THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-000882

In Re: Eleanor McCarthy Lenahan Trust under agreement Dated July 12, 2001.

Kathleen Suzanne Heslin and Maureen Teresa Mosley, in their capacities as Cotrustees of the Eleanor McCarthy Lenahan Trust under agreement dated July 12, 2001 ....Appellants,

v.

Mary Kathleen Lenahan, individually and in her capacity as Trustee of the Art. X(35) MKL Trust Share UAD 071201, Jean Marie Qualliu, Joan Eleanor DeMaio, and Christine Ann Lenahan ....Respondents,

Of Whom Mary Kathleen Lenahan and Jean Marie Qualliu are Respondents.

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

I. The Respondents' Brief contains several errors and mistatements.

Throughout their Brief, the Respondents make a number of assertions that are not borne out by either the circuit court's February 3, 2017 order ("Order") or the record.

A. The circuit court specifically held that probable cause for the Respondents' contest exists in this case, despite an absence of facts to support such holding.

At page 9 of their Brief, the Respondents aver that the circuit court made no finding that probable cause exists in this case for the Respondents' contest, and that, instead, the circuit court was merely making a statement about precedent, and that it is "nonsensical" to claim that the circuit court was "confirming the validity of complaints it had never seen." However, this argument ignores the plain language of the Order, which states as follows:

> Furthermore, it is well settled in South Carolina that public policy is against enforcing no contest clauses, especially where – ***as in this instance*** – probable cause exists for the contest based on justice and morality. (Emphasis supplied.) (R. p. 4)

Obviously, this is no mere statement about precedent: the Order's inclusion of the phrase "as in this instance" reflects a specific finding by the circuit court that probable cause for the Respondents' contest exists in the instant case.

Moreover, the word "furthermore" at the beginning of the sentence indicates that the circuit court is going beyond its ruling that the Office of Disciplinary Counsel (ODC) letters could not, as a matter of law, constitute a contest of the Trust at issue here, by holding that, even if the letters could serve such a purpose, the no contest clause would nevertheless be

unenforceable in this case by virtue of the public policy exception – which applies when objecting beneficiaries can show they have probable cause for their objections. The circuit court then cites *very specific* grounds for the Respondents' probable cause (i.e., that the Trustees refused "to make Trust distributions" and charged "all legal fees to the complaining beneficiaries"),[1] before concluding that the Respondents indeed had probable cause for their contest and, therefore, the No Contest Restriction in the instant case is "void as against public policy." (R. p. 4) The Order's holding – without a trial, and without any facts to support such a holding – that Respondents had probable cause for their contest could not be clearer.

B. The circuit court's ruling on when and how the ODC letters will be discoverable was within its discretion and has not been appealed.

On pages 7 and 8 of their Brief, the Respondents attempt to counter the holding of Judge Dukes' order of July 13, 2016 ("Dukes Order") with a two-pronged approach: First, the Respondents make the (unsupported) claim that "no turn of events, including completion of the ODC investigation, will render" the ODC letters non-privileged, and that the ODC letters will not be discoverable when that matter concludes; second, the Respondents assert that Judge Dukes' holding that the ODC letters and communications will be discoverable when the ODC matter is concluded "was not a part of Judge Dukes' holding or in any order". This argument ignores the plain language of the Dukes Order, which states as follows:

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[1]These very specific grounds – the Trustees' refusal "to make Trust distributions" and "charging all legal fees to the complaining beneficiaries" – are not supported by the record, and no such testimony or other evidence in this regard has been submitted to the circuit court.

> Once the ODC proceeding is no longer pending or active, then filings, complaints or other documents related to the ODC matter will no longer be shielded from disclosure or discovery. (R. p. 15)[2]

Thus, regardless of whether or not any turn of events renders the Respondents' ODC complaints non-privileged, the Dukes Order makes it clear that the ODC documents and related items will no longer be shielded from disclosure or discovery once the ODC proceeding concludes. And, while it now appears that the Respondents disagree with this holding, as they themselves assert on page 3 of their Brief, the Dukes Order has not been appealed.

C. All of the facts asserted in the Appellants' Brief are supported by the record and were presented to the trial court.

The Respondents claim, at pages 2 and 4 of their Brief, that the Appellants have made reference to improprieties and facts that are "not supported by the record on appeal" or "before the Circuit Court." This is erroneous. While the Respondents do not specifically identify those improprieties and facts that are supposedly "not supported" or were not "before" the circuit court, all of the facts referenced in the Appellants' Brief are found in the affidavits filed with the circuit court clerk, served on opposing counsel and presented to the circuit court in opposition to the Respondents' motion for partial summary judgment. (R. pp.

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[2]The Dukes' Order stemmed from the Appellants' motion to compel the Respondents' discovery responses relating to the ODC matter; therefore, Judge Dukes' determination as to when and under what circumstances documents related to the ODC matter would become discoverable is crucial to the overall holding of the Dukes Order, and well within Judge Dukes' discretion to make. "A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion." *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).

97, 103, 106)

D. The argument that this case is "retaliatory" is unsupported by the record and the facts presented to the circuit court.

At page 8 of their Brief, the Respondents argue that the privilege afforded to communications in Rule 13 was granted to protect those who report attorney misconduct from "retributory lawsuits like this one".[3] Further, throughout their Brief, the Respondents refer to the underlying lawsuit using the terms "retribution", "reprisal" and "retaliatory". Not only does this argument misinterpret and misapprehend Rule 13, but it is disingenuous: the Appellants – **not** Douglas Delaney – brought the lawsuit against the Respondents, in Appellants' capacity as cotrustees of the Trust; Delaney is **not** a party to this case. To suggest that the Appellants brought the underlying lawsuit because the Respondents sent complaints to the ODC about Delaney is not only absurd, it is not supported by any evidence in the record or facts presented to the circuit court, by either party. (R. pp. 97, 103, 106)

CONCLUSION

For the reasons set forth hereinabove, as well as those found in the Appellants' Brief, the circuit court's order granting partial summary judgment should be reversed.

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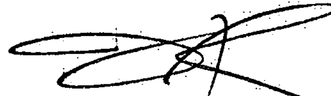
[3]Note that this assertion directly conflicts with the opinion espoused by the circuit court at the hearing on Respondents' motion to dismiss in January of 2016 concerning Rule 13 ("That's to protect lawyers, and that's to protect complaining clients about **their** lawyers.") (Emphasis supplied.) (R. p. 61, lines 3-5) Of course, Delaney never represented the Respondents, who were themselves represented by their own, separate counsel. (R. p. 99)



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January 24, 2018

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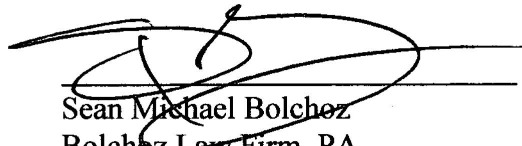
CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants' Final Reply Brief complies with Rule 211(b), SCACR.

(Signature on next page following.)



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