THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr., Circuit Court Judge
2016-002337

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative
of the Estate of Marion M. Kay, ... Petitioner/Respondent

v.

Martha Brown and Mary Moses,. . . . . Respondents/Petitioners

Appellate Case No. 2016-002337

RESPONSE TO PETITIONER/RESPONDENT'S RETURN TO PETITION FOR REHEARING

John R. Ferguson
S.C. Bar No. 1987
107 W. Laurens St. - PO Box 286
Laurens, SC 29360
(864) 984-212
Fax (864) 984-7372

COX, FERGUSON & WHAM, LLC
Attorneys for Respondents/Petitioners

TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA SUPREME COURT

In response to the Return to Respondents/Petitioners' Petition for Rehearing Respondents/Petitioners respectfully submit the following response:

LAW/ANALYSIS

I. The Court erred in affirming a denial of attorney fees under the common fund doctrine.

Mr. Sullivan (Rehearing Respondent) faults Ms. Brown and Ms. Moses (Rehearing Petitioners) for failing to present any new factual basis in support of rehearing, but Rule 221(a), SCACR is not limited to the presentation of new facts. Throughout this appeal, Ms. Brown and Ms. Moses have argued that Lisbon Presbyterian Church and its cemetery fund cannot be counted as opposing their position. Repeatedly they stressed that only a vote of the congregation could establish the church's position, and there was no vote opposing Ms. Brown's and Ms. Moses's position in this matter.

Rehearing Respondent's present position that the lack of subject matter jurisdiction was not raised before is unavailing. "Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court." *SC DHEC v. Columbia Organic Chemical Co.*, 310 S.C. 495, 499, 427 S.E.2d 661 (1993). "Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal, by a party or by the court." *Ex Parte Cannon,* 385 S.C. 643, 654, 685 S.E.2d 814 (Ct. App. 2009). This lack of subject matter jurisdiction is based on the Second Amendment of the U.S. Constitution and Art. 1 Section 2 of the S.C. Constitution.

That principle was applied by this Court in the context of a church dispute in *Knotts v. Williams,* 319 S.C. 473, 462 S.E.2d 288 (1995). There the circuit court had attempted to end a dispute concerning the dismissal of the pastor. With the best of intentions the judge had attempted to resolve the matter, but ultimately in order to do this he had to rule on the proper procedure for the church to follow to ascertain the will of the congregation. This court vacated his order as lacking subject matter jurisdiction, because he did not have the power to resolve ecclesiastical questions.

The Presbyterian Church (USA) has established in its constitution that the only way to determine whether a church wants to sell real estate is to have a congregational vote (R. pp. 630-1). The Personal Representative has lured the Court in to error by persuading it that the pastor or some members of the Session can fill this role. "It is not the function of the courts, however, to dictate procedures for the church to follow, *Bowen v. Green*, 275 S.C. 431, 272 S.E.2d 433 (1980). The courts' function is solely limited to interpreting the final action of the church." *Knotts v. Williams,* 319 S.C. 473, 478, 462 S.E.2d 288 (1995). Only a congregational vote is a final action for determining a church's will concerning the sale of real property in the Presbyterian Church.

Rehearing Respondent's accusation that Ms. Brown and Ms. Moses "misstate the record as to Lisbon Church" and "conveniently ignore the minutes of the Lisbon Church Session" (p. 2 of his Return) deserves a response. Mr. Sullivan quotes a statement from R. p. 867 about a discussion by members of the Session concerning whether they wanted to own real estate, but it is on the next page that we find what was actually voted on and this statement was not put to a vote. Further, even if it had been put to a vote and passed, it would not have been binding on the congregation, which alone has the authority to declare the will of the church.

It is in fact the Rehearing Respondent who misstates the record. There were three points of contact between the church and the hearing of this matter. Two of them were affidavits from the Lisbon Clerk of Session generally supporting Ms. Moses's and Ms. Brown's position (R. pp. 865-871 and 872-874) and complaining about the PR's lack of cooperation with the church. The other was the testimony of Session member Charles Blackmon. He affirmed that only a vote of the congregation could establish the church's position regarding the sale of the land (R. p. 471/16-21, 472/1-5). This would have been the perfect opportunity for him to state the church's rejection of Ms. Brown's and Ms. Moses's handling of their case, but he did not. Opposition cannot be manufactured from a failure to comment, and what is shown is the acquiescence of Lisbon in getting to the bottom of the matter.

Conversely, they had a duty to speak if they opposed the hearing, and they could not be allowed to benefit from their silence. "It is a well recognized principle of equity 'that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first proper and opportune moment.' [An interested entity] must act promptly after acquiring knowledge of the facts; he cannot sleep on his rights and then expect a court of equity to enforce them." *Metromont Materials Corp. v. Pennell*, 270 S.C. 9, 22, 239 S.E.2d 753 (1977). See also *Mayes v. Paxton,* 313 S.C. 109, 437 S.E.2d 66 (1993) and *Landrum v. Branyon,* 161 S.C. 235, 159 S.E. 546 (1931). It would be pernicious to establish a rule that a person benefitted could escape paying attorney fees merely by saying nothing until there was a benefit to be distributed.

Mr. Sullivan is incorrect when he alleges that there is no evidence of an implied contract between Rehearing Petitioners' counsel and the Lisbon Church (and its Cemetery Fund) and Marla Orias. These parties were well aware of counsel's efforts and had every opportunity to express a negative opinion of them or oppose them, but they did not. Converting their silence into dissent now would be unjust and result in unjust enrichment. Those parties went along for the ride and have benefitted handsomely. Now they must pay for the benefit they received. "The [common fund] rule is founded upon the just principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefitted should bear their just share of the expenses, including a reasonable attorney's fee...." *Johnson v. Williams*, 196 S.C. 528, 14 S.E.2d 21, 23 (1941).

Throughout this appeal, Mr. Sullivan has repeatedly stressed that 70% of the beneficiaries supported his position. It was he who has told this Court that this is a vital factor in the denial of attorney fees under the common fund doctrine. Indeed, he had to take this position because grumbling by heirs entitled to only 20% of the estate would not have been sufficient. See *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship.*, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993). His 70% claim has fallen apart.

Mr. Sullivan also misstates the record when he says "Respondent Brown continued to press a claim for 5 acres of real estate (R. p. 319, line 19- p. 327, line 5) after the trial." His citation is to the trial record, so this was obviously not after the trial. The only thing Ms. Brown did after the trial was to ask the judge to rule on the issue, inasmuch as his order had omitted to do so. The 5 acre issue was a very minor part of this case, and it did not pertain to Ms. Moses.

II. The Court erred in awarding the Personal Representative the attorney fees and costs generated by his pursuit in his individual capacity of additional compensation for himself.

The function of the Personal Representative is to represent the interests of the Estate. The Probate Code compensates him for representing those interests. The Court in its opinion erroneously concluded that anything the PR does must be for the benefit of the Estate. A review of the trial transcript shows that the primary issues dealt with were not estate issues but issues pertaining to the PR's compensation. The evidence and the arguments presented dealt with the PR's departure from his PR duties into a course of conduct designed to maximize his compensation from Estate assets. For example, the Estate derived little if any benefit from the 204.6 hours of paralegal time devoted largely to boosting the value of the personalty ("[T]he Court questions the necessity of 204.6 hours of paralegal time...." Final Order, # 17, R. pp. 10-11) so that the PR could get a bigger commission (which undermines his assertion about other factors he supposedly used to set his fee) and from his charges for his 27 trips to Laurens County where his relatives lived (R. pp. 828-9).

It is contrary to the intent of the Probate Code and to Equity to reward a fiduciary for abandoning the interests he was supposed to be protecting to pursue his personal interests. "Although Daryl G. Hawkins represented the PR well, his representation was primarily of the PR in his individual capacity seeking approval of the PR's commissions and expenses." (Final Order # 19, R. p. 11). "While S.C. Code 62-3-720 allows litigation expenses, including attorney fees for the PR, I do not find the statute to be applicable to a situation where the representation was primarily for the benefit of the PR individually and not the Estate." (Final Order # 5, R. p. 12). See also Order Disposing of Post-Trial Motions, (R. pp. 16-18) and the Order of Judge Addy

affirming the denial of the PR's attorney fees, (R. p. 19). "We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity." (In the Matter of the Estate of Marion M. Kay, S.C. Court of Appeals's Op. No. 5414, refiled November 2, 2016, p. 38 of the slip opinion). It would be contrary to the testatrix's intent to reduce her heirs' bequests to reward the PR's benefitting of himself.

CONCLUSION

The Rehearing Petitioners are entitled to the relief they have sought in their Petition.

COX, FERGUSON & WHAM, LLC
Attorneys for the Respondents/Petitioners

By: John R. Ferguson
John R. Ferguson
S.C. Bar No. 1987
107 E. Laurens St.- P.O. Box 286
Laurens, S.C. 29360
(864) 984-2126

June 15, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 15 day of June, 2018 she served the Response to Petitioner/Respondent's Return to Petition for Rehearing with attached memorandum herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

Daryl G. Hawkins, Esq.
Attorney at Law
P.O. Box 11906
Columbia, SC 29211.

Deborah S Ball

June 15, 2018