

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-000882

RECEIVED
JAN 26 2018
SC Court of Appeals

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

Kathleen Suzanne Heslin and Maureen Theresa 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,

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

RESPONDENTS' FINAL BRIEF

Kelly M. Jolley (SC Bar #72573)
Ariail B. Kirk (SC Bar #71101)
JOLLEY LAW GROUP, LLC
Post Office Box 22230
Hilton Head Island, SC 29925
(843) 681-6500

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	4
I. THE CIRCUIT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO RESPONDENTS BECAUSE APPELLANTS PRESENTED NO EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT.....	4
II. THE CIRCUIT COURT PROPERLY INTERPRETED AND APPLIED RULE 13 OF THE RULES FOR LAWYER DISCIPLINARY ENFORCEMENT IN RULING THAT RESPONDENTS' CORRESPONDENCE WITH THE OFFICE OF DISCIPLINARY COUNSEL IS PRIVILEGED AND CANNOT BE USED AGAINST THE COMPLAINANT IN A CIVIL ACTION AND CANNOT VIOLATE THE NO-CONTEST CLAUSE OF THE TRUST AGREEMENT OR THE PRIVATE AGREEMENT BETWEEN THE PARTIES.....	6
III. THE CIRCUIT COURT PROPERLY HELD THAT DISINHERITING TRUST BENEFICIARIES FOR FILING LETTERS OF COMPLAINT WITH THE SOUTH CAROLINA SUPREME COURT OFFICE OF DISCIPLINARY COUNSEL VIOLATES PUBLIC POLICY.	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<i>D.R. Horton, Inc. v. Westcott Land Co.</i> , 730 S.E.2d 340, 398 S.C. 528 (S.C. App., 2012).....	9
<i>Pond Place Partners, Inc. v. Poole</i> , 351 S.C. 1, 24, 567 S.E.2d 881 (Ct.App.2002).....	9
<i>Russel v. Wachovia Bank, N.A.</i> , 370 S.C. 5, 633 S.E.2d 722 (2006).....	10

RULES

Rule 413, SCACR; Rule 13 of the Rules for Lawyer

Disciplinary Enforcement.....	4, 6, 7, 8, 9, 10
-------------------------------	-------------------

STATEMENT OF ISSUES ON APPEAL

1. THE CIRCUIT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO RESPONDENTS BECAUSE APPELLANTS PRESENTED NO EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT.
2. THE CIRCUIT COURT PROPERLY INTERPRETED AND APPLIED RULE 13 OF THE RULES FOR LAWYER DISCIPLINARY ENFORCEMENT IN RULING THAT RESPONDENTS' CORRESPONDENCE WITH THE OFFICE OF DISCIPLINARY COUNSEL IS PRIVILEGED AND CANNOT BE USED AGAINST THE COMPLAINANT IN A CIVIL ACTION AND CANNOT VIOLATE THE NO-CONTEST CLAUSE OF THE TRUST AGREEMENT OR THE PRIVATE AGREEMENT BETWEEN THE PARTIES.
3. THE CIRCUIT COURT PROPERLY HELD THAT DISINHERITING TRUST BENEFICIARIES FOR FILING LETTERS OF COMPLAINT WITH THE SOUTH CAROLINA SUPREME COURT OFFICE OF DISCIPLINARY COUNSEL VIOLATES PUBLIC POLICY.

STATEMENT OF THE CASE

This case is an attempt by two trustees to disinherit two beneficiaries because the beneficiaries filed letters of complaint regarding the trustees' legal counsel with the Office of Disciplinary Counsel ("ODC"). The trustees and the beneficiaries are all daughters of the settlor, Eleanor McCarthy Lenahan. Mrs. Lenahan's trust under agreement dated July 12, 2001 ("the Trust") was created in 2001 and the Fourth Restatement of Trust Agreement of Eleanor McCarthy Lenahan, the trust agreement at issue in this action, was created in 2012 (the "Trust Agreement"). (R. pp. 62-78).

Eleanor McCarthy Lenahan passed away on or about August 8, 2012. (R. p. 25, ¶ 9). Following her death, the Appellants began their tenure as co-trustees of the Trust. Appellants allege various improprieties by Respondents Qualliu and Lenahan in their Petition for Declaratory Judgment (the "Petition") and in their brief that are not supported by the record on appeal. Nonetheless, it is undisputed that both Lenahan and Qualliu at some point questioned Appellants' administration of the Trust and that a private agreement, which Appellants name the "Agreement and Release" in their Petition, circulated among the Appellants and Respondents in 2014 (the "Private Agreement"). (R. pp. 89-96). It is also undisputed that both Respondents filed letters of complaint with the ODC regarding Appellants' counsel Douglas Delaney in 2014. (R. pp. 125-128).

After learning that Respondents had filed letters of complaint with the ODC, presumably from their counsel Douglas Delaney, Appellants brought this suit against the Respondents alleging that Respondents had violated the no-contest restriction contained in the Trust Agreement and had breached the Private Agreement. Specifically, Paragraph 31 of the Petition and Appellants' first cause of action for declaratory judgment (R. pp. 28-30) allege that the

Respondents' actions, including their communications with the ODC, violate Article XI of the Trust Agreement. Additionally, Paragraph 32 of the Petition and Appellants' second cause of action for breach of contract allege that the "proceedings" initiated by Respondents with the ODC, by filing their letters of complaint regarding Delaney, violate the Private Agreement. (R. pp. 29-31).

On August 17, 2015, this case was removed to the Court of Common Pleas for the 14th Circuit. (R. pp. 22-23).¹ On November 1, 2016, Respondents moved for partial summary judgment, requesting that the circuit court grant Respondents summary judgment on Appellants' cause of action for breach of contract – which relied entirely on Respondents having filed letters of complaint with the ODC – and that the circuit court hold that the Respondents' submission of complaints regarding Appellants' counsel with the ODC did not and could not violate the Trust Agreement's no-contest restriction and did not violate the Private Agreement. (R. pp. 120-124). The hearing on the motion was held on February 2, 2017 and the circuit court granted Respondents' motion for partial summary judgment via a Form 4 Order the following day. (R. pp. 9-12).

On February 10, 2017, Appellants timely filed and served a Notice of Motion and Motion for Reconsideration, Alteration, and/or Amendment. (R. pp. 115-117). On March 8, 2017, Respondents filed and served a Memorandum in Response to Petitioners' Motion for Reconsideration, Alteration, and/or Amendment along with a proposed order. (R. pp. 118-119). On March 14, 2017, the circuit court issued a Supplemental Order in response, upholding its

¹ Appellants discuss various motions and orders in their brief, including Judge Mullen's Form 4 Order granting Respondents' Motion for Partial Summary Judgment, Respondents' Motion to Dismiss, Judge Dukes' Order, Appellants' Motion to Compel, and Judge Mullen's Form 4 Order denying Appellants' Motion to Stay Litigation. However, none of these orders were appealed nor are they subject to review by this court.

grant of partial summary judgment to Respondents, stating grounds for the same, and responding to other issues raised by Appellants in their Motion for Reconsideration. (R. pp. 1-8). Appellants initiated this appeal on April 5, 2017.

ARGUMENT

The Circuit Court for Beaufort County properly granted Respondents' Motion for Partial Summary Judgment. Respondents' motion for partial summary judgment was limited to Appellants' claims that Respondents' letters to the ODC regarding Appellants' counsel Delaney violated the Trust Agreement and Private Agreement. In their brief, Appellants allege many facts not present in the record on appeal or before the Circuit Court. However, Appellants' attempt to cloud the issues does not affect the Circuit Court's holding that complaint letters filed with the ODC regarding a trustee's lawyer cannot and do not, as a matter of law, constitute a dispute with the Trust triggering the exclusion of the complaining beneficiary pursuant to a no-contest clause and cannot and do not constitute a breach of the Private Agreement.

The Circuit Court found that letters of complaint regarding a trustee's lawyer to the ODC cannot harm a trustee and that the ODC has no authority to alter or pass judgment on the administration of a trust. Additionally, the Circuit Court held that letters of complaint to the ODC are absolutely privileged pursuant to Lawyer Disciplinary Enforcement Rule 13, included in Rule 413, SCACR, which also grants complainants with immunity from civil suits related to such communications. As noted by the Circuit Court, the Private Agreement contains no language forbidding Respondent from complaining about Appellants' counsel. Further, even if letters of complaint to the ODC could trigger the no-contest clause or breach a provision in the Private Agreement, these provisions would be void as against public policy.

I. THE CIRCUIT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO RESPONDENTS BECAUSE APPELLANTS PRESENTED NO EVIDENCE CREATING A GENUINE ISSUE OF MATERIAL FACT.

In granting the Respondents partial summary judgment, the Circuit Court held that as a matter of law, any statements made by Respondents in their letters of complaint to the ODC are absolutely privileged and, even if they were not, could not and did not constitute a dispute triggering the no-contest clause of the Trust Agreement and did not violate the Private Agreement. The complaint letters to the ODC, and the privileged statements contained therein, are not part of the record. Appellants produced no evidence at the hearing or in the record demonstrating that any question of material fact exists which calls into question the Circuit Court's holding as a matter of law that:

1. Respondents' letters to the ODC regarding Appellants' counsel did not constitute a breach of the Trust Agreement because the ODC lacks jurisdiction over trust contests or anyone other than lawyers and judges;
2. Respondents' letters to the ODC did not constitute a breach of the Private Agreement because the Private Agreement does not address complaints about counsel made to the ODC;
3. Respondents' letters to the ODC cannot be the basis of a suit against complainants because Lawyer Disciplinary Enforcement Rule 13 provides that all communications from a complainant to the ODC are absolutely privileged and grants complainants with immunity from civil suit; and
4. Even if the privileged letters of complaint to the ODC could trigger a no-contest clause in a trust agreement or breach a provision in a private agreement between the trustees and beneficiaries of a trust, any such no-contest clause and provision in such a private agreement would violate public policy and should not be enforced.

Indeed, Appellants' brief cites to no fact in the record indicating a question of fact exists that undermines any of the above holdings of the Circuit Court.

Appellants present an extensive argument regarding whether evidence demonstrating that Respondents have probable cause to contest the actions of the Appellants as trustees was before the Circuit Court. (Appellants' Initial Brief pp. 7-9). Appellants are correct in noting that no evidence regarding the actions of the Appellants, aside from the bringing of this action on the grounds stated in the Petition, were presented to the Circuit Court. However, whether or not probable cause exists for a trust contest in this action, no question of fact exists that undermines the holdings of the Circuit Court listed above in support of its grant of partial summary judgment to Respondents. No outstanding question of fact impacts these matters of law and Appellants presented no evidence of any such questions of fact at the hearing on Respondents motion for Partial Summary Judgment or in their memorandum in opposition. Accordingly, the Circuit Court's order should be upheld.

II. THE CIRCUIT COURT PROPERLY INTERPRETED AND APPLIED RULE 13 OF THE RULES FOR LAWYER DISCIPLINARY ENFORCEMENT IN RULING THAT RESPONDENTS' CORRESPONDENCE WITH THE OFFICE OF DISCIPLINARY COUNSEL IS PRIVILEGED AND CANNOT BE USED AGAINST THE COMPLAINANT IN A CIVIL ACTION AND CANNOT VIOLATE THE NO-CONTEST CLAUSE OF THE TRUST AGREEMENT OR THE PRIVATE AGREEMENT BETWEEN THE PARTIES.

In granting the Respondents' Motion for Partial Summary Judgment, the Circuit Court properly held that the communications at issue in this case are privileged. Respondents' letters of complaint to the ODC were filed because they related to the conduct of an attorney: Appellants' counsel Delaney. Such letters to the ODC are absolutely privileged pursuant to Lawyer Disciplinary Rule 13, included in Rule 413, SCACR and Rule 13 provides complainants to the ODC with immunity from suit based on their communications to the ODC. The rule granting the privilege and immunity from suit contains no exception. No suit should have been

brought against Respondents based on any statements made in their correspondence to the ODC and the Circuit Court's grant of partial summary judgment to the Respondents on all claims based on the Respondents' communications with the ODC should be upheld.

As noted by the Circuit Court, Lawyer Disciplinary Rule 13, included in Rule 413, SCACR, renders any and all correspondence between Respondents and the ODC privileged. Rule 13 sets forth, in pertinent part, as follows:

Communications to the Commission, Commission counsel, disciplinary counsel, or their staffs relating to misconduct, incapacity, or the inability to participate in a disciplinary investigation or assist in the defense of formal proceedings and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witness.

(Emphasis added). Though case law and precedent on this exact issue is lacking, the rule itself makes clear that Respondents' letters of complaint to the ODC are privileged – absolutely so – and that no turn of events, including the completion of the ODC investigation, will render them otherwise. “Privileged communications are either absolute or qualified,” and South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged. *D.R. Horton, Inc. v. Westcott Land Co.*, 730 S.E.2d 340, 349, 398 S.C. 528 (S.C. App., 2012); *citing Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 24, 567 S.E.2d 881 (Ct.App.2002). Though the situation is often encountered when it is not clear if communications on their face are privileged, Rule 413 removes the need for such deliberation by explicitly stating that communications to the ODC are absolutely privileged – with no questions asked and with no reference to qualified privilege.

Furthermore, the privilege afforded to the ODC complaints is not removed – and the Respondents' letters to the ODC will not be discoverable – upon the completion of the ODC's investigation into the contents of Respondents' letters. Appellants' brief references a footnote

made by the Honorable Judge Marvin Dukes earlier in the matter to the effect that the Respondents' letters to the ODC will be discoverable when the ODC investigation and matter are no longer pending. (R. p. 15). However, such statement was not part of Judge Dukes' holding or in any order, nor is it the law of the case. (R. pp. 13-15).

It would defeat the purpose of the Lawyer Disciplinary Rules and hinder any ODC investigation into unethical or unlawful attorney behavior if any party who reported such to the ODC could then have that information used against them. Although the letters to the ODC are not part of the record due to their confidential nature and the very privilege that should protect Respondents from this suit common understanding would expect a complainant to discuss all of the parties to a transaction being complained about with the ODC. The privilege afforded to the letters of complaint cannot be parsed to not include the mention of third parties in such letters. Parties would fail to provide complete and accurate information to the ODC, or perhaps refrain from providing the ODC with any information at all, if such were the case. Therefore, both a plain reading of Rule 13, and common sense, dictate that Respondents' correspondence with the ODC must be privileged in its entirety, and that the privilege is not limited to those portions referencing Delaney, and not simply until the ODC completes their investigation.

Appellants' argument that the no-contest clause in the Trust Agreement contains no requirement that objections by beneficiaries of the Trust be made in a certain forum misses the point. The privilege afforded to ODC communications under Rule 13 was granted to keep those who report attorney misconduct from retributory lawsuits like this one. Such rules have been put in place to provide protections to members of the public, like Respondents, and to give them the opportunity to make a complaint without fear of any sort of reprisal. Respondents made the complaints to the ODC with full expectation that Appellants would never learn of the letters'

contents and knowing that the complaints could not interfere with the conduct of the Trust because the ODC has no jurisdiction over the Trust or the Trustees. The breadth of the no-contest clause in the Trust Agreement is immaterial. By law, the clause can only reach so far before privilege and public policy allow it to reach no further.

Respondents' statements, whatever they may be, to the ODC are absolutely privileged. Moreover, Rule 13 grants Respondents absolute immunity from suit based on such statements. No suit should have been brought based on Respondents' letters to the ODC and the Circuit Court's grant of partial summary judgment should be upheld.

III. THE CIRCUIT COURT PROPERLY HELD THAT DISINHERITING TRUST BENEFICIARIES FOR FILING LETTERS OF COMPLAINT WITH THE SOUTH CAROLINA SUPREME COURT OFFICE OF DISCIPLINARY COUNSEL VIOLATES PUBLIC POLICY.

Appellants' focus on whether or not probable cause exists to support a trust contest misconstrues the Circuit Court's holding and misses the point – there is no evidence on the record demonstrating a question of fact that undermines the Circuit Court's grant of partial summary judgment to the Respondents on the grounds stated above. Contrary to Appellants' argument, the Circuit Court did not hold “that public policy precludes enforcement of the Trust's ‘No Contest’ provision against respondents because ‘probable cause exists for the contest’.” (Appellants' Initial Brief p. 8, lines 8-9). The phrase quoted by Appellants comes from the Circuit Court's statement regarding precedent in South Carolina which declined to enforce no-contest clauses where probable cause exists for the contest. However, the validity of Respondents' claims in their letters to the ODC was not before the Circuit Court – those letters and Respondents' complaints reside properly within the ODC. It is nonsensical to assume the Circuit Court was blindly confirming the validity of complaints it had never seen.

Instead, the Circuit Court's holding that public policy would be violated if Respondents'

privileged letters of complaint to the ODC were found to breach the private agreement or trigger a no-contest clause in the Trust Agreement is based on the rights of complainants – like Respondents – to file confidential and privileged complaints regarding lawyer conduct with the ODC when they believe they have been wronged. Appellants’ initiation of this lawsuit attempting to disinherit the Respondents in retaliation for filing complaints against their lawyer is improper and alone violates the Appellants’ fiduciary duties, as Trustees, to the Trust beneficiaries. *See Russell v. Wachovia Bank, N.A.*, 633 S.E.2d 722, 370 S.C. 5 (S.C., 2006) (stating that probable cause is based upon justice and morality, and summarizing that bona fide inquiries into unethical or unlawful behavior will not be found to violate a no-contest clause in South Carolina).

However, even if no probable cause for a claim by Respondents against the Appellants for violation of the trust, which it does, disinheriting trust beneficiaries for filing letters of complaint with the ODC would still violate public policy. Furthermore, even if this egregious act of retribution against a trusts’ beneficiaries did not violate public policy, which it does, then the other grounds stated by the Circuit Court would still be sufficient basis for its grant of Partial Summary Judgment to Respondents. Accordingly, the Circuit Court’s decision should be upheld.

CONCLUSION

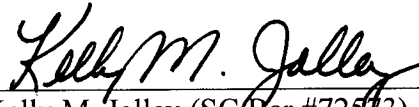
The Circuit Court in the instant case correctly held that Respondents’ letters of complaint to the ODC could not and did not trigger the no-contest provision of the Trust Agreement nor breach the Private Agreement between the parties. Respondents’ letters are and were absolutely privileged under Rule 13 of the Rules for Lawyer Disciplinary Enforcement and Respondents are protected by Rule 13 from any civil suit based on their privileged letters of complaint to the

ODC. The Private Agreement between the parties does not address complaints regarding a party's counsel and complaints to the ODC cannot be a contest of a trust because the ODC has no authority or jurisdiction over non-lawyer trustees. Finally, disinheriting trust beneficiaries because they filed confidential letters of complaint with the ODC violates public policy which seeks to encourage members of the public to report allegations of wrongdoing by attorneys.

For these and the foregoing reasons, and any other reason supported by the Record, the Circuit Court's Order granting Respondents partial summary judgment in this matter should be UPHELD.

Respectfully submitted,

JOLLEY LAW GROUP, LLC

A handwritten signature in black ink, reading "Kelly M. Jolley", is written over a horizontal line.

Kelly M. Jolley (SC Bar #72573)
Ariail B. Kirk (SC Bar #71101)
Post Office Box 22230
Hilton Head Island, SC 29925
(843) 685-6500

Attorneys for Respondents

January 25, 2018
Hilton Head Island, South Carolina