

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

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NOV 18 2017

Donald B. Hocker, Circuit Court Judge

SC Court of Appeals

Case No. 2015-CP-24-1174

Jerald Lamar Harbin, Special Fiduciary of the Franklin N. Harbin and Edna F.
Harbin Living Trust

Appellant

v.

Susan H. Williams, George T. Williams, Citifinancial Inc. and CFNA Receivables
(SC) Inc.

Respondents

INITIAL BRIEF OF APPELLANT

ATTORNEY FOR APPELLANT

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2. The trial judge erred in submitting to the jury the issue of whether or not the governing Trust Declaration authorized the survivor of two co-Settlers to withdraw the property in question from the Trust, after the earlier death of the other co-Settlor.

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3. Following the jury’s verdict in favor of the Respondent, the trial judge erred in refusing to grant Appellant’s motion for judgment notwithstanding the verdict on the grounds that that the deed in question, executed by the survivor of two co-Settlers, over five years after the death of the first co-Settlor, was invalid, because the governing Trust Declaration provided, in relevant part, that the authority to withdraw property from the Trust had expired upon the earlier death of the other co-Settlor.

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge erred, at the close of the evidence, in refusing to grant the Appellant's motion for directed verdict on the grounds that the deed in question, executed by the survivor of two co-Settlers, after the death of the other co-Settlor, was invalid, because the governing Trust Declaration provided, in relevant part, that the authority to withdraw property from the Trust had expired upon the earlier death of the other co-Settlor.
2. The trial judge erred in submitting to the jury the issue of whether or not the governing Trust Declaration authorized the survivor of two co-Settlers to withdraw the property in question from the Trust, after the earlier death of the other co-Settlor.
3. Following the jury's verdict in favor of the Respondent, the trial judge erred in refusing to grant Appellant's motion for judgment notwithstanding the verdict on the grounds that that the deed in question, executed by the survivor of two co-Settlers, over five years after the death of the first co-Settlor, was invalid, because the governing Trust Declaration provided, in relevant part, that the authority to withdraw property from the Trust had expired upon the earlier death of the other co-Settlor.

STATEMENT OF THE CASE

1. This action was commenced by the filing of a Summons and Complaint on November 24, 2015. In relevant part, the Plaintiff, as Special Fiduciary of a Trust, sought a declaratory judgment that a deed purporting to withdraw property from the Trust Estate (the "Purported Deed") was invalid and had no effect on the ownership of the property referenced in the deed.
2. In relevant part, the Respondent and her late husband, George T. Williams, claiming ownership under the Purported Deed, filed an Answer on January 31, 2016, denying that the Purported Deed was invalid and that they owned the property.
3. George T. Williams subsequently died. Since the Purported Deed contained survivorship language, any interest owned by Mr. Williams would have automatically passed to the Respondent as a matter of law, so no estate was ever opened for Mr. Williams.
4. The case was called for trial by the Hon. Donald B. Hocker, Circuit Court Judge, on August 21, 2017. A jury was chosen and sworn.
5. The parties appeared before the trial judge, on August 22, 2017, to argue pre-trial matters. The trial judge took the pre-trial matters under advisement.
6. On August 23, 2017, the parties appeared for trial. The trial judge announced his ruling on various issues raised the previous day and instructed the parties on how he would allow the case to proceed.
7. The parties presented evidence as allowed by the trial judge.
8. At the close of the evidence, the Appellant made a motion for a directed verdict, which the trial judge denied.

9. The trial judge submitted the case to the jury. The jury returned a verdict in favor of the Respondent on August 23, 2017.
10. After the jury's verdict, the Appellant made a motion for judgment notwithstanding the verdict, which the trial judge denied. Court was adjourned.
11. The jury's verdict was entered into the computer system as a judgment in favor of the Respondent. However, the Clerk of Court indicated that Form 4's were not prepared for jury trials.
12. On September 14, 2017, the Appellant filed and served Notice of Appeal and explained in his cover letter the absence of the Form 4 or any other order.
13. On September 20, 2017, the Deputy Clerk for the Court of Appeals wrote a letter to the Appellant's attorney indicating that the Notice of Appeal was deficient because it did not contain the Form 4 and that the appeal would be dismissed if the matter was not corrected within 10 days..
14. On September 27, 2017, the Appellant's attorney spoke with the Deputy Clerk by phone and explained to her that the Greenwood Clerk of Court does not prepare Form 4's for jury trials. The Deputy Clerk indicated that the appeal would not be dismissed, but she also stated that she would prefer that the Appellant's attorney request a Form 4 from the trial judge.
15. Upon request of the Appellant's attorney, the trial judge executed a Form 4 on September 29, 2017 which was filed by the Clerk of Court on October 3, 2017 and delivered to the Appellant's attorney immediately after filing.
16. On October 4, 2017, the Appellant's attorney filed and served a Supplemental Notice of Appeal containing a copy of the Form 4 and the jury's verdict.

1. THE TRIAL JUDGE ERRED, AT THE CLOSE OF THE EVIDENCE, IN REFUSING TO GRANT THE APPELLANT'S MOTION FOR DIRECTED VERDICT ON THE GROUNDS THAT THE DEED IN QUESTION, EXECUTED BY THE SURVIVOR OF TWO CO-SETTLORS, AFTER THE DEATH OF THE OTHER CO-SETTLOR, WAS INVALID, BECAUSE THE GOVERNING TRUST DECLARATION PROVIDED, IN RELEVANT PART, THAT THE AUTHORITY TO WITHDRAW PROPERTY FROM THE TRUST HAD EXPIRED UPON THE EARLIER DEATH OF THE OTHER CO-SETTLOR.

At the close of the evidence, the Appellant moved for a directed verdict. The Appellant argued that the considering all of the evidence before the court, even when viewed in the light most favorable to the Defendant, there was no genuine issue as to any material fact and the Plaintiff was entitled to a directed verdict as a matter of law. The trial judge denied the motion, stating "After consideration of the evidence presented, I believe the Trust document itself does create an issue in fact. And I will send the case to the jury and deny your motion." Transcript page 114 line 16 through Transcript page 115 line 10.

The following relevant facts are alleged in the Complaint and admitted in the Answer:

1. Franklin N. Harbin and Edna F. Harbin created the Franklin N. Harbin and Edna F. Harbin Living Trust (the "Trust") by executing a Declaration of Trust on January 16, 2000 (the "Trust Declaration") which was recorded in Deed Book 606 at page 15.

Complaint paragraph 6. Answer paragraph 2.

2. Franklin N. Harbin conveyed the property located at 313 Lakeshore Drive (the "Property") to the Trust by deed recorded in Deed Book 606 at page 18. Complaint paragraphs 4 and 5. Answer paragraph 2.

3. Franklin N. Harbin died on June 23, 2000. As of the time of his death, the Trust Declaration had not been amended or revoked, and the Property was still a part of the Trust Estate. Complaint paragraphs 9 and 10. Answer paragraph 2.

4. On November 30, 2005, Edna F. Harbin, as the remaining Trustee, executed a

document purporting to convey the Property to herself for life with remainder to Susan H. Williams (the "Purported Deed). The Purported Deed was recorded on March 22, 2006 in Deed Book 963 at page 221. Complaint paragraphs 11 and 12. Answer paragraph 2.

With regard to factual allegations of a complaint, which are admitted in an answer, no further proof thereof is required. See Brown v. Sandwood Development Corporation, 277 S.C. 581, 291 S.E.2d 375 (1982). 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. Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964).

Article 3 of the Trust Declaration states “**While both Settlers are living**, either may: (1) withdraw property from this Trust in any amount and at any time; (2) add other property to the Trust; (3) change the beneficiaries, their respective shares and the plan of distribution; (4) amend this Declaration of Trust in any other respect; and (5) revoke this Trust in its entirety or any provision therein.” (emphasis added).

The trial judge had already ruled that the Trust Declaration was not ambiguous and that he would therefore not allow extrinsic evidenced to be presented in an attempt to contradict the plain language of the Declaration. Transcript page 35 line 22 through Transcript page 36 line 2.

The trial judge had also ruled that if there was an ambiguity in the Trust Declaration, any such ambiguity would be a patent ambiguity. If that were the case, he ruled that any extrinsic evidence would still be inadmissible to attempt to contradict the plain language of the Declaration. Transcript page 36 line 2 through Transcript page 36 line 5.

The law is very clear. "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988).

Because the plain language of Article III of the Trust Declaration limited the powers of either Settlor, to withdraw property from the Trust, specifically to the period of time when both Settlers were living, the plain reading of the Trust indicates that the power to withdraw property from the Trust expired upon the death of the other Settlor in 2000. The deed executed in 2005 by the surviving Settlor had no legal impact on the ownership of the property.

As a result, the Appellant was entitled to a directed verdict. Rule 50, SCRC.P.

THE TRIAL JUDGE ERRED IN SUBMITTING TO THE JURY THE ISSUE OF WHETHER OR NOT THE GOVERNING TRUST DECLARATION AUTHORIZED THE SURVIVOR OF TWO CO-SETTLORS TO WITHDRAW THE PROPERTY IN QUESTION FROM THE TRUST, AFTER THE EARLIER DEATH OF THE OTHER CO-SETTLOR.

The trial judge ruled that the language of the Trust Declaration was not ambiguous.

Transcript page 35 line 22 through Transcript page 36 line 2.

In the event the trial judge erred in ruling that the language of the Trust Declaration was not ambiguous, any ambiguity would have been a patent ambiguity. The trial judge stated as much himself. Transcript page 36 line 2 through Transcript 36 line 1.

Interpretation of an unambiguous policy, or a policy with a patent ambiguity, is for the court. Beaufort County School Dist v. United Nat. Ins. Co., 392 S.C. 506, 709 S.E.2d 85 (S.C. App. 2011), citing Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 526-27, 167 S.E.2d 420, 423 (1969); B.L.G. Enters., Inc. v. First Fin. Ins. Co., 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct.App.1997), *aff'd*, 334 S.C. 529, 514 S.E.2d 327 (1999).

Interpretation of a policy with a latent ambiguity is for the jury. Beaufort County School Dist v. United Nat. Ins. Co., 392 S.C. 506, 709 S.E.2d 85 (S.C. App. 2011), citing Wheeler v. Globe & Rutgers Fire Ins. Co., 125 S.C. 320, 329, 118 S.E. 609, 612 (1923) (Cothran, J., dissenting).

Given court's ruling that the language of the Trust Declaration was not ambiguous, it was error to submit the issue to the jury. The trial judge should ruled as a matter of law that the deed in question was invalid, because the governing Trust Declaration unambiguously provided, in relevant part, that the authority to withdraw property from the trust had expired upon the earlier death of the other co-settlor

3. **Following the jury's verdict in favor of the Respondent, the trial judge erred in refusing to grant Appellant's motion for judgment notwithstanding the verdict on the grounds that that the deed in question, executed by the survivor of two co-Settlors, over five years after the death of the first co-Settlor, was invalid, because the governing Trust Declaration provided, in relevant part, that the authority to withdraw property from the Trust had expired upon the earlier death of the other co-Settlor.**

After the jury returned a verdict in favor of the Respondent, the Appellant moved for judgment notwithstanding the verdict on the same grounds raised in the motion for a directed verdict. The motion was denied by the trial judge. Transcript page 136 line 22 through Transcript page 137 line 5.

Because the plain language of Article III of the Trust Declaration limited the powers of either Settlor, to withdraw property from the Trust, specifically to the period of time when both Settlers were living, the plain reading of the Trust indicates that the power to withdraw property from the Trust expired upon the death of the other Settlor in 2000. The deed executed in 2005 by the surviving Settlor had no legal impact on the ownership of the property.

As a result, the Appellant was entitled to a directed verdict and a subsequent judgment notwithstanding the jury's verdict. Rule 50, SCRCP.

CONCLUSION

The deed executed by the survivor of two co-Settlers, purporting to withdraw property from the Trust, after the death of the other Settlor, was in direct contravention of the plain language of the Trust Declaration which limited the exercise of that power, and similar powers, to the time when both Settlers were still living.

Article 3 plainly states “**While both Settlers are living**, either may: (1) withdraw property from this Trust in any amount and at any time; (2) add other property to the Trust; (3) change the beneficiaries, their respective shares and the plan of distribution; (4) amend this Declaration of Trust in any other respect; and (5) revoke this Trust in its entirety or any provision therein.” (emphasis added).

The Appellant was entitled to judgment on this issue as a matter of law. The trial judge erred in refusing the motion for a directed verdict, erred in submitting this to the jury for its determination, and erred in refusing to grant the motion for judgment notwithstanding the verdict after the jury returned its verdict in favor of the Respondent.

Greenwood, South Carolina

11-9, 2017

BY: _____



CHARLES M. WATSON, JR.

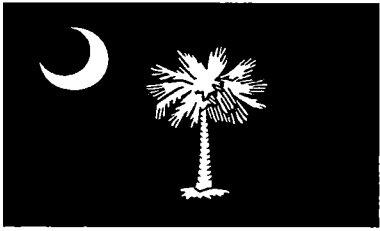
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November 9, 2017

The Hon Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia SC 29211

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Re: Jerald Lamar Harbin, Special Fiduciary of the Franklin N. Harbin and Edna F. Harbin Living Trust, vs. Susan H. Williams, George T. Williams, Citifinancial Inc. and CFNA Receivables (SC) Inc. Docket No: 2015-CP-24-1174

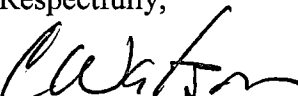
Dear Ms. Kitchings

Enclosed for filing is a copy of my Initial Brief of Appellant along with my Designation of Matter to be Included in the Record on Appeal.

Also enclosed are copies of the following:

1. Proof of Service of the Initial Brief of Appellant on the attorney for the Respondent.
2. Proof of Service of the Designation of Matter to be Included in the Record on Appeal on the attorney for the Respondent.

Respectfully,


Charles M. Watson Jr.

COPY TO:

Donna J. Jackson, Esquire



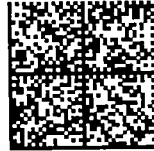
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