THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2017-001077

April Grant Mack, as Personal Representative of the Estate of Barrett Demetric Jeremiah Mack.....Respondent,

v.

Estate of Harry Washington, Defendant,
Necole Binyard, as Personal Representative of the Estate of Harry Rufus Emmanuel Washington are the .....Appellant.

REPLY BRIEF OF APPELLANT, NECOLE BINYARD IN HER CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HARRY RUFUS EMMANUEL WASHINGTON

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3. Whether the Court erred in its written Order declaring beneficiaries of the Estate of Harry Washington and ordering distribution of insurance settlements proceeds to the same with the pending actions in Probate and Circuit Court.

STATEMENT OF THE CASE

On July 1, 2016, Barrett Demetric Jeremiah Mack and Harry Rufus Emmanuel Washington were both killed during a fatal, single-vehicle accident. On July 20, 2016, Respondent April Grant Mack was appointed Personal Representative for the Estate of Barrett Demetric Jeremiah Mack in the Probate Court of Williamsburg County by Judge Betty Matthews. Thereafter, Appellant Necole Binyard was appointed Personal Representative of the Estate of Harry Rufus Emmanuel Washington by and through her counsel.

On March 3, 2017, the Appellant filed a Declaratory Judgment in the Circuit Court of Williamsburg County seeking to determine the identity of the driver at fault in the fatal accident. On March 30, 2017 at the Williamsburg County Courthouse, in Kingstree, South Carolina a hearing was held to approve an insurance settlement for a wrongful death action. On March 30, 2017, the Wrongful Death Settlement was signed and ordered by Judge Clifton Newman. Appellant now files this appeal.

FACTS

On July 1, 2016, Barrett Demetric Jeremiah Mack (Respondent), and Harry Rufus Emmanuel Washington (herein referred to as Appellant) were both killed in a single-vehicle automotive accident in Kingstree, South Carolina. Following this accident, the spouses of the Decedents petitioned the Probate Court of Williamsburg County to become Personal Representatives of the respective estates. Respondent's Attorney Kimberly Barr, filed a motion to settle a wrongful death claim in favor of the Estate of Barrett Mack (herein referred to as Respondent). Prior to the settlement hearing, Appellant was made aware of a bona fide dispute as to the identity of the driver of the vehicle at the time of the fatal accident when a witness, Jermon Cooper (herein referred to

as Cooper) came forward to dispute the findings of the South Carolina Highway Patrol's investigation of the accident.

Cooper refuted the conclusion of the Highway Patrol's investigation that the Appellant was the driver at the time of the accident. Cooper through an affidavit gave an alternative version of the facts of the fatal accident. Cooper attested that the Respondent's husband and not the Appellant's husband was the driver at wheel at the time of the crash. Further, Mr. Cooper attested he personally knew Respondent and Appellant.

Consequently, on March 3, 2017 this compelling new evidence lead Attorney for Appellant, William J. Barr (herein referred to as Appellant's Counsel) to file a Declaratory Judgment with Cooper's affidavit attached pursuant to South Code Ann § 15-53-10 et seq. and South Carolina R. Civ. P. 57. On March 30, 2017, a hearing to approve the Wrongful Death Settlement took place before Judge Newman in the Williamsburg County Court of Common Pleas. Present at the Hearing, were the Attorney for the Respondent, Kimberly Barr, the Attorney for the Appellant, William J. Barr, Jonathan Robinson the Attorney for State Farm Insurance, the liability insurance carrier, and Attorney Ashley Nance representing GEICO the underinsured motorist carrier, for the Respondent.

Appellant's Counsel, at the onset of the Settlement hearing informed the Court of pending actions in Probate and Circuit Courts. (Hearing Transcript, March 30, 2017 R. p.5 line 17-19). Appellant Counsel also informed the Court of the improper notice given for the Settlement Hearing, and not being able to review the settlement documents. (Hearing Transcript, March 30, 2017 R. p.20 line 1-3). Counsel for Appellant emphatically informed the Court a Declaratory Judgment action had been filed in Circuit Court, citing a disputed fact as to the identity of the driver during the fatal crash. (Hearing Transcript, March 30, 2017 R. p.5 line 17). Counsel for the

Appellant made the Court aware of a filed claim against the Estate of Mr. Mack. (Hearing Transcript, March 30, 2017 R. p.5 line 17). During the hearing, Appellant referenced the fact both deceased parties at the time of the accident were not wearing seatbelts, and were tossed around the vehicle. This is indicative of a genuine dispute of fact to the insurance company findings of Mr. Harry Washington being the actual at fault driver. Additionally, Appellant introduced the presence of an eyewitness corroborating this assertion. (Hearing Transcript, March 30, 2017 R. p.17 line 17).

State Farm, the Appellants insured, through their Attorney Robinson stated to the Court State Farm's awareness of the pending Declaratory Judgment action. (Hearing Transcript, March 30, 2017 R. p.8 line 11). However, Robinson proffered to the Court State Farm's preparedness to go forward provided the Court approved the settlement to offer the money in exchange for a covenant to the Estate of Washington. (Hearing Transcript, March 30, 2017 R. p.8-line 3-7). Although expressing no monetary adverse consequences of their settlement to the Estate of Mr. Washington, their settlement would be an admission of liability as to Washington being the driver of the car.

Also, Respondent's Attorney indicated on the record their awareness of the Declaratory Judgment action and the fact that her client had been served the Declaratory Judgment. (Hearing Transcript, March 30, 2017 R. p.10 line 16-19). Respondent's Attorney further indicated she had reviewed the Declaratory Judgment action and was aware of the genuine dispute of fact as to the driver of the car in the accident. Appellant's Attorney at this point proceeded before the Court and marked as evidence the death certificate, which cited how the injuries occurred indicating both parties were not wearing seatbelts. (Hearing Transcript, March 30, 2017 R. p.13 line 9-13). Appellant's Attorney also presented to the Court the Declaratory Judgement with Cooper's attached affidavit for the Courts review. (Hearing Transcript, March 30, 2017 R. p.20 line 4-10).

Appellant's Attorney at this point made the argument to the Court if the proceedings were allowed to proceed with the issue of liability unresolved, there could be potentially no money for the Estate of Robinson if the Appellant prevailed. (Hearing Transcript, March 30, 2017 R. at p.13 line 22). Robinson, while answering the Court, did not answer this question and referred only to what State Farm would be paying if the settlement was approved. (Hearing Transcript, March 30, 2017 R. p.14 line 12-13).

Appellant's Attorney, after making the Court aware of the pending litigation, moved to inform the Court of the improper notice given to the Appellant in the current procedure. (Hearing Transcript, March 30, 2017 R. p.20 line 1-5). Further, Robinson indicated to the Court he was aware of the pending actions, and he had contacted Appellant's Attorney "yesterday" to inform him of the proceedings. (Hearing Transcript, March 30, 2017 R. p.18 line 16-17). Appellant's counsel indicated to the Court that he had given all parties proper indication of his involvement in the case, and informed the Court that he had written all necessary parties to inform them of the same. (Hearing Transcript, March 30, 2017 R. p.20 line 2). Appellant's Counsel on the record attempted to bring the Court's attention to the need for the Respondent to be "Bonded." (Hearing Transcript, March 30, 2017 R. p.33 line 4-25) The Court when making its ruling expressly stated it would make no assessment as to who was driving the car. (Hearing Transcript, March 30, 2017 R. p.39 line 22-23).

The Order dated March 30, 2017, executed by Judge Clifton Newman, factually stated the driver at the time of the accident was Decedent Harry Washington. (Judge Newman Order at pg. 2). The Court stated the hearing commenced on March 29, 2017; however, the proceedings indicated commenced on March 30, 2017. (Judge Newman Order at pg.1). The Court in its Order indicates

the awareness of pending litigation in the form of a Declaratory Judgment action in the same County. (Judge Newman Order at pg. 4).

The Court, when rendering the Order stated all facts, which are pertinent and necessary in deciding the propriety of the settlement had been considered pursuant to S.C. Code Ann. §15-51-42 (B). (Judge Newman Order at pg. 5). The Court in the Settlement order stated as a matter of law the statutory beneficiaries of the S.C. Wrongful Death Statute had been satisfied. (Judge Newman Order at pg. 6 paragraph 4). The Court in the Settlement Order ruled the payment of the insurance proceeds accurately settles the wrongful death action. (Judge Newman Order at pg. 6 paragraph 5). The Appellant, based on the proceedings of the Settlement Hearing and the Settlement Order, brings forth this appeal with the exuberant errors of law and abuse of discretion made by the Lower Court.

ARGUMENTS

I. The Court erred in conducting the Wrongful Death Settlement hearing as Appellants counsel did not have proper notice of the hearing as the Appellant was a real party in interest giving the Appellant standing, thus granting Appellant entitlement to intervene.

S.C. Code Ann. § 62-1-401(2012), states, "If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall provide notice of the time and place of hearing of any petition to be given to any interested person or his attorney." An interested party under South Carolina R. Civ. P. 17, of the South Carolina Rules of Civil Procedure is defined as a party with a real interest or a party with whom or in whose name a contract has been made for the benefit of another. Providentially, Respondent named the Estate of Harry Washington as the Defendant in the lower Court Settlement proceeding which actually made Appellant an interested party by virtue of Rule 17 (e) as she is an heir of the Estate of Harry

Washington. As the rule states "that in all ac tions disposing of any property real, personal or mixed a person may be made a party in a Complaint," which was done by Respondent labeling the Estate of Harry Washington as a Defendant. Further, Appellant's counsel communicated with Respondent's and State Farm's attorneys prior to the Settlement Hearing placing them on notice of her position and personal stake in this matter. Consequently, all these things triggered mandatory notice to Appellant of any proceeding(s) involving the Estate of Harry Washington pursuant to SCRCP 17.

Based on S.C. Code Ann. § 62-1-401(2012), and the application of South Carolina R. Civ. P. 17, a known party is legally required to be given notice of a settlement hearing. S.C. Code Ann. § 62-1-401(2012), states an interested party, ***shall have been notified of the hearing by mailing a copy thereof at least twenty days (20) before the time set for the hearing*** by certified, registered, or ordinary first class mail. The Courts have further defined an interested party as one who has standing, referring to the parties' personal stake in the subject matter of the litigation. *Michael P. v. Greenville County Dep't of Soc. Services*, 385 S.C. (Ct. App.2009). In *Wilson v. Dallas*, Op. No. 27227 (S.C. Sup. Ct. filed Feb. 27, 2013, Respondents asserted the Appellants, who were attorneys responsible for the construction and discharge duties of the will, did not have legal standing to pursue an appeal because they had no interest or standing in the actual benefits of the will and trust of the decedent. The Court in *Wilson v. Dallas* ruled that the Appellants had legal standing to pursue an appeal established by their fiduciary capacity. Based on this holding the Court has defined an interested party with legal standing as one having an interest or personal stake in the subject matter, and/or a party who has a fiduciary responsibility.

The Appellant, Necole Binyard, is the wife and beneficiary of the Decedent Harry Washington, also representing the Estate of Washington as Personal Representative. This gives Appellant legal

standing, and makes her an interested party with fiduciary responsibilities. The Respondent seeks to narrow the application of the rule through its interpretation. However, the Respondent cannot ignore past court decisions which have further defined a real party in interest as one who has personal stake in the matter. Clearly as the Appellant is the spouse of one of the deceased victims and the insurance company is the insured of the deceased, the Respondent cannot claim the Appellant has no stake in the outcome. Like in *Michael P. v. Greenville,* the Appellant's personal stake in the subject matter at hand of this litigation is undeniable. Harry Washington if found through the Declaratory Action not to be the driver, the Appellant is entitled to pursue a wrongful death claim. As the Respondent stated, if this outcome is likely the Appellant would have the right and obligation to litigate and or prosecute this action in her own name. As she was denied this opportunity, and consequently denied her rightful status as an interested party she is not able to pursue this outcome. The Respondent seeks to distinguish the facts of *Wilson v. Dallas* vastly different. However, like in *Wilson v. Dallas,* the Appellant's status as Personal Representative gives her standing as she has a fiduciary responsibility to ensure all assets and claims of the estate are properly adjudicated. The Appellant illuminates *Wilson v. Dallas* not for the verbatim inapplicable facts but to highlight the most important feature which is that the Appellant as Personal Representative has standing through her fiduciary responsibility. Therefore, based on S.C. Code Ann. § 62-1-401, the Respondent had a duty to provide the Appellant with proper notice of the settlement hearing. The Respondent who states Rule 17 is being broadly defined by the Appellant fails to adhere to the wording of the rule which states "a party with whom or in whose name a contract has been made for the benefit of another." The Appellant as spouse and Personal Representative of Harry Washington Estate would be the beneficiary of any insurance proceeds. As such the Respondent cannot claim the Appellant has no standing as it is the policy of Harry

Washington for which is being paid out and for whose benefit was contracted and intended for the benefit of the Appellant and the estate of Harry Washington.

The lack of statutory notice by the Respondent counsel should have resulted in the immediate non-allowance of the Settlement Hearing by the Court. The Court at the onset of the Settlement Hearing was made aware of the improper notice by State Farm, the Insurer, and Appellant's counsel. Additionally, no objection to the claim of improper notice was made by Respondent's Counsel. (Hearing Transcript March 30, 2017 R. p.20 line 1-5). (See also Judges comment "Anything further on this issue" Hearing Transcript March 30, 2017 R. p.20 line 10) The improper notice by the Respondent of the settlement hearing prejudiced and affected the Appellant's ability in several aspects. The prejudicial aspects of this extend to the inability of counsel to view the settlement documents and to provide proper consent or objection to the agreement under South Carolina R. Civ. P. 43(k). South Carolina R. Civ. P. 43(k) will be expounded upon later in this appeal.

First, the Appellant's inability to view the settlement documents is prejudicial as Appellant as an interested party was prevented from wholly protecting the rights and interest of the Estate of Washington. The failure of the Respondent's Counsel to notify all interested parties severely prejudiced the Appellant.

The Appellant brought the Court's attention to some of these prejudicial effects, such as collateral estoppel or claim preclusion scenarios it could face, if the Court proceeded with the improper hearing. Although the Court assured the Appellant of its right to still pursue a claim, absent these issue(s), Appellant is now facing the exact issues admonished to the Court. The Courts awareness of this lack of notice should have resulted in the disallowance of the settlement hearing.

Now, nothing curative at this point could revive this blow other than complete voidance of this proceeding.

In summation, the Court erred in conducting the Wrongful Death Settlement hearing as Appellant's counsel did not have proper notice of the hearing. The Appellant, as the Personal Representative, wife and beneficiary of the Estate of Harry Rufus Washington was an interested party under the law, and should have received notice. The Respondent incorrectly states that the Appellant did not have legal standing as South Carolina case law has indicated the Appellants status makes her a real party in interest. As such the improper notice of the settlement itself and settlement hearing have severely prejudiced the Appellant's pending actions in Probate and Circuit Courts. Accordingly, the reversal of the Court's decision is the only remedy able to cure this prejudicial result. These reasons were abundantly sufficient for discernment under the circumstances of this case for the Court to have initially adjourned the Settlement Hearing.

II. The Respondent is in error in its interpretation of the approval of settlement proceeds as there were still disputes of genuine fact and a pending actions in Probate and Circuit Court's rending the approval of the settlement in bad faith.

S.C. Code Ann. § 15-51-42 (B) states, "If no action is pending, the personal representative shall petition either the Probate or the Circuit court of this State seeking approval of a proposed settlement." The Court vividly erred in issuance of the Order on March 30, 2017 as it was approved with knowledge of pending actions in the Circuit and Probate Courts. S.C. Code Ann. § 15-51-42 (B) which unambiguously states, ***"If no action is pending, the representative can petition either the probate or the circuit court of this State for approval of a proposed settlement***. (*See Merriam-*

Webster Dictionary defining "pending" as awaiting decision or settlement, unresolved, undecided, unsettled)

The Appellant informed the Court a Declaratory Judgment action had been filed in Circuit Court and filed concurring action in Probate Court. The Declaratory Action was filed citing a disputed fact as to the identity of the driver during the fatal crash. (Hearing Transcript, March 30, 2017 R. p.5 line 17). State Farm, the Appellant's insured, through their Attorney Robinson indicated to the Court State Farm's awareness of the pending declaratory Judgment action. (Hearing Transcript, March 30, 2017 p.8 line 11). The Attorney for the Respondent, on the record also indicated their awareness of the Declaratory Judgment action and the fact that her client had been served the Declaratory Judgment presented to the Court at the Hearing. (Hearing Transcript, March 30, 2017 p.10 line 18-19). Respondent's Attorney stated she had reviewed the Declaratory Judgment action, and was aware of the genuine dispute of fact as to the driver of the car during the fatal accident. (Hearing Transcript, March 30, 2017 p.13 line 15). Undeniably, the Court erred here with knowledge of the pending Declaratory Judgment, and the pending action in Probate Court.

The Respondent argument that the Court's approval of the settlement was not in bad faith is incorrect. The Eligibility Test standards from Wilson v. Dallas clearly dictate along with S.C. Code Ann. § 62-3-1102, sets forth the standard to determine whether the proposed compromise agreement is resolved in good faith. The Petitioner in a settlement hearing must show the settlement is just and reasonable. The Court set forth the standards of completion of this doctrine in the case of *Wilson v. Dallas*. *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013). In *Wilson v. Dallas*, 403 S.C. the Court applied three standards under which settlement agreements are eligible for court consideration. (See also *In re Estate of Riley*, 228 Ct.App.2011 stating that a compromise agreement is void unless executed in compliance with the governing statute). The

Court in *Wilson v. Dallas* under S.C. Code Ann. § 62-3-1102 stated a settlement involving an estate is only considered to be in good faith if three factors are complied with: *(1) the terms of the compromise shall be set forth in an agreement in writing executed by all competent parties who have a beneficial interest (2) any interested party may submit the agreement to court for approval (3) after notice to all interested parties the court can then approve only if the controversy is in good faith and the agreement effect on the parties is just and reasonable.*

The Court erred, as the approval of the settlement does not comply with the just and reasonability standards set forth in *Wilson v. Dallas*. Here, the Appellant is an interested party, with general legal standing as personal representative, and was not afforded proper notice of the hearing or notice of the actual Respondent's wishes to initiate a settlement negotiation. Like in *Wilson v. Dallas,* the Eligibility Test first requires the settlement or compromised agreement to be set forth in writing and executed by all parties having a beneficial interest or claim. The third prong under this test as aforementioned in this brief requires proper notice. Under the requirement for notice the Eligibility Test standard states, "After notice to all interested persons or their representatives, the Court shall make an order approving the agreement."

Here the Respondent brought this action against the Estate of Harry Washington making the Appellant an interested party to the litigation at hand. Furthermore, the Appellant was given improper notice, thus rendering the settlement in conflict with the third prong under the eligibility test. ***(After notice to all interested parties the court can then approve only if the controversy is in good faith and the agreement effect on the parties is just and reasonable)*** The settlement or compromised agreement was not set forth in writing and executed by all parties having a beneficial interest or claim. Therefore, the Order approving settlement should be void ab initio as the

settlement is not in good faith and departs from the South Carolina Supreme Court standards set forth in *Wilson v. Dallas,* 403 S.C. 411.

The Respondent argument that the Court did not erred in granting approval of settlement proceeds is without merit. The interest of the Estate of Harry Washington were not adequately represented, as Counsel for the Personal Representative for Harry Washington did not consent to the settlement under South Carolina R. Civ. P. 43(k) of the South Carolina Rules of Civil Procedure. South Carolina R. Civ. P. 43(k) states for a settlement to be binding, counsels must consent through written order or stipulate in open court as to their approval. Effective in April 2009 Rule 43 was amended and a sentence was added stating "reduced to writing and signed by the parties and their counsel." Through this language it is crystal clear for settlement agreements to be binding and enforceable, all parties must agree through signed writing or stipulate in open court. Furthermore, the South Carolina Courts have rendered settlement agreements to be unenforceable if there is shown to be no meeting of the minds, no representation by counsel or strictly no agreement as to the terms. The Respondent again is in correct in its assertion as the Appellant is an interested party under Rule 17 and thus should have been a party to any settlement agreement pursuant to Rule 43k. The Appellant failure to be properly put on notice and made a real party interest thus subjects the settlement to invalidity as it cannot meet the terms of the rule if the party in interest is not a part of the agreement. By failing to make the Appellant a proper party the settlement cannot be held to complying with the Rules governing settlement.

In *Ashfort Corp v. Palmetto Construction Corp* the Appeals Court refuse to compel a settlement agreement after the lower court ruled there was no meeting of the minds during the initial settlement. South Carolina R. Civ. P. 43 requires all agreements to be fully entered into and announced in court or through written consent order. *Ashfort Corporation v. Palmetto*

Construction Group, 458 S.E.2d (S.C. 1995*).* In *Ashfort*, the Appellants argue that the settlement should be compelled because it is between Respondent and insurer, however the Court disagreed. *Ashfort Corporation*, 458 S.E. 2d (S.C. 1995). The Court in *Ashfort* affirmed the lower Circuit's decision by ruling compliance with Rule 43(k) had not been fully complied with, with the Court finding there had been no meeting of the minds between the parties. Further, *in Price v. Investors Title Insurance Company,* the Court again refused to implement specific performance on a settlement agreement for failure to abide by Rule 43(k). *Price v. Investors Title Ins.* Co 2011 (S. Ct Appeals). In this case, the Appellants brought forth two issues violating Rule 43(k) standards for settlement agreements. The Court found for South Carolina R. Civ. P. 43(k) compliance parties have to be represented by Counsel at the time of the agreement under South Carolina R. Civ. P. 43. The Court went on to find that the settlement agreement was not binding and thus could be revoked by the non-represented party. (*See also Farnsworth v. Davis Heating & Air Conditioning, Inc.* 367 S.C. 634, with Court finding that no agreement is binding unless all conditions of South Carolina R. Civ. P. 43(k) are satisfied.

Here in the case of the Appellant, by way of the above cited fact of improper notice, the Appellants' interest was not adequately represented during the settlement hearing. Like in *Price v. Investors Title Insurance Company*, the Court found the settlement to be unenforceable as they were not represented by Counsel. The lack of notice of the petitioned Settlement Hearing to the Appellant, did not allow for the Appellants interest to be wholly represented by her attorney. The need for counsel ensures the interest of the party at hand are properly and adequately addressed. The Appellant, due to improper notice of the settlement was not afforded the ability for her interest to be fully represented, which equates to non-representation based on *Farnsworth.* Under Rule

43(k) of South Carolina Rules of Civil Procedure this should render the agreement unenforceable and non-binding as the Appellants interest were not wholly represented.

The Appellant cites under South Carolina R. Civ. P. 43(k) there was no written consent, or stipulation given by her attorney in open court agreeing to the settlement. This unsatisfied condition results in making the agreement unenforceable. *Farnsworth v. Davis Heating & Air Conditioning, Inc.* 367 S.C. 634. The, Appellant, like in *Ashfort* was never given notice of the settlement preventing a meeting of the minds needed for this agreement. Like in *Ashfort*, the Court did not compel performance of the settlement as there was no evidence of mutual assent. The Appellee who brought this action against the Estate of Washington making the Appellant a party of interest. The action by Respondent means the Respondent had a duty under South Carolina R. Civ. P. 43(k) to ensure the Appellant as an interested party consented to the settlement. As this did not happen the agreement has not been fulfilled under the conditions of South Carolina R. Civ. P. 43(k).

The Appellant, already established as an interested party under South Carolina R. Civ. P. 17 should have been given proper notice, and the Respondent failure to provide proper notice directly affects the enforceability standard under South Carolina R. Civ. P. 43(k). The failure to provide notice of the Settlement, and the failure to confer with Appellant's counsel to achieve a "meeting of the minds" like in *Ashcroft* results in the requirement of South Carolina R. Civ. P. 43(k) not being properly satisfied, and makes the approval of the settlement by the Court a legal impossibility under South Carolina R. Civ. P. 43(k).

The Court erred in granting approval of settlement proceeds as the interest of the Estate of Harry Washington were not represented, and Appellant, as the Personal Representative for Harry Washington, did not consent to the settlement under South Carolina R. Civ. P. 43(k). These factors

render the settlement unenforceable as all conditions of South Carolina R. Civ. P. 43(k) have not been satisfied.

The Respondent argument as to the Court Order not finding Harry Washington as the driver is in error. The Court after ruling during the Settlement Hearing that it would make no assessment as to who was driving the car expressly did so in its written order. South Carolina R. Civ. P. 60(b)(1)(3) allows for relief from a Final Judgment or Order based on a mistake, or misrepresentation and therefore the judgement should be vacated under South Carolina R. Civ. P. 60(b)(5). The Court subsequently contradicted itself in its March 30, 2017 Order finding Harry Washington as the Driver. (Judge Newman Order at pg. 2). The Court finding Harry Washington as the driver is in direct contradiction of its ruling on the record that it would make no assessment to the driver. This constituted error under South Carolina R. Civ. P. 60(b)(1)(3) and under South Carolina R. Civ. P. 60(b)(5) the judgement is no longer equitable and should have no prospective application. The Court on the record stated, ***"I'm making no assessment as to who was driving the car"*** (Hearing Transcript, March 30, 2017 R. p.39 line 22-23). The Appellant's Counsel used this statement by the Court as a good faith assurance that the Appellant could still pursue its pending Declaratory Judgement action. The Respondent argues the court made such ruling, however the Appellant clearly sites correctly from the Hearing transcript indicating the Court's own verbatim ruling. As the Appellant stated in its original brief the Court in issuance of this finding in opposition to its statement on the record has substantial implications to the Appellant. These implications have already manifested themselves in the form of issue preclusion claims which the Appellant has faced in actions in Circuit and Probate Court. In summation, the Court did erred in finding Harry Washington as the driver, and the Respondent incorrectly states that it was not ruled upon in its Order.

The Respondent fails to address S.C. Code Ann. § 15-51-42 (B) states, "If no action is pending, the personal representative shall petition either the Probate or the Circuit court of this State seeking approval of a proposed settlement." The Court vividly erred in its written Order on March 30, 2017 declaring beneficiaries as there are pending actions in the Circuit and Probate Courts. S.C. Code Ann. § 15-51-42 (B) which unambiguously states, ***"If no action is pending, the representative can petition either the probate or the circuit court of this State for approval of a proposed settlement***. (*See Merriam-Webster Dictionary* defining "pending" as awaiting decision or settlement, unresolved, undecided, unsettled)

Appellant's Counsel on record during the Settlement Hearing informed the Court of two pending actions involving the Estates of Mack and Washington. (Hearing Transcript, March 30, 2017 R. p.5 line 13-19). Appellant's Counsel on the record attempted to bring the Court's attention to the need for the Respondent to be "Bonded." This question was raised expressly to ensure the Appellant's interest would be protected from an erroneous allowance of the distribution of the proceeds. (Hearing Transcript, March 30, 2017 R. p.33 line 4-25) Appellant's Counsel provided proof of the Declaratory action to the Court and subsequently placed other important facts into the record. (Hearing Transcript, March 30, 2017 R. p.20 line 4-10). Therefore, any Order declaring beneficiaries is invalid pursuant to S.C. Code Ann. § 15-51-42(B). Accordingly, as there are action(s) pending the Court could not and cannot declare beneficiaries for the Estate of Harry Washington due to a pending action. The Respondent was made aware of this during the hearing, Respondent states that the interest were adequately represented however does not address the issue of proper notice and the requisite impact lack of notice prejudiced the Appellant.

CONCLUSION

For these reasons, the Appellant's position in this appeal is crystal clear: The Court erred in allowing the Settlement hearing to proceed with knowledge of the improper notice provided thereof to the Appellant. The Court further erred in approving the settlement agreement despite being aware of the actions pending in Circuit and Probate Courts. The Court even further erred in declaring beneficiaries, and allowing distribution of the insurance proceeds to the heirs of the Estate of Mack. The Courts violation of settlement agreements under Rule 43(k) of the South Carolina Rules of Civil Procedure is also in error. The conscious ignoring of the all these issues constitutes bad faith, and does not comply with the Eligibility Test set via *Wilson v. Dallas*.

The above stated reasons birth this appeal, and accordingly must results in the inevitable reversal of the Lower Court's approval of the Settlement Order in this matter.

Respectfully submitted,

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April 18, 2018

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April 18, 2018

The Honorable Jenny Abbott Kitchings
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RE: April Grant, as Personal Representative of the Estate of Barrett Demetric Jeremiah Mack, Respondent, v. Necole Binyard, Appellant
Case No. 2017-001077

Dear Ms. Kitchings:

Enclosed please find original and copies of Appellant's Reply Brief along with Proof of Service in connection with the above referenced matter for filing. Please return the filed copy in the enclosed self-addressed envelope.

Also, by copy of this letter, I am serving all parties of record a copy of the same.

Sincerely,

William J. Barr
Attorney At Law

WJB/jdb

enclosures

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