

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

SEP 19 2018

Judge Perry M. Buckner, III, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 5563 (S.C.Ct.App. filed May 23, 2018)

Angel Y. Gary as Personal Representative of the Estate of
Blondell M. Gary, Respondent,

v.

Lowcountry Medical Transport, Inc., American Medical Response, Inc.,
d/b/a Access2care, and Eugene A. Kirkland, In re: Charles Gary, Purported
Surviving Spouse, Defendants,

Of Whom Charles Gary, Purported Surviving Spouse, is Petitioner

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 16, 2018.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it misapplied the Johns Court's public policy against bigamous marriages decision to the facts of this case, because there is no allegation that the Petitioner was married to someone else at the time of the decedent's death?

2. Whether the Court of Appeals erred when it overlooked the legal effect of the consent order of dismissal with prejudice which was an adjudication on the merits which precludes subsequent litigation?

STATEMENT OF THE CASE

The Respondent Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary (the "Estate") filed a lawsuit on November 9, 2012, against several defendants, alleging Wrongful Death and Survival causes of action in this case (hereinafter "Wrongful Death Case") after Angel Y. Gary, filed an Application for Appointment as Personal Representative for the Estate of Blondell M. Gary on February 14, 2012, Estate of Blondell M. Gary, Case Number 12-CP-07-00140. (App. p. 76). The Estate obtained a Judgment by Default against one of the defendants, American Medical Response Inc., d/b/a Access2Care pursuant to Rule 55, SCRCP.

The Wrongful Death Case was set for a jury trial on September 1, 2015. The parties settled the case that day and an Order Approving Wrongful Death and Survival Action Settlement was signed by Judge Brooks P. Goldsmith, on September 14, 2015, and filed on September 15, 2015. (App. p. 12). On November 13, 2015, Judge Perry M. Buckner, III, signed an Order of Dismissal, with the consent of the parties dismissing the case with

prejudice. (App. p. 6). The Order of Dismissal was filed on November 30, 2015.

On December 14, 2015, the Respondent filed a Petition to Determine Heirship challenging whether Charles Gary was an heir and spouse of the decedent. (App. p. 16). Charles Gary served its Answer/Return to the Petition to Determine Heirship on January 12, 2016. (App. p. 36). The trial court held a motion's hearing on January 13, 2016, to decide the Respondent's Petition.

On January 21, 2016, the trial court entered its Order finding that Charles Gary was not Blondell Gary's husband at the time of her death; and therefore, not an heir of the Estate. (App. p. 3). Charles Gary timely filed and served its Notice of Appeal on February 5, 2016. The Court of Appeals affirmed the trial court's Order on May 23, 2018. (App. p. 251). Petitioner seeks a writ of certiorari to review the Court of Appeals' decision to determine if the Johns Court's public policy against bigamous marriages decision is applicable to the facts of this case and whether a consent order of dismissal with prejudice precludes this subsequent litigation.

ARGUMENT

I. THE COURT OF APPEALS MISAPPLIED THE JOHNS COURT'S PUBLIC POLICY AGAINST BIGAMOUS MARRIAGES TO THE FACTS OF THIS CASE, BECAUSE THERE IS NO ALLEGATION THAT THE APPELLANT WAS MARRIED TO SOMEONE ELSE AT THE TIME OF THE DECEDENT'S DEATH.

The Supreme Court of South Carolina should grant a writ of certiorari to review the *Court of Appeals' application of South Carolina's public policy regarding bigamous marriages to the facts of this case.* The Court of Appeals misapplied Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct.App.1992) to the facts of this case when it held that "[w]hile ordinarily the Estate may be bound to its previous assertions, we find that policy should

yield to the overriding policy against bigamous marriages, as expressed by the General Assembly.” Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary v. Charles Gary, 2018-Opinion No. 5563 (Ct.App. 2016). In Johns, the Court of Appeals found that “[a]t the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy.” Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct.App.1992). Accordingly, the Johns Court found that although the parties’ consent order is not void, the marriage it affirms is void because the public policy expressed in S.C. Code Ann. § 20-1-80 (1985) overrides the public policy of res judicata. Id. Therefore, at no time during their relationship was Mr. John’s unmarried.

The case at bar is distinguishable from the Johns case. First, it is undisputed that the Estate in its Wrongful Death Case complaint alleged that “Blondell Gary (hereinafter “Blondell”), on behalf of her husband, Charles Gary, contracted with American Medical Response to provide non-emergency medical transport on the day in question.” (App. p. 78, Wrongful Death and Survival Action, Complaint ¶15). The Estate maintained this position throughout the Wrongful Death Case, despite knowledge of a possible defect in the decedent and Appellant’s marriage license in 1999. Blondell M. Gary died on January 31, 2012, more than a decade after the events alleged by the Respondent in its Petition. The Estate does not allege a bigamous marriage at the time of the decedent’s death. Rather it argues that a common law marriage was not established. This is not a Johns public policy impediment; therefore, there is no competing public policy to yield to in this

case.

On the other hand, South Carolina law is clear, the Respondent is judicially bound by its pleadings and it cannot contradict its previous position that Mr. Gary is the decedent's spouse and a beneficiary of the Estate notwithstanding the factual basis to support common law marriage. South Carolina law provides that:

It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 418 S.E.2d 322 (Ct.App.1992).

The Estate is judicially bound by the admissions in its pleadings in the Wrongful Death Case and in two other companion cases where it admitted that Mr. Gary is the surviving spouse and a beneficiary of the Estate of Blondell M. Gary. This Court correctly noted "... the doctrine of binding a party to its pleadings exists to protect the integrity of the court process."¹ This Court should protect the integrity of the judicial process here.

There is no public policy conflict in this case. Instead, the pleadings on file with the court clearly show that Mr. Gary had only one wife on the date of the decedent's death (January 31, 2012) and that the Respondent cannot contradict this judicial admission based on its pleadings. Therefore, this Court should grant the Petitioner's Petition for a writ

¹ The Estate claimed that Mr. Gary must and/or it intended to compel him to seek recovery of certain damages in the Wrongful Death Case as the surviving spouse even though he was also seeking to recover the same in his Personal Injury Case. Due to this controversy over damages recoverable in the two cases, Mr. Gary filed a Declaratory Judgment Action against the Estate in the Beaufort County Circuit Court to resolve this dispute, on October 20, 2014. (App. 90-98, Declaratory Judgment Action Complaint). Notwithstanding this dispute, the Estate settled the Wrongful Death case without retracting its claim that Mr. Gary was the surviving spouse and that his damages must be included in its case.

of certiorari to review the Court of Appeals' decision.

II. THE COURT OF APPEALS OVERLOOKED THE LEGAL EFFECT OF THE CONSENT ORDER OF DISMISSAL WITH PREJUDICE WHICH WAS AN ADJUDICATION ON THE MERITS WHICH PRECLUDES SUBSEQUENT LITIGATION.

Additionally, this Court should grant the Petitioner's Petition for a writ of certiorari, because the Court of Appeals overlooked the legal effect of the Consent Order of Dismissal when the circuit court failed to dismiss the Estate's Petition. It is undisputed that the Estate consented to an Order of Dismissal with prejudice prior to filing its Petition challenging Mr. Gary's spousal status. Mr. Gary asserted at the Petition hearing that the trial court should dismiss the Petition as it relates to him because the Court's earlier dismissal of the underlying case bars subsequent litigation on the issues raised in the Estate's complaint. South Carolina law provides that:

A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as *res judicata*, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. [Citations Omitted]. Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, 'so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.'

Nunnery v. Brantley Constr. Co., 289 S.C. 205, 345 S.E.2d 740 (Ct.App.1986)

It is undisputed that the Estate alleged that Mr. Gary was the husband of Blondell Gary. (R. p. 076, Wrongful Death and Survival Action, Complaint ¶15). Equally, it is undisputed that American Medical Response failed to Answer the Respondent's Complaint within 30 days of service; and therefore, it was held in default. The Estate objected to American Medical Response's motion to answer out of time. Moreover, the Estate did not seek to amend its pleadings to strike the reference that Mr. Gary was the decedent's spouse, over

the course of the litigation in the Wrongful Death Case. South Carolina law is clear:

It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.

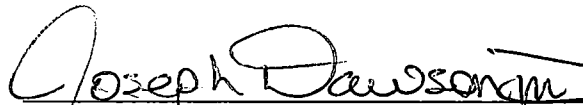
Laughon v. O'Braitis, 360 S.C. 520, 602 S.E.2d 108 (Ct.App.2004).

There is no allegation that Mr. Gary was married to another woman at the time of the decedent's death. The Estate judicially admitted that Mr. Gary was the spouse of the decedent at the time of Blondell Gary's death. That fact is conclusively settled by Judge Buckner's November 13, 2015, Consent Order of Dismissal with Prejudice. Mr. Gary's spousal status is the law of the case, whether rightly or wrongly decided and may not again be litigated in a subsequent action, regardless of the form that the issue may take. See Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

CONCLUSION

For the foregoing reasons, the Petitioner Charles Gary respectfully requests that this Court grant its Petition of Writ of Certiorari.

Respectfully submitted,



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Of Whom Charles Gary, Purported Surviving Spouse, is Petitioner

PROOF OF SERVICE

I certify that I have served the **Petition for Writ of Certiorari** upon all counsel of record and the Clerk of the South Carolina Court of Appeals by depositing a copy of the same in the United States Mail, postage prepaid, on September 17th, 2018, addressed as follows:

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A handwritten signature in black ink that reads "Joseph Dawson, III". The signature is written in a cursive style with a horizontal line underneath it.

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