she agreed for Respondent Tonney to purchase food, medicine, clothes, and furniture for her father with the expectation that she would be reimbursed. (S.R.p. 20, lines 12-16; R.pp. 136-137).

Walter Kaufmann testified the need for such purchase for the benefit of Norman Robert Knight, Jr. arose from the emergency removal of Mr. Knight from his primary residence to an assisted living facility. (S.R.p. 28, line 22- p. 31, line 21). The Charleston County Probate Court issued an Order dated January 31, 2006, which authorized Mr. Kaufmann as the guardian to "take custody of the ward, Mr. Knight." (R.p. 230).

Respondent Tonney presented detailed receipts of food, clothes, and furniture that she purchased with her own funds or credit cards. (R.pp. 120-135). Judge Fulp concluded by the

preponderance of the evidence that Respondent Tonney made the purchases for her father with the expectation that she would be reimbursed. (R.p. 13).

Appellants further asserted Walter Kaufman and Iris Albright, guardian and conservator for Norman Knight, Jr., respectively, failed in their duty to inform Mildred Knight of major decisions regarding Mr. Knight; therefore, they breached their duty. (Appellants' Brief, p. 22). Such contention is incorrect.

Mrs. Albright testified that she did not contact Mildred Knight because Mrs. Knight did not want to hear from her. (S.R.p. 26, lines 14-18). Mr. Kaufman expressed in his testimony that he "consulted with her as often as she would speak with me, but that was not very often…, the dynamic between Mrs. Knight and Mr. Bobby Knight and myself went south so early on in the process that we did not have good open lines of communication as I did with Mr. Knight's daughters."(S.R.p. 35, lines 3-11).

The exhibits and testimony of Walter Kaufman, Iris Albright, and Respondent Tonney provide significant evidence to substantiate Judge Fulp's findings of fact; therefore, the Judge Fulp's Order is to be affirmed per Howard.

ARGUMENT IX

RESPONDENT CHLOE TONNEY'S CREDITOR'S CLAIM WAS TIMELY FILED.

The applicable claim statute that being S.C. Code Ann. §62-

3-803(a)(2008) required the claimant to file a claim against an estate within one year after the decedent's death or within the time provided in S.C. Code Ann. §62-3-801(a)(2008). Pursuant to S.C. Code Ann. §62-3-801(a)(2008), creditors of the estate must "present their claims within eight months after the date of the first publication of the notice or be forever barred."

"The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, and must file a written statement of the claim, in the form prescribed by rule, with the clerk of the probate court" per S.C. Code Ann. §62-3-804(1)(a)(2008).

The issue of the timeliness of Respondent Tonney's claim filing was presented in Judge Fulp's Order dated July 29, 2013. (R.p. 41). In such Order, Judge Fulp indicated the record reflected as follows: the decedent died on March 11, 2008; notice to creditors was first published on May 21, 2008; Chloe Tonney's claim was presented on January 20, 2009. "Those dates were stated on the record at the hearing, and none was questioned by Knight's counsel." (R.p. 41).

As indicated in Order dated July 29, 2013, Judge Fulp stated the Appellants' counsel did not question the date as they were stated on the record; therefore, Appellants' contention failed. (R.p. 41).

ARGUMENT X

APPELLANTS' CONTENTION THAT PROBATE COURT JUDGE ERRED IN ALLOWING RESPONDENT TONNEY TO BE REIMBURSED FOR ATTORNEY'S FEES ARISING OUT OF FAMILY COURT MATTER AND ALLOWING FULL INTEREST ON JUDGMENT IS NOT PRESERVED FOR APPEAL.

It is axiomatic that a party cannot raise an issue for the first time on appeal, and such issue "must been raised to and ruled upon the trial judge to be preserved for appellate review." Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 563, 762 S.E.2d 693,695 (2014).

Appellants did not contend in their Motion for New Trial and to Alter or Amend the Judgment that Judge Fulp erred in allowing Respondent Tonney to be reimbursed for attorney's fees arising out of the family court action and allowing full interest on judgment. Appellants only raised the issue of attorney's fees as related to family court for the first time in their appeal from the Charleston County Probate Court to the Charleston County Clerk of Court as the appellate court. The issue regarding the allowance of interest judgment is raised for the first time on appeal from the Charleston County Circuit Court to the South Carolina Court of Appeals; therefore, both issues are barred.

If this Court concludes the Appellants properly preserved the argument concerning the award of attorney's fees arising out of a family court action, then Respondent Tonney contends the trial transcript is replete with testimony from Iris Albright of Family Services, Inc., conservator, and Walter Kaufman, the

guardian for Norman Robert Knight, that Mr. Knight needed representation in the family court matter. (S.R.p. 21, lines 8-17; S.R.p. 32, line 12-p. 33, line 11). Respondent Tonney apprised Ms. Albright in a letter dated October 24, 2007, that she would pay her father's legal expenses for the family court matter, and such payments would be treated as a loan. (R.p. 113). Judge Fulp concluded Respondent Tonney agreed to pay for her father's legal expenses, and she had made arrangements with Iris Albright as the conservator to Mr. Knight for such payments. (R.pp. 9-10).

As stated previously, if a proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court's finding of fact unless a review of the record discloses there is no evidence to support them. Howard v. Mutz, 315 S.C. 356, 361-262, 434 S.E.2d 257-258 (1993).

Appellants' arguments regarding attorney's fees and interest on the judgment are barred because they have been raised for the first time on appeal. In the alternative, there is substantial evidence in the trial record to prove that Respondent Tonney treated the payments of her father's legal fees as loans. Such payments were made with the consent of Iris Albright as her father's conservator.

CONCLUSION

Respondent Chloe Tonney's claim for reimburse from the Estate of Norman Robert Knight, Jr. is treated as an action in

law. The appellate court's review is limited to whether there evidence to support Judge Fulp's findings of fact.

Judge Fulp issued a detailed findings of fact based on the evidence that was presented to the Court. Judge Fulp concluded a Summons was not required when Respondent Chloe Tonney filed her petition for allowance against the Knight Estate in 2009 on the basis the applicable 2008 South Carolina Probate Code did not require the filing of the Summons.

Additionally, it is irrefutable that the South Carolina Court Administration on behalf of the Chief Justice of the South Carolina Supreme Court had the authority to appoint a special probate court judge per S.C. Const. art. V, §4 and S.C. Code Ann. §14-23-1080(1976). Appellants' attorney conceded such point in a motion hearing before Judge Fulp.

Moreover, Judge Fulp succinctly held the redacted documents regarding checks from a Morgan Stanley account were not relevant to Respondent Chloe Tonney's claim, and such ruling did not prejudice the Appellants. Judge Fulp pointed out Respondent Chloe Tonney withdrew a claim for $1,622.22 for a payment she made from the Morgan Stanley account to Bishop Gadsden Rehab, Inc. for her father Norman Robert Knight, Jr., and such checks were the only checks that were drawn from a Morgan Stanley account. Judge Fulp concluded in his Order dated April 22, 2014, that the withdrawal of such checks eliminated such payments as a matter for trial or defense by Appellants, and such withdrawal of the checks did not prejudice the Appellants.

Appellants' contention that the appeal of a 2005 Order and 2007 Order required the proceeding to be stayed does not have any merit. Judge Goode as the appellate judge concluded in the Order that Judge Curry's Order regarding the appointment of Walter Kaufman as the Guardian for Norman Robert Knight, Jr. was proper. Moreover, the 2007 Order only dealt with the appointment of Respondent Chloe Tonney as the successor conservator for Norman Robert Knight, Jr. The Charleston County Probate Court appointed Family Services, Inc. as the successor conservator so Respondent Chloe Tonney never undertook the role as a conservator. The 2005 Order and 2007 Order dealt with the conservatorship and guardianship of Norman Robert Knight, Jr., not with Respondent Chloe Tonney's claim against the Estate of Norman Robert Knight, Jr.; therefore, a stay was not applicable.

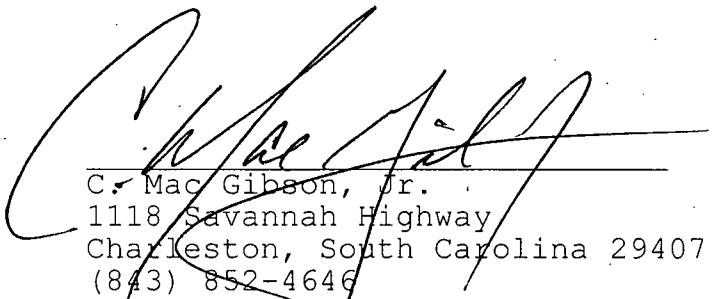
Respondent Chloe Tonney complied with the applicable 2008 South Carolina Probate Code regarding the submission of her creditor's claim against the Estate of Norman Robert Knight, Jr. As Judge Fulp stated in his Order dated July 29, 2013, Appellants' attorney did not question the dates, which included the date of the creditor's notice and the date that Respondent Tonney filed her claim.

Appellants' arguments that Respondent Tonney is not entitled to reimbursement for attorney's fees arising from a family court matter and interest on judgment are not preserved on the basis the arguments are being raised for first time on appeal.

For the foregoing reasons, Judge Fulp's Order dated July 11,

2014 is to be affirmed.

Respectfully submitted,



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January 3, 2017

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-10-5355

IN RE: ESTATE OF NORMAN ROBERT KNIGHT, JR., (deceased), ESTATE OF MILDRED C. KNIGHT (deceased) and NORMAN ROBERT "BOBBY" KNIGHT, III,

Appellants,

-versus-

BEATRICE E. WHITTEN, AS SPECIAL ADMINISTRATOR, and CHLOE KNIGHT-TONNEY, CLAIMANT,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

January 3, 2017

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