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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

James C. Harrison, Jr., Special Referee

Case No. 1998-CP-12-00325

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SC Court of Appeals

Patricia E. King and Robbie King Jones, as representatives
of W.R. King and Ellen King.....Plaintiffs,

Of whom, Patricia E. King is.....Appellant,

v.

Margie B. King and Robbie Patricia Ione King, individually,
and as Co-Representatives of the Estate of Christopher C.
King (deceased) and Nelson M. King.....Respondents.

PETITION FOR REHEARING

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On April 29, 2015, the lower court held an evidentiary hearing on all remaining claims in this action. Rather than hearing closing arguments, the Special Referee requested each side submit proposed orders. In Respondents' Proposed Order, Respondents conceded that they failed to establish their claims multiple claims. (R. pp. 792-799). Therefore, only two causes of action remained for the Special Referee to address: Unjust Enrichment and Conversion.

After receiving the transcript of the hearing and reviewing proposed orders from both sides, the Special Referee issued his Final Order, which was filed September 21, 2015. (R. pp. 20-27). The Order awarded no monetary damages to Respondents. The Order required that Appellant Patricia King cease using the name King's Funeral Home and awarded use of the same name to Respondents. The undersigned filed a Motion to Alter or Amend pursuant to Rule 59(e) on September 28, 2015. The Special Referee issued a final order granting in part and denying in part Appellant's Motion to Alter or Amend. (R. pp. 28-29). Appellant received notice of the entry of the final order via email on October 7, 2015. On November 5, 2015, Appellant filed a Notice of Appeal as to limited issues contained in the orders referenced above. After Appellant filed an initial brief and designation of matter, prior counsel for Respondents successfully petitioned this Court to be relieved as counsel and Respondents proceeded *pro se* without filing a response or otherwise engaging in the appeal in any manner.

1. The record was finalized and the Final Brief of Appellant was filed on July 11, 2016. On September 1, 2017, the Clerk of Court submitted the case on the record and briefs to be decided without oral argument. Put simply the issue addressed in the Appeal whether the trial court erred in granting the name "King's Funeral Home" to Respondents.

On March 21, 2018, the Court issued Unpublished Opinion No. 2018-UP-129 affirming the lower court's order.

The Opinion states, as follows:

As to issue 1: *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Due process is flexible and calls for such procedural protections as the particular situation demands."); *id.* at 542, 570 S.E.2d at 569 ("The Due Process Clause demands notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); Rule 54(c), SCRCP ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."); *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our [c]ourt looks for guidance to cases interpreting the federal rules."); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971) (recognizing Rule 54(c), FRCP, "has been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the basis of the facts proved").

...

As to issue 3: *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994) ("Whether administrative remedies must be exhausted is a matter within the trial [court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof."); *Stinney v. Sumter Sch. Dist.*, 17, 391 S.C. 547, 550 n.1, 707 S.E.2d 397, 398 n.1 (2011) ("When an administrative remedy is not available for the injury suffered, the doctrine of exhaustion is not applicable."); *id.* at 550 n.1, 707 S.E.2d at 398-99 n.1 ("This . . . suit was a tort claim, not a statutory violation for which the legislature has provided an administrative remedy. For that reason, exhaustion simply is inapplicable to the . . . suit.").

Pursuant to Rule 221, S.C.R.A.P, the Appellant Patricia King petitions the Court for rehearing on the ground that the Court overlooked or misapprehended the following points as noted below and as more fully discussed in the Final Brief of Appellant filed by Patricia King, which is incorporated herein as if fully restated:

1. **The Court overlooked or misapprehended the argument that Appellant was denied due process.** Both Appellant's Final Brief and the Court's Opinion cite *Blanton v.*

Stathos. In order to interpret *Blanton* and Rule 54(c), S.C.R.C.P., the Court's Opinion relies upon *Robinson v. Lorillard Corp*, 444 F.2d at 803. The facts of the *Robinson* case are distinct from this appeal, but the *Robinson* case's analysis of exceptions to the general rule are applicable.

The *Robinson* case "is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq." *Id.* at 794. The lower court, *inter alia*, awarded the plaintiffs back pay, even though "[t]he complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay." *Id.* at 802. Back pay was not sought by plaintiffs prior to or during the trial of the case. *Id.* at 803. However, "after trial of the case, though ***before the judge had entered a decision***... a request was made [by plaintiffs] for additional relief in the form of back pay for the class." *Id.* (emphasis added).

Therefore, in the *Robinson* case, the lower court granted relief which was specifically requested by the plaintiffs prior to issuance of the order granting the relief specifically sought. In the case at hand, Respondents never, at any point, made any request for the relief granted by the Special Referee. Even in the *Robinson* case, the appellant was afforded the opportunity to respond to the specific request prior to the lower court's grant of relief. No such right was afforded the undersigned Appellant. Furthermore, as set forth below, the *Robinson* defendants were also afforded additional opportunity to contest individual claims for back pay after the subject back pay was awarded by the lower court. *Id.*

Though the facts of the case are distinguishable, the rule as fully set forth by *Robinson* applies to this Appeal. The *Robinson* case sets forth a general rule and multiple exceptions to the general rule. The general rule is articulated as follows: "[Rule 54(c)] has been liberally construed, leaving no question that it is the court's duty to grant whatever

relief is appropriate in the case on the basis of the facts proved.” *Robinson* at 803. But there are two exceptions to the general rule outlined in the *Robinson* case and important to its holding:

The first is that **a remedy desired by none of the parties should not be forced upon them.** *Mercury Oil Refining Co. v. Oil Workers Int'l Union*, 187 F.2d 980, 983 (10th Cir. 1951); *International Nikoh Corp. v. H. K. Porter Co.*, 358 F.2d 284, 290 (7th Cir. 1966) (dictum). **But that is not our case.** Although the plaintiffs initially indicated that they were not seeking back pay, prior to the entry of judgment they added a request that back pay be awarded the class. Clearly it was not forced upon them against their will.

The one other limiting principle which might assist defendants' case is expressed in the following manner by *Rental Development Corporation of America v. Lavery*, 304 F.2d 839, 842 (9th Cir. 1962): **If, however, it is made to appear that the failure to ask for particular relief substantially prejudiced the opposing party, Rule 54(c) does not sanction the granting of relief not prayed for in the pleadings.**

In our case, because the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief. Any specific defenses related only to computation of back pay may be raised during the process of assessing individual back pay claims, possibly before a special master. The defendants have in no way been prejudiced by the belated claim.

Id. at 803. (emphasis added).

The substantial prejudice exception applies to Appellant. Respondents' failure to seek the particular relief substantially prejudices Appellant because all of her defenses presented at trial were geared toward the monetary damages sought by Respondents. As argued in Appellant's Final Brief, since Appellant did not have notice of the issue, she was not able to offer evidence which might have swayed the court as to the proper owner of the name, such as whether the Respondents ever sought to register the name with the South Carolina Secretary of State, whether Respondents ever abandoned a trademark with the United States Patent and Trademark Office, or other defenses unique to the specialized area of law associated

with trademark claims. In the cross-examination of Respondents' witnesses and in the direct examination of Appellant, Appellant successfully defended against the remedy sought by Respondents and the remedy that is customary to the claims brought by Respondents—a monetary award. Therefore, Appellant has been substantially prejudiced, and "Rule 54(c) does not sanction the granting of relief not prayed for in the pleadings." *Id.* at 803.

As for the other exception, the Respondents have indicated no desire for the remedy ordered by the Special Referee, therefore it should not be enforced. The record before this Court establishes the following: (1) Respondents did not plead the remedy awarded during the twenty years of this litigation; (2) Respondents did not seek the remedy awarded at any of the multitude of motions hearings and merit hearings during the twenty years of litigation; (3) Respondents did not offer testimony at any hearing about entitlement to the remedy; (4) Respondents specifically referenced all remedies they desired in their proposed order submitted subsequent to the final hearing, and that proposed order is devoid of any reference to the remedy awarded; and (5) Respondents have made no response in this Appeal which is entirely limited to the remedy awarded by the Special Referee.

Appellant was able to successfully defend against the monetary award Respondents sought because Appellant was on notice of the issue to be tried. Appellant, however, was not on notice of the remedy eventually awarded by the Special Referee. Therefore, since Appellant is prejudiced by the remedy awarded and since the Respondents have expressed no desire for that remedy, Appellant respectfully requests the Court reconsider its Opinion.

2. **The Court overlooked or misapprehended the argument that Respondents failed to exhaust administrative remedies.** Appellant, in the alternative, argued that, even if the Respondents could be found to have been seeking the remedy awarded, they failed to

exhaust the administrative remedies that would have been associated with such a pursuit. Both Appellant and the Court cite *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. at 208, 442 S.E.2d at 582. In further addressing this argument, the Court's Opinion relies upon a footnote in *Stinney v. Sumter Sch. Dist. 17*, 391 S.C. at 550 n.1, 707 S.E.2d at 398 n.1. The facts of the *Stinney* case are distinct from this appeal. The *Stinney* plaintiffs sued, in tort, the administrative board which denied plaintiffs their rights. The suit included a claim for the board's failure to follow disciplinary procedures. The equivalent in this action would be if Respondents believed that the South Carolina Board of Funeral Services (hereinafter, "Board") denied them their rights and therefore they sued the Board. The Board is the administrative authority governing funeral homes, including their licensure. However, in distinction from the *Stinney* case, the Board is not a party to this action.

There is evidence in the Record and in Appellant's Final Brief that Respondents attempted to register the name "King's Funeral Home" with the Board, and that the Board instructed that they could not use that name. There is evidence in the record that Appellant Patricia King followed appropriate formalities with the Board in maintaining the license of King's Funeral Home. To the extent that this division of LLR denied Respondents the right to use the name King's Funeral Home, the same should have been appealed to the Administrative Law Court consistent with SC Code § 40-1-160, as that is where any dispute over use of the name King's Funeral Home arose and that is the court which may have appropriate jurisdiction to address such issues.

Respondents' failure to exhaust administrative remedies after contacting the Board serves as further indication that Respondents were not seeking the name King's Funeral Home during the pendency of this litigation. Had they engaged in the administrative remedy process,

Appellant would have had notice and opportunity to defend against such a claim, as she is the proprietor of the business registered with the Board as King's Funeral Home. Therefore, Appellant respectfully requests the Court reconsider its Opinion.

CONCLUSION

WHEREFORE, for the reasons stated above, the Appellant Patricia King respectfully requests that the Court reconsider its Opinion and overturn the portion of the Order and findings of the Special Referee which would require Appellant Patricia King to cease using the name "King's Funeral Home."

SWEENEY, WINGATE & BARROW, P.A.

April 5, 2018


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April 5, 2018

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VIA HAND-DELIVERY

Honorable Jenny Abbott Kitchings
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RE: Margie B. King v. Patricia King
Court of Appeals Case No. 2015-002289
Our File: 4022-7231

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent's Petition for Rehearing and the original and one copy of the Proof of Service in the above-referenced case. Please file the original and six copies of the main document and return a filed stamped copy to me of the same, and a filed stamped copy of the Proof of Service to our courier.

By copy hereof, all parties of record are being served with the above.

Thank you for your assistance in this matter and should you have any questions or concerns, please do you hesitate to contact me.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.


John E. Tyler

JET/smt

Enclosures

cc: Margie B. King
Robbie P.I. King
Nelson M. King
Robbie King Jones