

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

MAR 14 2017

SC Court of Appeals

James B. Jackson, Jr., Master-in-Equity

Trial Court Case No. 2012-CP-38-453
Appellate Case No.: 2016-002350

Le Feather, LLC and Son Van Le,

Respondents

v.

Tuyet L. White,

Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT DID NOT ERR BY FAILING TO DETERMINE THAT THE APPELLATE AND THE RESPONDENT WERE IN A PARTNERSHIP.**
- II. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT'S DISASSOCIATION WAS VALID.**
- III. THE TRIAL COURT DID NOT ERR IN FAILING TO ORDER AN ACCOUNTING**

STATEMENT OF THE CASE

This action was commenced by Respondents Le Feather, LLC and Son Van Le when they filed an eviction action against Appellant Tuyet L. White in the Orangeburg County Magistrate Court. The Appellant in this case had previously claimed that she was the owner of the Respondent's residential home located at 1585 Rhoad Street, which required action on the part of the Respondent herein to eject the Appellant. In using a similar tactic as the Appellant used in this Appeal, the Appellant asserted that she was the owner of the property, 1585 Rhoad Street property unsupported by Title or any other documents, which was Deeded to the Respondent. The Appellant moved into the Respondent's home and refused to leave while the Respondent was in Vietnam. The Appellant moved in with her then boyfriend. See Transcript of the record Page 56, Lines 5-24. The Appellant was evicted and no appeal followed. In this case concerning the St. Matthews Road property, the Appellant timely filed her Answer and Counterclaim from this eviction case, denying the allegations in the Complaint and alleging constructive trust, unjust enrichment, breach of fiduciary duty, resulting trust, accounting and asking that the case be removed from Magistrate's Court to Circuit Court. On March 5, 2012, Judge Peggy Doremus granted Appellant's Motion to Remove and transferred the entire case to Orangeburg County Circuit Court. On March 23, 2012, Respondent's filed an Appeal from the transfer to the Orangeburg County Circuit Court. This appeal was denied on July 31, 2012.

The parties agreed to refer the case to Judge James B. Jackson, Jr., by Order of Reference signed July 24, 2013, and filed July 26, 2013. A hearing was held before Judge Jackson on April 20, 2016. On July 18, 2016, the Court issued an Order directing Appellant to vacate the premises

at issue and pay Respondents rent retroactive to the Court's previous Order dated December 18, 2013, and continue through the date Appellant vacates the premises.

On July 29, 2016, Appellant filed a Motion to Reconsider. Appellant's Motion was denied by Order of the Court dated October 26, 2016, and filed November 3, 2016. Appellant then timely filed and served her Notice of Appeal on November 22, 2016. The transcript was received by Appellant on January 11, 2017.

FACTS

The parties to this appeal met on October 31st or early morning November 1, 2004 . Transcript of the Trial, Page 215, Lines 6-9. This meeting occurred at the Atlanta airport. Also present was the Respondent's Mother. The parties were introduced by the Respondent's Mother, who was the babysitter for two (2) of the Appellant's children. The parties had previously been involved in telephone conversations prior to meeting in late October, early November, 2004. The parties spent the first night at a hotel near the Atlanta airport. The parties returned to South Carolina. The Respondent stayed in South Carolina from November 14, 2004 through August 31, 2005. At that time the parties resided together at the Appellant's home on Lakeside Drive in Orangeburg, South Carolina. According to the Appellant the parties formed a romantic relationship when they first talked on the phone. Transcript of the Trial, Page 216, Lines 21-25, Page 217, Line 1. The Appellant allowed the Respondent to return to California with her two (2) children. Also on the trip was the Respondent's Mother. See Transcript of the Trial, Page 216, Lines 8-11. Shortly thereafter, the Appellant advised that she was pregnant. The parties had a child born to them on September 10, 2005, Le Feather White. Unfortunately, the Appellant was still married to, and continues to be married to, Mr. White. The Appellant testified that the Respondent drove a Studebaker from California to South Carolina and the parties resided at the Appellant's home on Lakeside Drive in Orangeburg, South Carolina. The Appellant was a victim of a robbery and desired to move from her previous nail salon on Wingate Street in Orangeburg, South Carolina. The parties became interested in a property located on St. Matthews Road in Orangeburg, South Carolina. The parties initially signed a Lease with the owner, Mr. Rutherford, concerning the property located on St. Matthews Road, Orangeburg, South Carolina.

See Transcript of the Trial, Page 223, Lines 7-14. At this point in the progression of the facts Le Feather, LLC became a tenant of Mr. Rutherford, by lease dated December 6, 2005. The parties formed a LLC, Le Feather, LLC, through the Secretary of State of South Carolina on December 19, 2005. The Appellant disassociated from the LLC, Le Feather, LLC, on March 20, 2006. See Secretary of State Member Statement of Disassociation from a Limited Liability Incorporation dated March 17, 2006, Exhibit 1, Page 11, Transcript of Trial. The Appellant was operating a nail salon and the Respondent was operating a seafood market. The middle unit was being operated as a clothing store. Prior to purchasing the building during the lease period the Appellant signed a Dissociation document of the LLC dated March 17, 2006. The Appellant did not appear on the Deed and she did not sign the Note or personal guarantee but witnessed the Mortgage. The St. Matthews Road property was purchased by Le Feather, LLC on May 9, 2006. The Respondent now sole owner of the Le Feather, LLC purchased the property from the grantors, Joseph C. Rutherford on May 9, 2006, and the Appellant witnessed the Mortgage but not did not sign the Note or personal guarantee. The clothing store was operated on the basis that both the Appellant and Respondent had individual purchases of clothing and the parties split the profits related to the sale of their individually purchased and owned clothes, according to who purchased the clothes. The Appellant paid no mortgage payments, taxes or insurance on the subject property and continued to operate in the property. From this point the eviction preceding began. The case was moved to Circuit Court. A request for bond was made. In lieu of bond the Trial Court Ordered the Respondent to pay \$1,000.00 per month beginning December 18, 2013,

or be evicted from the premises. Your Appellant paid one (1) Court Ordered payment and still to this day paid no rent, no mortgage payment, no taxes or insurance since the hearing on December 18, 2013.

ARGUMENTS

I. **THE TRIAL COURT DID NOT ERR BY FAILING TO DETERMINE THAT THE APPELLATE AND THE RESPONDENT WERE IN A PARTNERSHIP.**

In the first paragraph of the Appellant's Initial Brief, the Appellant states correctly that the Court failed to specify what the parties relationship actually was and that the business relationship of the parties is very confusing. It is clear from the record that the Appellant failed to prove a partnership as defined by §33-41-210, SC Code of Laws. One of the most important tests as to the existence of a partnership is the intention of the parties. To determine whether a partnership exists the following tests are used. One (1) the sharing of profits and losses. Two (2) community of interest in capital and property and three (3) community of interest and control and management. When ALL OF THE CONDITIONS EXIST (emphasis added), a legal relationship is created. Where in the record does their exist any such evidence to support a partnership? Clearly, the record demonstrates the parties did not share profits. The parties' relationship was simply that of the mother and father of a child born out of wedlock. *State v. Parris*, 353 SC 582. To establish the existence of a fiduciary relationship the facts and circumstances must indicate that the party reposing trust in another has some foundation for believing the one so entrusted will not act in his own behalf but in the interest of the party so reposing. The parties were adversaries in Family Court on issues of paternity, custody, child support, name change, visitation, and attorney's fees, as well as previous Court action in which the Respondent evicted the Appellant from his home. Moreover, the evidence must show the entrusted party actually accepted or induced the confidence placed in him. This is because as a general rule a fiduciary

relationship cannot be established by the unilateral action of one (1) party. The parties previously owned a LLC from which the Appellant disassociated. In order to determine whether the parties shared a profit or loss their must be evidence of shared profits and/or losses; there is no such evidence. The Appellant failed to prove any accumulation of profit or the sharing of any loss and simply refused to participate in the LLC by the following acts. One (1) signing a dissociation agreement dated March 17, 2016, disassociating from the LLC. Two (2) refusing to pay mortgage payments, taxes or insurance on the St. Matthews Road property and (3) refusing to execute the Note as a member or sign the personal guarantee for the purchase money mortgage. The record supports only a joint venture on the operation of the middle unit of the St. Matthews Road property for a short period of time, which is now discontinued. The parties purchased clothing individually, sold clothes they purchased individually, and retained the profits on the clothing purchased by each of the parties herein. See Transcript of testimony, Page 51, Lines 5-11. This association for clothing sale was more of an agreement to share expenses and where each party purchased their own clothes to be sold and shared the rent on the middle unit on St. Matthews Road and realized the individual profits from the acquisition of the clothes purchased by the individual purchaser and segregated by the sale of the items purchased individually by each participant. The parties shared the rent on the middle unit emphasizing that this agreement terminated when the inventory was depleted and the store was closed and the relationship ended. There was no community of interest in the property other than the venture to sell the clothing and this was as a tenant only and co-tenant. The parties sold and collected profits from only their separate clothing inventory and there was certainly no community interest in the real property.

The Appellant presented no evidence, no document, no executed Note, no signing of a mortgage, and disassociated herself from the LLC prior to the acquisition of the St. Matthews Road property. See Transcript of testimony, Page 11. In fact, the Appellant testified she did not own the property. See Transcript of the testimony, Page 27, Line 7-8 and Page 28, Line 2-4. It is clear from the testimony and actions of the Appellant that there was also no community of management of the St. Matthews Road property. The Appellant was immediately asked about control and the general response from the Appellant was that the Respondent could do whatever he wanted with the building because "she loved him." The Appellant fails to prove even one of three (3) tests set forth above. *Moore v. Moore* 360 SC 241, 599 SE 2d 467 (2004) (SC Ct. App.). The record supports in several different portions of the record the fact that the Appellant never desired ownership of the building. This was perhaps motivated by the Appellant's fear of an IRS levy due to her significant cash dealings. See Transcript, Page 231 discussing the Appellant's lock box.

Q: Okay. And what do you keep in that safe deposit box?

A: The safety – safety deposit box that I opened in 1999, sir, sometime because I have my mother name in there, if something happened to me with the IRS, so they cannot get in, because my mother name on there. But she ask my name, so that what I can come in. I keep the jewelry, diamond, gold, and cash.

The Trial Court found by the greater weight of the evidence that the Appellant failed to prove a partnership and the finding of a confusing relationship is another way of stating that the Appellant failed to prove a partnership or an interest in the Le Feather, LLC by the greater weight of the evidence. The Appellant simply submits transfers, unexplained, undocumented by any receipt, note, promise to pay or other collateral information supporting the nature or the reason

for the transfers of funds, or in the alternative she can't remember. Repeatedly, the explanation of these transfers are met by the Appellant with statements such as she loved him and let him handle things. See Transcript of trial, Page 223, Lines 2-12 and Page 226.

A: I trust Mr. Le, the only that I love.

See Page 230, Lines 1-12.

See Page 232.

A: He negotiated with the property owner, because I love and trust him.

There is not a single business record that supports the Appellant's version of the transfer of funds.

The record supports on numerous occasions the fact that the Appellant never desired ownership of the building.

See Transcript, Page 221, Lines 21-24.

A: And then after that I would come home and I would tell him that you need to call and talk to whoever owners so that we can rent (emphasis added) the place.

See Transcript, Page 223, Lines 15-25

Q: Okay. And at what point did y'all talk about buying the building?

A: I remember after we – I told Mr. Le, I say, because the business good, it happened to – to Ann Stillinger before. So I tell Mr. Le, I said we better sign longer term, because if we sign three year, we going to get kick out again. So that much better that I tell Mr. Le. So I believe we sign a ten year. That my memory is not all the way. But he said that he got like three month free rent and that why Mr. Le handle all that.

The total uncertainty and confusing nature of the undocumented dealings between the parties do not constitute a partnership. The record reveals only a personal relationship founded upon the fact that the Appellant and the Respondent had a child together and that the Appellant

was "in love" with the Respondent and signed whatever documents he requested out of that connection and affection. However, the relationship was strained by a Family Court case in which involved matters of custody, support, and name change were contested. The Appellant was not married to the Respondent. However, the Appellant's testimony indicates that they were living as husband and wife in a relationship that they could not possibly maintain because the Appellant still remains married to Mr. White. However, our Courts have determined in relationships such as husband and wife, the general rules concerning the existence and creation of a partnerships ordinarily apply. Although, acts and circumstances occurring between husband and wife do not have the significance as respects the establishment of a partnership relationship which would have occurred between strangers. A relationship of a husband and wife does not itself establish a partnership even if a wife renders some service at the husband's business. That, of course, would not create a partnership. Such services would be regarded as having been rendered gratuitously for the family benefit. *Stevens v. Stevens*, 213 SC 525, 50 SE 2d 577. The Appellant cites §33-41-210 of the South Carolina Code of Laws, asserting that a partnership existed because of the three (3) following factors. One (1) the sharing of profits and losses, two (2) community of interest in capital or property and three (3) the community of interest in control of management. It is respectfully submitted that the record fails to support none of those criteria. There is no evidence of sharing of profits and losses. The Respondent continued to pay the total mortgage payments, both first and second mortgages, pay taxes and insurance and there is no evidence of any contribution to the mortgage debt or sharing of profits or losses by your Appellant. Therefore, there is no record to support these necessary factors. The Appellant had previously purchased at least one (1) home and had managed at least five (5) businesses and

defended two (2) other lawsuits, one a civil suit filed by a nail salon customer for negligence. Transcript, Page 264. The Appellant did not desire to be financially responsible for the mortgage on the St. Matthews Road property, nor the Rhoad Street property. The Appellant also claimed ownership of the Rhoad Street property but no financial liability. She attended closing of the property on St. Matthews Road and even signed as a witness to the Mortgage but did not sign the Note, nor did her name appear on the Deed or Mortgage or personal guarantee. Prior to the acquisition of the property on St. Matthews Road, the Appellant withdrew from the LLC, thereby extinguishing any community interest in the property. The Appellant simply continued to occupy the premises without payment of rent, mortgage payments, insurance and/or upkeep for approximately four (4) years and continues to do so today. There is no evidence or testimony that the Appellant and the Defendant had any community interest and control of the property. The subject of this appeal is the real property located on St. Matthews Road, which was originally a leasehold until purchased after the disassociation of the Appellant from the LLC and the property to which the Appellant refused to pay rent, taxes or insurance on said property and is not subject to liability on the purchase money mortgage as a co-obligor nor does appear on the Deed as an owner. The Appellant's conduct in refusing to pay rent payments, even when Ordered by the Circuit Court further shows a lack of community interest in the management and control of the LLC and, in fact, to the contrary actions of the Appellant were contrary to and against the interest of the LLC. The Appellant cites to the record trial transcript, Page 96 Lines 6-8. However, a full disclosure of those exchanges show more clearly that there was no sharing of profits, but in fact, the Appellant's actions show only damage to the LLC and reduction in profits. The asserted clothing partnership was simply a sharing of space in the retail sale of

clothing and profits were divided by the difference between the cost acquisition of the individual participant and sale price. There was no co-mingling and this business dissolved.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE APPELLANT'S DISASSOCIATION WAS VALID.

The facts supported by credible evidence are that the Appellant abandoned and disassociated from Le Feather, LLC, previous to the purchase of the subject property on St. Matthews Road. This case has been ongoing for over six (6) years. The Appellant waived the right of compensation by failing to exercise or initiate a proceeding against the LLC as set forth in §33-44-701(d). "If an agreement to purchase the distributional interest is not made within one hundred twenty days after the date determined under subsection (a), the dissociated member, within another one hundred twenty days, may commence a proceeding against the limited liability company to enforce the purchase. The jurisdiction of the court in which the proceeding is commenced under this subsection is plenary and exclusive." The Appellant did not exercise her rights to enforce the purchase and raises this issue for the first time in the appeal. Clearly, §33-44-701(d) gave the disassociated member another 120 days after the first 120 days after no agreement on a purchase price was obtained to bring an action or commence a proceeding against the limited liability company to enforce the purchase. The Appellant had no interest and should have commenced an action within the second 120 day period to enforce a purchase. She did not. This constitutes a waiver, and this is corroborative of the abundant evidence that she had no interest in the LLC, did not intend to participate in retiring the debt and intended to disassociate from the LLC. In addition, the Appellant's disassociation is time barred, equitable estoppel and laches applies.

III. THE TRIAL COURT DID NOT ERR IN FAILING TO ORDER AN ACCOUNTING.

The Appellant testified that she contributed \$100,000.00 to the purchase of the St. Matthews Road property. The notion that the Appellant took \$100,000.00 out of her safe deposit box is unsupported by any receipt or evidence of any kind to show that any money was taken out of the cash box or that it was applied to the purchase of the subject property deeded into Le Feather, LLC. To the contrary, the testimony of closing attorney Bolen refutes this. See testimony of Bolen. See Page 23, Lines 4-10.

A: I may never have made a connection with those two and there is no reason I would have pursued that. I was doing a specific job for Feather. I did a specific job for Ms. White and the two weren't connected in any way, shape or form at that time. So I wouldn't have had any reason to include her in the closing for another client.

See Transcript of the Record, Page 27, Lines 4-8.

A: I hate to say because I just don't really remember.

Q: Okay.

A: My impression was that Feather Le was the sole owner and sole decision maker.

(Page 26, Line 24- Page 28, Line 6)

Page 30(Line 9-20)

Q: Mr. Boland you testified on cross-examination that this closing stuck out a little bit because it may have been the largest cash.

A: Correct.

Q: Transaction which was a portion of the purchase price.

A: That's right.

Q: Did you see Ms. White hand Mr. Le any cash at that closing?

A: No.

Q: Who handed you the cash?

A: Feather

Q: Okay.

Even after discovery the Appellant has been unable to show with any degree of certainty what her transfer of funds were based upon. Therefore, there is nothing now that a Court Ordered accounting would add to the case because both parties made their individual private dealings so confusing and so devoid of proof and unsupported by normal business practices documents so as to make an accounting impossible. To have an accounting there must be a partnership. No partnership was proven by the greater weight of the evidence.

CONCLUSION

The Appellant has managed to maintain use and control of one (1) of the three (3) units located at the St. Matthews address for over six (6) years without the payment of rent or bond, and only paying \$1,000.00 towards the previous Court Ordered payments. See Judge Jackson's Order of December 18, 2013. The Appellant has managed to continue the operation of the nail business without the payment of any mortgage payment or rent payment, nor has the Respondent paid any taxes or contributed to the insurance for the building she currently occupies based upon clever and continuing ruse of legal maneuvering in total disregard of previous Court Orders while claiming she was a hapless, in-love, and uneducated woman who was disabled by her affection for the father of one (1) of her five (5) children. She has provided at trial no document, but rather inserted a confusing array of exhibits unsupported by a single, legally recognized proof of

payment or ordinary business document. She has failed to support her claims for resulting constructive trust. She has failed to prove a partnership of an LLC while hiding behind a disguise of uneducated, inexperienced, love-sick female. All the while she has acquired property, operated five (5) businesses successfully enough to obtain approximately \$300,000.00 in her lock box (See Transcript, Page 231, Lines 15-20), has acquired a home, operated and defended legal actions concerning other business entanglements she has created.

It is respectfully submitted that this Court should affirm the decision of the Trial Judge who accurately processed the evidence and came to these conclusions.

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Dated: 3-13-17

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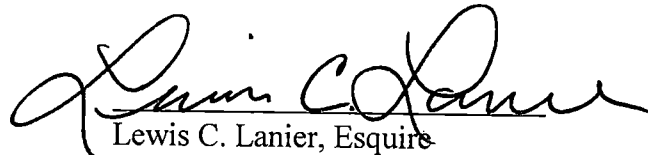
v.

Tuyet L. White,

Appellant

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Tuyet L. White, Appellant by depositing a copy of in the United States Mail, postage prepaid, on March 13, 2017, addressed to their attorney of record, Russell A. Blanchard, IV, PO Box 1084, Orangeburg, SC 29116.



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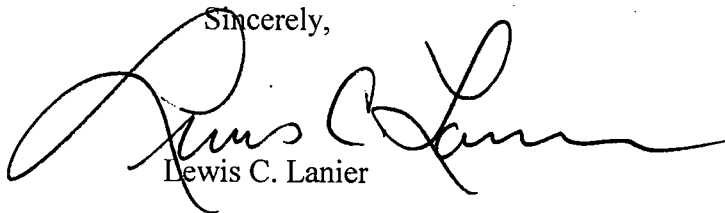
RE: Le Feather, LLC and Son Van Le v. Tuyet L. White
Appellate Case No.: 2016-002350

Dear Ms. Kitchings:

Enclosed please find Respondents' Initial Brief, the Designation of Matter to be Included in the Record on Appeal and Proof of Service for filing regarding the above captioned matter. Please return a certified true copy of same to my office in the self addressed stamped envelope.

Please call if you have any questions.

Sincerely,



Lewis C. Lanier

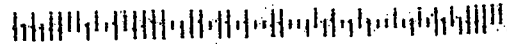
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Enclosure

cc: Russell A. Blanchard, IV, Esquire



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