IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY

Court of Common Pleas
The Honorable John C. Hayes, III

C/A No: 15-CP-46-1827

Appellate Case No. 2016-001558
Supreme Court Case No. 2017-001226

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JUN 26 2017
SC Court of Appeals

Willie Bell, individually and on behalf of the Estate of
Emma M. Davis as its duly appointed Personal Representative,

Appellant,

v.

McGowan, Hood, and Felder, LLC and Chad McGowan,

Respondents.

APPELLANT'S REPLY TO RESPONDENTS' RETURN TO THE MOTION TO CERTIFY TO THE SOUTH CAROLINA SUPREME COURT

In opposing the motion to certify, Respondents claim that this Court has already made a clear and final determination of the issues present in this appeal, citing to *Parker v. Parker*, 313 S.C. 482, 443 S.E.2d 388 (1994). However, what Respondents ignore is that both the law and the facts of that case are completely different than this case.

Parker involved an illegitimate child as a potential heir. Respondents claim that since the Supreme Court in *Parker* rejected the argument that S.C. Code § 62-2-109 was the only way to determine parentage, the *Parker* would also require a court to reject that S.C. Code Ann. § 62-2-802(b)(4) is required to determine a common law spouse. Respondents ignore critical differences in the language of the two statutes.

Section 62-2-109, by its own terms, indicates that a legal determination may only be needed if there is a challenge to paternity, as indicated by the use of the word "if":

> **If**, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, though, or from a person:
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father if:
> ii) the paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate and, if after his death, by clear and convincing proof....

In other words, if an illegitimate child's status as heir is questioned, then an adjudication is required. In contrast, the statute governing common law spouses does not anticipate a challenge, but instead mandates who can be considered a surviving spouse and heir:

> For purposes of Parts 1, 2, 3, and 4 of Article 2 [Sections 62-2-101 et seq., 62-2-201 et seq., 62-2-301 et seq., and 62-2-401 et seq.] and of Section 62-3-203, a surviving spouse **does not** include:
>
> 4) an individual claiming to be a common law spouse **who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative**; if the action is commenced after the death of the decedent, proof must be by clear and convincing evidence.

S.C. Code Ann. § 62-2-802(b)(4) (emphasis added). In other words, a putative common law spouse cannot be a surviving spouse *unless and until* a timely adjudication has been made--regardless of whether there is or might be a challenge by an interested party.

Moreover, the factual differences between *Parker* and the case at bar indicate that *Parker* did not address the issues present here. In *Parker*, the decedent's wife was appointed personal representative and in the petition for informal probate, she listed herself and four children as the heirs, including an illegitimate child of decedent, Virginia Ann Martin ("Martin"). During the probate process, the legitimate children challenged the appointment of the personal representative though ultimately, a settlement was reached that allowed PR to continue. Martin was a part of this settlement agreement. Almost a year after the death of decedent, another person came forward asserting he was a child and heir. While his claim was rejected as untimely, the probate court's orders acknowledged Martin's continued presence and participation in each proceeding regarding the claim. Almost four years after the death of the decedent, the legitimate children, for the first time, sought to exclude Martin under Section 62-2-109. The court found that an adjudication of paternity was required only where an interested party questioned paternity and that the challenge must be brought within the statutory time limit. Since the legitimate children had notice of Martin's claim and allowed her to participate in proceedings for four years before challenging paternity, the court rejected the children's request.

However, unlike the case here, all of the heirs in *Parker* were listed in the initial probate filing and thus, had notice that Martin claimed to be a child and heir. The legitimate children could have challenged Martin's parentage but chose not to. In contrast, here, Appellant Willie Bell was not included in the Petition for Appointment filed by Tanisha Gilmore, even though he

was the only child of Emma Davis, nor was he contacted regarding the institution of legal proceedings for medical malpractice in his mother's name.[1] Moreover, Strong was not listed in the Petition filed by Ms. Gilmore as a common law spouse.[2] Thus, there was no way for Bell or any interested party to even challenge Strong's status as none had been asserted by Strong or the Personal Representative.[3]

Contrary to Respondents' claim, *Parker* does not resolve the crucial issue present here: whether a putative common law spouse, seeking damages under loss of consortium (in a death case) and/or wrongful death action must be adjudicated a common law spouse pursuant to S.C. Code § 62-2-802(b)(4). As set forth in Appellant's Motion and herein, that issue raises a "legal principle of major importance" which supports certification of this matter pursuant to Rule 204, SCACR.

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[1] Respondents knew of Willie Bell's existence as a "surviving son" who may have been adopted, but failed to determine his status and include him in the proceedings. Pl. Ex. 14i.

[2] The only people Gilmore included as intestate heirs were Rosa Hall and Atlean D. Johnson, Ms. Davis's sisters.

[3] Respondents also wrongfully claim that that *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (2001) is existing precedent for Respondent's claim that the lawyer for a personal representative has no duty to a child of the deceased. *Douglass* involved the presumption that a child was born to the marriage of two other people and was not the illegitimate child of the deceased. The lawyer was not expected to look past that legal presumption and the illegitimate child had no action for the failure of the lawyer and personal representatives for their failure to include him in the wrongful death action. The clear distinction between *Douglass* and the instant case is that the attorney in that case did not know about the existence of the child during the wrongful death litigation and, even if the evidence was available to him, all evidence pointed to the child being fathered by someone other than deceased.

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June 22, 2017

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IN THE SUPREME COURT

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McGowan, Hood, and Felder, LLC and Chad McGowan,

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PROOF OF SERVICE

I, Kathy A. Collins, legal assistant to the law firm of Lewis Babcock L.L.P., do hereby certify that I have served Appellant Willie Bell's Reply to Respondents' Return to the Motion to Certify to the South Carolina Supreme Court upon counsel of record by placing a copy of same in the United States Mail, first-class postage prepaid, this 22nd day of June, 2017, to the following addresses:

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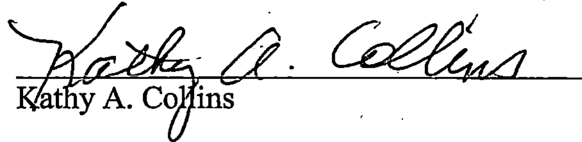
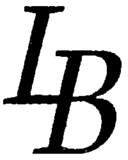


Kathy A. Collins

Columbia, South Carolina

June 22, 2017.



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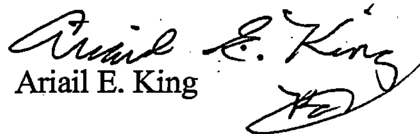
VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Willie Bell, individually and on behalf of the Estate of Emma M. Davis as its duly appointed Personal Representative v. McGowan, Hood and Felder, LLC and Chad McGowan
Appellate Case No.: 2016-001558
Supreme Court Case no. 2017-001226

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven copies of Appellant's Reply to Respondents' Return to the Motion to Certify to the South Carolina Supreme Court. By copy of this letter, we are hereby serving a copy of same upon counsel of record.

Sincerely,

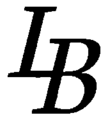


Ariail E. King

AEK/kc

Enclosures

cc: Whitney Harrison ,Esq.
S.C. Court of Appeals
Steven G. Janik, Esq.
Lovic A. Brooks, III, Esq.



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