THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

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SC Court of Appeals

Case No.: 2017-CP-07-01180

In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent,

Samuel H. Tims, individually and as Co-Personal Representative of the Estate of Harriet Kathleen Tims,..... Petitioner,

vs.

Michael Tims, individually and as Co-Personal Representative of the Estate of Harriet Kathleen Tims, ...Respondent,

and

Deborah T. Krane, individually and as Co-Representative of the Estate of Harriet Kathleen Tims, ...Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE LOWER COURT ERRED IN DENYING SUMMARY JUDGENT PURSUANT TO S.C. PROBATE CODE § 62-3-803, A NON-CLAIM STATUTE, WHERE RESPONDENTS, MORE THAN ONE YEAR AFTER PUBLICATION OF THE NOTICE TO CREDITORS, FILED DECLARATORY JUDGMENT CLAIMS BASED ON A CONTRACTUAL AGREEMENT BETWEEN THE DECEDENT AND RESPONDENT?

II. WHETHER THE LOWER COURT ERRED IN FINDING THAT THERE WAS AN ISSUE OF TITLE REGARDING PROPERTY TITLED IN DEEDENT'S NAME, DEEDED TO DECEDENT BY RESPONDENT WITH A WARRANT OF TITLE, AND OVER WHICH DECEDENT ASSERTED TITLE AND FOR WHICH DECEDENT GAVE GOOD AND SUFFICIENT CONSIDERATION?

III. WHETHER THE LOWER COURT'S DENIAL OF SUMMARY JUDGMENT TO APPELLANT SHOULD BE REVERESED AS A MATTER OF POLICY SO AS TO NOT MOOT THE CLAIMS-BARRING PROCESS ESTABLISHED BY THE SOUTH CAROLINA GENERAL ASSEMBLY?

IV. WHETHER THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THEIR CLAIM OF A RESULTING TRUST WHERE THE PROPERTY WAS DEEDED TO DECEDENT BY EXPRESS WRITTEN AGREEMENT BY RESPONDENT WITH A WARRANT OF TITLE, AND OVER WHICH DECEDENT ASSERTED TITLE AND FOR WHICH DECEDENT GAVE GOOD AND SUFFICIENT CONSIDERATION?

V. WHETHER THE LOWER COURT ERRED IN FINDING THAT DECEDENT DID NOT PROVIDE ANY CONSIDERATION TO RESPONDENT AT THE TIME OF TRANSFER WHEN DECEDENT OBTAINED A NOTE AND MORTGAGE IN HER NAME TO PAY OFF RESPONDENTS DEBT?

VI. WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT THE RIGHT TO A JURY TRIAL ON HER DEFENSES TO RESPONDENT'S LEGAL CLAIMS OF BREACH OF FIDUCIARY DUTY?

STATEMENT OF THE CASE

The Decedent Harriett Tims (hereinafter "Decedent") died intestate February 14, 2016. See Application for Informal Appointment filed on March 3, 2016 and granted on March 4, 2016. She is survived by her three children, Respondents Michael Tims (hereinafter "M. Tims") and Sam Tims (hereinafter "S. Tims") and Appellant Deborah T. Krane (hereinafter "Krane"). See Id. The Estate was opened with the Beaufort County Probate Court and Notice to Creditors was published in the Beaufort Gazette on March 10, March 17, and March 24, 2016. See Krane Memo in Support of Motion for Summary Judgment, p. 3; See Notice to Creditors.

On May 22, 2017, more than a year after the Estate was opened and after publication of the Notice to Creditors, Respondent Samuel Tims filed a declaratory judgment action against the Estate of Harriett Tims with the Beaufort County Probate Court asking the Court to determine that the intent of the Decedent as to certain real property known as Cloverdale was not part of the Estate, but rather held in a resulting trust by the Decedent for the benefit of Respondent Michael Tims. See S. Tims' Amended Petition, para. 7 & 9. Appellant Answered denying the relief sought and filed counterclaims and crossclaims against Respondents for breach of fiduciaries duty and asked that the matter be transferred to Circuit Court. See Krane Answer; Motion to Remove. Appellant's 7th defense asserted that Respondents were time barred from bringing a claim against the Estate pursuant to South Carolina Probate Code § 62-3-803. Respondent Michael Tims and Samuel Tims replied to the counterclaims and crossclaims. Respondent Michael Tims joined with Petitioner Samuel Tims in the request for declaratory judgment and filed crossclaims against Appellant for breach of fiduciary duty. See M. Tims' Answer and Crossclaims. Appellant answered denying Petitioner's counterclaims and co-Defendant's allegations. See Krane Reply. Appellant requested a jury trial. See Krane Answer.

Appellant filed a Motion for Summary Judgment on the grounds that Respondents' Declaratory Judgment claims were time barred by South Carolina Probate Code § 62-3-803. See Krane Motion for Summary Judgment. Respondents S. Tims and M. Tims filed separate Motions for Summary Judgment on their allegations that the property deeded to the Decedent by M. Tims was held by the Decedent in a resulting trust and that Appellant was not entitled to a jury trial on her counterclaims and crossclaims because they were permissive. See M. Tims Motion for Summary Judgment; S. Tims Motion for Summary Judgment. Respondent Samuel Tims subsequently withdrew his motion for Summary Judgment. See S. Tims Notice.

Appellant Krane and Respondent M. Tims filed memoranda of law in support of their positions and in opposition to the opposing motions. See Krane Memos; M. Tims Memo. Both parties also filed supporting affidavits with only Appellant referencing and attaching certain documents to her affidavit as exhibits thereto. See Krane Affidavit with exhibits; M. Tims Affidavit. The Lower Court heard the Motions on October 9, 2017. See February 7, 2018 Ct. Order (hereinafter "Order I"). The Lower Court by Order dated February 7, 2018 denied Appellant's Motion for Summary Judgment and granted Respondent Michael Tims' Motion for Summary Judgment. See Id. Appellant filed a Motion for Reconsideration. See Krane Motion. The Lower Court denied Appellant's Motion for Reconsideration. See Ct. Order dated August 7, 2018 (hereinafter "Order II"). Appellant filed this Appeal. See Krane Notice of Appeal.

STANDARD OF REVIEW

This matter was before the Lower Court on separate Motions for Summary Judgment pursuant to South Carolina Rule of Civil Procedure 56. See Krane Motion for Summary Judgment; M. Tims Motion for Summary Judgment. These motions were not "cross motions" on the same

issues. A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, ____, 754 S.E.2d 875, 879 (2014) quoting Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "In reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Id. "On appeal from an order granting summary judgment, the appellate court [is to] review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id. S.C.E. & G, Co. v. Town of Awendaw, 359 S.C. 29, 34, 596 S.E.2d 482, ___ (2004). However, "[q]uestions of statutory interpretation are questions of law, which [the Appellate Court is] free to decide without any deference to the court below." Gurnham, 407 S.C. at ___, 754 S.E.2d at 879.

Thus, in considering Appellant's appeal of the Lower Court's Order denying Appellant Summary Judgment on the application of the nonclaim statute, this Court is not required to defer to the Lower Court. With regard to the review of the Lower Court's Order granting Respondent Summary Judgment on his claim that the parties intended a resulting trust, because it involves

questions of fact and Respondent has the ultimate burden of proof, the Court must view the facts and all reasonable inferences therefrom in a light most favorable to Appellant.

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Lord v. D & J Enters., Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). ("Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991))); Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.").

FACTS

This dispute involves the heirs of the Estate of Harriett Timms and revolves around certain real property located in Beaufort County, South Carolina known as "Cloverdale". Cloverdale was originally owned by Respondent M. Tims. Respondent M. Tims was about to lose the property to a bank foreclosure. See M. Tims Affidavit; D. Krane Affidavit. On November 14, 2012, M. Tims, in order to avoid losing the Cloverdale property to foreclosure, entered into a contract with Decedent entitled "Land Exchange Agreement" (hereinafter "LEA") setting forth the parties' agreement as to that property. See Krane Affidavit, Ex. A.

Pursuant to the contract, Decedent Harriet Tims agreed to pay off Respondent M. Tims' existing note and mortgage owed to MCAS Beaufort Federal Credit Union in exchange for Respondent M. Tims deeding Cloverdale to the Decedent. See Id.; M. Tims Affidavit. Pursuant to the contract between the Respondent and the Decedent, Respondent M. Tims deeded the property to the Decedent and Decedent used her funds to pay off Respondent's mortgage debt on the property and prevent a foreclosure. Id. In order to do so, Decedent borrowed funds from Palmetto State Bank (hereinafter "PSB"). See Krane Affidavit, Ex. A. Simultaneously with Respondent deeding the property to Decedent, Decedent executed a mortgage on the Cloverdale property. See Id., Ex. C.

The Lower Court erroneously found that the Note and Mortgage were executed subsequent to the deed. See Ct. Order II, p. 9. The Note and Mortgage do have a November 15, 2012 date. However, a review of the recording data found on the Mortgage shows that the Mortgage was recorded immediately after the Deed on November 14, 2012. The Deed dated November 14, 2012 was recorded with the Beaufort County ROD in book 03190, page 2752-2753, on November 14, 2012 at 4:24:45 PM. See Krane Affidavit, Ex. A. The Mortgage was recorded in the same book 03190, and the immediately succeeding pages, pages 2754-2762, the same date and time – November 14, 2012, at 4:24:45 PM not November 15, 2012. Id., Ex. C. It would have been impossible to record an unsigned mortgage on November 14, 2012. Likewise, the Note also had to have been signed on November 14, 2012 because the Mortgage, recorded on the same day as the Deed, references Promissory Note No. 7712136 which is the Note the Decedent signed. Id.

In addition to detailing the basis of the exchange: the Land for the payoff of the Note, the LEA also sets forth the terms under which the property could be returned to the Respondent. See Krane Affidavit, Ex. A. The LEA states that the property would be put back in Respondent's name

"upon the acquisition of the contract of sale ...." See Id. In other words, the property was to remain Decedent's until the parties obtained a contract for sale of the property. And then it was only to be returned to Respondent in an attempt to avoid capital gains taxes on the sale by selling it as Respondent's residence rather than as a non-residential property. See Id. It is not returned to Respondent for him to retain as his residence or merely upon him paying off the debts or upon any other trigger other than obtaining a contract for sale.

Further, it was agreed that "[u]pon the sale of the premises, the amount of money owed to the bank at that time will be paid along with any taxes, insurance payments, interest or any other items paid for by [the Decedent] for the ownership, maintenance and upkeep of the property." See Id. (emphasis added). The LEA language specifically acknowledges that the Decedent was to have "ownership" of Cloverdale. Lastly, the LEA concludes with a merger clause expressly stating that the language in the LEA "constitutes the entire agreement of the Parties and all oral negotiations are merged herewith." Id.

In the Deed conveying the Cloverdale property to the Decedent, M. Tims expressly stated that he was bound "to warrant and forever defend all and singular the said premises unto the [Decedent] and her Heirs and Assigns, against the Grantor [Respondent] and the Grantor's Successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof." See Krane Affidavit, Ex. A. Respondent M. Tims publicly represented that the Decedent's title to the Cloverdale property was good and valid and that he would defend the Decedent's title against all claims against it. See Id.

In the Mortgage, recorded simultaneously with the Deed on November 14, 2012, Decedent, as Mortgagor, expressly warranted that the Decedent "is or will be lawfully seized of the Estate conveyed by this security instrument and has the right to grant, bargain, convey, sell and mortgage

the Property." See Krane Affidavit, Ex. C, para.5. (emphasis added). Decedent's representation to PSB that she can sell the property completely contradicts Respondents' argument that the Decedent held the property in trust for Respondent M. Tims. Decedent also warranted that "the property was unencumbered, except for encumbrances of record." Id. The LEA was not recorded. See Krane Affidavit, Ex. A. In other words, there were no other outside obligations regarding the property such as an agreement to hold the property in trust. Further, Decedent agreed to "defend [the] title to the Property against any claims that would impair the lien of ..." the bank. Id., Ex. C at para. 7. Decedent also affirmed that she had "the right and authority to enter into ..." the mortgage and that doing so would "not violate any agreement governing ..." the Decedent or to which Decedent was a party. Id. at para. 9.

Closing attorney Thayer Rivers also verified that the title was "vested" in the Decedent's name as of the date of the policy, November 14, 2012. See Krane Affidavit, Exhibit B. He likewise affirmed that Decedent had "good, valid and marketable title to the property ...." Id., Rivers' letter dated November 13, 2012 (emphasis added). Decedent could not have a marketable title to the property if she held the property in trust for Respondent. Decedent could not have mortgaged the property if she did not own it outright.

Additionally, Decedent, in a subsequent Personal Financial Statement given to PSB dated October 11, 2013, included Cloverdale in a list of her "wholly owned real estate". See Krane Affidavit, Exhibit G, page 3. Decedent made the representation "to induce Palmetto State Bank ("PSB") to extend or continue the extension of credit" to the Decedent. See Id. page 4. There is no evidence that Decedent represented to PSB that Respondent was an owner or had any rights or interest whatsoever in the property. Respondent references no evidence where he ever disputed Decedent's claim of sole ownership or for that matter ever claimed an interest in the property after

he deeded it to Decedent. M. Tims has represented to the public and to lenders that the Decedent owned the property, but now alleges that she did not actually own it, but rather held it in trust. M. Tims cannot now make a contrary argument. He is estopped from doing so.

Lastly, both M. Tims and the Decedent jointly applied for a subsequent business loan with PSB, Decedent's current mortgage holder. See Krane Affidavit, Ex. E. In doing so Decedent represented to the bank that she was borrowing the money to invest in a Game Processing business. See Id. Decedent, in the Business Purpose Statement stated that she "is exercising and will continue to exercise actual control over the managerial decisions of the business concerning the use of funds ...." Id. That M. Tims was aware of Decedent's claim of ownership of the Business is evidenced by his initials on Decedent's document. See Id. Decedent's representation was made subject to fines and imprisonment under state and federal law. See Id.

ARGUMENTS

I. THE LOWER COURT ERRED IN DENYING SUMMARY JUDGENT PURSUANT TO S.C. PROBATE CODE § 62-3-803, A NON-CLAIM STATUTE, WHERE RESPONDENTS, MORE THAN ONE YEAR AFTER PUBLICATION OF THE NOTICE TO CREDITORS, FILED DECLARATORY JUDGMENT CLAIMS BASED ON A CONTRACTUAL AGREEMENT BETWEEN THE DECEDENT AND RESPONDENT.

Despite these aforementioned facts established by the documents in the record, the Respondents filed a Petition with the Lower Court on May 22, 2017 naming the Estate as a party and asking the Court to determine that the Decedent's intent was to hold the Cloverdale property in a resulting trust for Respondent M. Tims and not part of the Decedent's Estate. See S. Tims' Petition; M. Tims' Answer and Crossclaims. This was more than a year after publication of the Notice to Creditors in March 2016.

"Pursuant to the general statutory scheme of the Probate Code, all claims against a Decedent's Estate ... must be presented after a personal representative is appointed and within the time limits prescribed by § 62–3–803, which our appellate courts have designated as a 'nonclaim statute.'" Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, ___, 754 S.E.2d 875, 879 - 880 (2014); See S.C. Code Ann. § 62–3–104 (2009) ("No proceeding to enforce a claim against the Estate of a Decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the Estate are governed by the procedure prescribed by this article [§§ 62–3–101 et seq.]."); In re Estate of Tollison, 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct.App.1995) ("Section 62–3–803 is a nonclaim statute.").

> All claims against a decedent's estate which arose before the death of the decedent ... whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statue; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following: (1) one year after decedent's death; or (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication.

South Carolina Probate Code § 62-3-803(a)(emphasis added).

Respondents filed their claims that the Decedent held Cloverdale in a resulting trust on May 22, 2017 and June 29, 2017. See S. Tims' Petition; M. Tims' Answer & Crossclaim. Pursuant to South Carolina Probate Code §62-3-803, the claims against the Decedent's Estate should have been filed at the latest by March 24, 2017 which is one (1) year after the publication of the Notice to Creditors. Respondents' failure to timely file a claim is fatal to their claims.

II. THE LOWER COURT ERRED IN FINDING THAT THERE WAS AN ISSUE OF TITLE REGARDING PROPERTY TITLED IN DEEDENT'S NAME, DEEDED TO DECEDENT BY RESPONDENT WITH A WARRANT OF TITLE, AND OVER WHICH DECEDENT ASSERTED TITLE AND FOR WHICH DECEDENT GAVE GOOD AND SUFFICIENT CONSIDERATION.

Despite the clear evidences that the property was titled in Decedent's name and the Respondent M. Tims warranting good title in Decedent's name in the Deed, Decedent asserting ownership, the ability to sell the property and not being encumbered by any other agreements, and the closing attorney attesting that title vested in Decedent and that she had good and marketable title to Cloverdale, the Lower Court erroneously refused to apply §62-3-803. It held that the nonclaim statute did not apply because the title to the property was allegedly in question, citing S.C. Probate Code § 62-1-201(4) which holds that "Claims" do "not include ... demands or disputes regarding title of a decedent ... to specific assets alleged to be included in the estate." See S.C. Probate Code § 62-1-201(4). See Court Order II, para. 5. The Lower Court erroneously held that because Respondents asserted a claim that the property was held in a resulting trust, there was a dispute as to the Decedent's title.

As discussed below, to have a resulting trust presupposes that legal title is in the name of one other than the party claiming the resulting trust. See Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 249, 489 S.E.2d 472, ___ (1997); McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct.App.1987). Thus, the Lower Court, in relying on the argument that there is a resulting trust in Respondent M. Tims' favor, has to acknowledge that title is in Decedent's name. Therefore there is no dispute as to who has title to the property and South Carolina Probate Code § 62-3-803 would apply.

However, nothing in the record reflects that there is a genuine, legitimate dispute regarding Decedent's title to Cloverdale. Respondent M. Tims does not allege in his Crossclaim that there

is a dispute as to title, but rather alleges that "[a] controversy has arisen between the parties regarding the intent of the parties in entering into the Land Exchange Agreement and with regard to the legal status of the Cloverdale property." See M. Tims' Answer and Crossclaim, para. 30 (emphasis added). Respondent goes on to add that both S. Tims and M. Tims "contend that the circumstances constitute a resulting trust and that the Cloverdale property should be conveyed back to Michael Tims when the terms of the Land Exchange Agreement are fulfilled and the Mortgage to Palmetto State Bank is paid off by Michael Tims." Id. para. 33. He does not dispute that the LEA contains the parties' agreement. Id. Nowhere in his pleadings does he assert that the title to the property is in dispute. Respondent alleges that there is an agreement between him and the Decedent and the Decedent is obligated per the contract to return the property titled in her name when M. Tims fulfills the terms of the contract between him and the Decedent. He is not contesting who has title to the property, but rather what obligation the Decedent and her Estate have under the contract.

The Lower Court cites M. Tims' affidavit and the language of the LEA as support for the position that the title is in dispute, but all the genuine evidence rebuts that allegation and M. Tims' affidavit is expressly contrary to his previous representations when deeding the property and signing the LEA that the property was to be the Decedent's and titled in the Decedent's name. See Krane Affidavit, Ex. A, B, C & E. Further the Lower Court ignores key components of the LEA, including the contractual agreement to deed the property back "when" a contract for sale is obtained and the merger clause. At best the issue is whether or when the Decedent is obligated to deed the property back to the Respondent, not whether title is in her name. It is a contractual issue, covered by the LEA, and as such, Respondents were required under § 62-3-803 to file a timely claim with the Probate Court.

Respondent acknowledges that he is not entitled to a return of the property at this point as his Answer and Crossclaim states that the property should be returned when the LEA terms are "fulfilled". There is no evidence that he has fulfilled or even tried to fulfill the terms of the LEA, namely by acquiring a contract to sell the property and repaying the Decedent. Even Respondents' request to have the property deeded to a Trustee would not work as the terms of the LEA require Respondent repaying Decedent upon the sale of the property which would necessitate leaving the Estate open ad infinitum until whenever Respondent got around to fulfilling the LEA terms.

If the Appellate Court upholds the Lower Court's ruling that essentially holds that a party can avoid the non-claim statutory time requirement of § 62-3-803 by simply alleging that there is a dispute as to ownership of the property in question, it would prevent an Estate from being able to safely convey, and any subsequent takers of real property from ever knowing that they hold, good title to the property. There is theoretically be nothing in the Estate to put the Estate on notice of the potential claim. The LEA was not recorded. No lis pendens was filed. All of the publicly filed documents affirm Decedent's absolute ownership and do not mention the LEA. The Estate could have sold the real property to a third party during or after the statutory period for filing claims had run. But under Respondent's theory of the law, Respondent would still be allowed to challenge the sale and the title to the property sold since he claims to not be bound by the non-claim statute. Under Respondent's theory of the case, he has no deadline whatsoever to notify the court or the Estate of the alleged claim. It would be a permanent cloud on the title to the property and would keep estates from closing.

The purpose of the nonclaim statute "is to expedite and resolve claims against a decedent's estate with finality." Gurnham, 407 S.C. at ____, 754 S.E.2d at 884. Under Respondents' arguments, and logic embraced by the Lower Court, the purpose of the nonclaim statute is

completely nullified. There is no finality for Respondent M. Tims to claim the Cloverdale property should be returned to him. The Lower Court's ruling begs the questions of when the Respondent would be obligated to fulfill the terms of the LEA, when would he be obligated raise his claim of a resulting trust if not within the statutory period set forth in the Probate Code, and when would he have to acquire a contract to sell the property and pay Decedent's Estate back.

In Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, 754 S.E.2d 875 (2014) the decedent Margaret Dever Hover Gurnham (hereinafter "Gurnham") took out a First and Second Mortgage on certain real property with the Plaintiff bank holding the second mortgage. After Gurnham's death, the personal representative continued to pay both the first and second mortgages. After the time for filing claims against the estate expired, the personal representative stopped making payments. The first mortgage holder filed a foreclosure action in the circuit court and named the plaintiff second mortgage holder as a party. The plaintiff filed a cross claim against the decedent's estate in the foreclosure action and filed creditor claim with the probate court for the deficiency judgment. A deficiency judgment was subsequently awarded to the plaintiff by the Master in Equity and it amended its creditor claim in the Probate Court to specify the amount of the deficiency.

The Gurnham Court recognized that "'[b]roadly speaking, all claims against the decedent should be presented for allowance ....'" Gurnham, 407 S.C. at ___, 757 S.E.2d at 880 quoting 34 C.J.S. Executors & Administrators § 548 (Supp. 2013) (footnotes omitted). In recognizing that §62-3-803 is a nonclaim statue, the Court in Gurnham held that "[a] nonclaim statute is a self-contained statute which absolutely prohibits the initiation of litigation based on it after a prescribed period." Id. at ___, 754 S.E.2d at 881. "[N]oncompliance eliminates a claimant's right of action against a decedent's estate and, in turn, deprives the court of the power to adjudicate the claim."

Id. at ___, 754 S.E.2d at 882. This elimination of right occurs even though there was no default in the loan payments and no claim for a deficiency during the statutory filing period under § 62-3-803.

Like the LEA in the present case which provides that the Decedent has an obligation to return Cloverdale to Respondent upon the acquisition of a contract for sale of the property, the decedent in Gurnham had an obligation to pay the note and mortgage. Id. at ___, 754 S.E.2d at 882-883. Despite this, the Supreme Court refused to allow the Plaintiff Bank to assert its claim against the Gurnham estate. Relying on C.J.S., the Court recognized that "[a] contingent claim within the meaning of the statues relating to presentation of claims against a decedent's estate is one under which the existence of any right or liability is not presently certain or absolute but is dependent on some future event that may or may not happen." Id. citing 34 C.J.S. Executors & Administrators § 582 (Supp. 2013). Decedent's obligation to return Cloverdale to Respondent M. Tims is expressly contingent on the presence of a contract to sell the property, a "future event that may or may not happen." Id.; See Krane Affidavit, Ex. A. It is a purely contractual duty and nothing more.

III. WHETHER THE LOWER COURT'S DENIAL OF SUMMARY JUDGMENT TO APPELLANT SHOULD BE REVERESED AS A MATTER OF POLICY SO AS TO NOT MOOT THE CLAIMS-BARRING PROCESS ESTABLISHED BY THE SOUTH CAROLINA GENERAL ASSEMBLY?

The consequences of the Lower Court's ruling, if affirmed, prevents the estate or will be to prevent any taker or subsequent purchaser of this property from the Estate, from ever knowing that they had clear and marketable title to the property. Decedent's Deed, given by Respondent, states that the property is Decedent's and that the Respondent warranted the title in her name. The closing attorney affirmed and verified that she had good and marketable title and the Decedent

herself represented to PSB that Decedent owned the property outright. Respondent was aware that Decedent was mortgaging the property in her name which requires that Decedent own the property.

Furthermore, and hypothetically, if the Decedent had not died and the Respondent claimed that he was entitled to a return of the property, and Decedent refused to return it to him, his action would be for breach of contract. He would have to allege that he had fulfilled the LEA's conditions, and that the LEA obligated the Decedent to return the property to him. In return, the Decedent could allege as a defense that her obligation to return it to him was contingent on having a contract for sale of the property. These would be breach of contract claims and defenses, all contingent on a contract for sale of the property or contingent on Decedent not deeding the property back to Respondent.

There is no dispute as to who owns the title to the property. At best is a dispute as to whether the Decedent had to deed the property back to M. Tims pursuant to the contractual agreement between Decedent and Respondent as set forth in the LEA. That is a claim that should have been raised with the Estate during the requisite time period and is now time-barred by § 62-3-803. As such Appellant is entitled to Summary Judgment and the Lower Court's ruling denying Appellant Summary Judgment should be reversed.

IV. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THEIR CLAIM OF A RESULTING TRUST WHERE THE PROPERTY WAS DEEDED TO DECEDENT BY EXPRESS WRITTEN AGREEMENT BY RESPONDENT WITH A WARRANT OF TITLE, AND OVER WHICH DECEDENT ASSERTED TITLE AND FOR WHICH DECEDENT GAVE GOOD AND SUFFICIENT CONSIDERATION.

The issue of whether a resulting trust existed was before the Lower Court on Respondent M. Tims' Motion for Summary Judgment. If this matter were being tried, M. Tims would have to prove that he had a resulting trust by clear and convincing evidence. "[T]o establish an equitable

title or resulting trust against one holding the legal title, the evidence must be clear and convincing." Feaster v. Kendall, 80 SC 30, 61, S.E. 200 (1908). "It is well settled that the evidence to establish a resulting trust must be definite, clear, unequivocal and convincing." Moore v. McKelvey, 266 S.C. 95, 98, 221 S.E.2d 780, 781 (1976) quoting Hodes v. Hodges, 243 S.C. 299, 306, 133 S.E.2d 816, 819 (1963). Despite that heightened standard, the Lower Court rejected Appellant's facts and inferences therefrom, ignored the uncontradicted evidence submitted, and disregarded the express language of the LEA. The facts and inferences therefrom, taken in a light most favorable to Appellant do not establish a resulting trust in favor of M. Tims by clear and convincing evidence and Summary Judgment in Respondents' favor was improper and should be reversed.[1]

"Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another." Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 249, 489 S.E.2d 472, ___ (1997); McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct.App.1987). "The general rule is that when real Estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf." Lollis v. Lollis, 291 S.C. 525, ___, 354 S.E.2d 559, 561 (1987) citing Caulk v. Caulk, 211 S.C. 57, 43 S.E.2d 600 (1947); Green v. Green, 237 S.C. 424, 117 S.E.2d 583 (1961). The presumption, however, may not be in accord with the truth. It may be rebutted, and the actual intention shown by parol evidence. Larisey v. Larisey, 93 S.C. 450, 77 S.E. 129 (1913).

[1] Appellant's position is that S.C. Probate Code § 62-3-803, a nonclaim statute, bars Respondents' action against the Estate and so there is no ability of the Lower Court to address the issue of a resulting trust in the first place.

The party attempting to establish a resulting trust has a very high burden of proof. See Glover v. Glover, 268 S.C. 433, 437, 234 S.E.2d 488, 489 (1977). Its imposition is specific to the time of the transaction and it "is clear that a resulting trust arises, if at all, only at the time of the purchase of the land ...." Dec In Re: Prince, 2011 WL 2747797 (citing Larisey v. Larisey, 93 S.C. 450, ___, 77 S.E. 129, 130 (1913). In the present case, a resulting trust does not arise because the consideration for the property transferring to the Decedent was paid for by the Decedent. At the time Decedent acquired title to Cloverdale, she used her ownership to acquire credit in the form of the loan from PSB. If her ownership in the property did not have value, she could not have mortgaged the property in her name. See generally In re Sanchez-Villalaba, C/A No. 10-29242-BKCAJC, 2012 WL 627746, at 2 (Bankr. S.D. Fl. Feb. 24, 2012), aff'd, Sanchez-Villalaba v. Heckert, C/A No. 12-23199-CV, 2013 WL 537496 (S.D. Fla. Feb. 12, 2013) (No resulting trust in bankruptcy court where property used to secure credit in the name of the titled owner). This action, along with Decedent's representations to PSB, coupled with Respondent's representations in the Deed and the closing attorney's attestations, show Decedent's intent to have ownership and not hold the property in trust.

The facts and inferences therefrom in the present case, taken in a light most favorable to Appellant, do not give rise to the need to even consider a resulting trust. Respondent conveyed real estate to Decedent in exchange for Decedent paying off Respondent's debt. There was a mutual offer and an acceptance. Decedent gave good, valuable consideration in the form of paying off Respondent's debt in exchange for the property. This was not a situation where Respondent paid a third party for the property and had it deeded by that third party to Decedent. It is not a gift situation. The LEA specifically spells out the exchange of consideration.

V. THE LOWER COURT ERRED IN FINDING THAT DECEDENT DID NOT PROVIDE ANY CONSIDERATION TO RESPONDENT AT THE TIME OF TRANSFER WHEN DECEDENT OBTAINED A NOTE AND MORTGAGE IN HER NAME TO PAY OFF RESPONDENTS DEBT?

As mentioned previously the Lower Court erroneously found that the Note and Mortgage were executed subsequent to the deed. See Ct. Order II, p. 9. The Note and Mortgage do have a November 15, 2012 date. However, a review of the recording data found on the Mortgage shows that the Mortgage was recorded immediately after the Deed on November 14, 2012. The Deed dated November 14, 2012 was recorded with the Beaufort County ROD in book 03190, page 2752-2753, on November 14, 2012 at 4:24:45 PM. See Krane Affidavit, Ex. A. The Mortgage was recorded in the same book 03190, and the immediately succeeding pages, pages 2754-2762, the same date and time – November 14, 2012, at 4:24:45 PM not November 15, 2012. Id., Ex. C. It would have been impossible to record an unsigned mortgage on November 14, 2012. Likewise, the Note also had to have been signed on November 14, 2012 because the Mortgage, recorded on the same day as the Deed, references Promissory Note No. 7712136 which is the Note the Decedent signed. Id. The Lower Court used this erroneous finding to rule that the Decedent did not give anything of value at the time Respondent transferred the property to Decedent. Respondent would not have deeded the property to Decedent if Decedent did not pay off his existing note and mortgage, and Decedent would not have paid off the Respondent's note and mortgage unless Respondent put the property in her name. Further, she could not have mortgaged the property unless she had full and complete ownership of the property. Because the Lower Court is in error as to this key factor, that Decedent did not pay anything for the property at the tme of transfer, Summary Judgment for Respondent should be reversed.

Further there is no evidence that M. Tims paid for the property when it was transferred or after it was transferred to the Decedent. On November 14, 2012, the date of the transfer of

property, there was no consideration paid by Respondent M. Tims for the property. See Anderson v. Architectural Glass Construction, Inc. (In re Pfister), 749 F.3d 299 (4th Cir. 2014) (finding on the date of purchase, there was no commitment of the claimant to pay for the property). While M. Tims makes allegations in his affidavit that he has paid all expenses and costs and solely operates the business located on the property retaining a beneficial interest, he offers no substantiating evidence to support those claims whatsoever: no business license, no corporate or business documents, no cancelled checks, no bank statements, no receipts, no state or federal tax returns, no property tax receipts. In short, Respondent offers nothing other than his bald, unsupported allegations. His statements are contradicted by Decedent's representation, which Respondent initialed, that Decedent was an owner of the business located on the property in question and by the cancelled checks for property expenses. See Krane Affidavit, Ex. E & F. At the very least, the evidence Appellant submitted raises a question of fact that would preclude summary judgment.

Even if the evidence is that Respondent paid all of the consideration for the property, which Appellant denies, Respondent is still not entitled to a resulting trust because with the LEA the parties had a written agreement as to who would have title to the property. The "intent" of the parties is spelled out in the LEA.

In Bowen v. Bowen, 345 S.C. 243, 547 S.E.2d 877 (Ct. App. 2001) the husband contended that he had a resulting trust in his ex-wife's portion of real property held in both their names because he furnished all the consideration for the purchase and did not intend to make a gift to his wife. Id., 345 S.C. at 249, 547 S.E.2d at ___. The Court found that since the parties had an "antenuptial agreement to express their intent regarding rights in property acquired by each during the marriage, there is no need to employ ..." the presumptions associated with a resulting trust and it was necessary to "examine the plain language of the agreement to give effect to the intention of

the parties." Id., 345 S.C. at 251, 547 S.E.2d at ___. Because there was a written agreement, the Bowen Court found that the parties had a clear understanding as to their respective rights to the property and a resulting trust would not arise. Id., 345 S.C. at 250, 547 S.E.2d at ___. The antenuptial agreement in Bowen held that the property acquired by a party during the marriage remained that party's separate property, the property was the wife's property and the husband was not able to claim a resulting trust, even though he paid the consideration. Since the LEA in the present case spells out that Cloverdale will be deeded to Decedent and spells out when it might be returned to Respondent and under what circumstances, there is no need to employ resulting trust presumptions to determine the parties' intent.

The LEA states that the document contains "the entire agreement of the Parties and all oral negotiations [are] merged herewith." See Krane Affidavit, Exhibit A (emphasis added). "A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App.1984); see also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:21 (4th ed.1999); Black's Law Dictionary 880 (9th ed.2009) (defining an integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract."). "The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing." Wilson, 281 S.C. at 266, 315 S.E.2d at 134.

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." Davis v. KB

Home of South Carolina Inc., 394 S.C. 116, 127, 713 S.E.2d 799, 805 (Ct. App., 2011) aff'd in part and vacated in part on other grounds Davis v. KB Home of South Carolina, Op. No. 2014-MO-004 (S.C. 2014), quoting Gilliland v. Elmwood Props., 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990); see also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:1 (4th ed.1999) (explaining the parol evidence rule "prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing"). The parol evidence rule is particularly applicable where the written instrument contains a merger or integration clause. Davis v. KB Home of South Carolina Inc., 394 S.C. 127 – 128, 713 S.E.2d 805.

Furthermore, when the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the writing is silent as to the particular term sought to be established. Id. at 128, 713 S.E.2d at 805; U.S. Leasing Corp. v. Janicare, Inc., 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988); see also Blackwell v. Faucett, 117 S.C. 60, 65, 108 S.E. 295, 296 (1921) (noting if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Davis v. KB Home of South Carolina, Inc., 394 S.C. at 127, 713 S.E.2d at 805 quoting Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). "The court is without authority to consider parties' secret intentions ...." Davis v. KB Home of South Carolina, Inc., 394 S.C. at 127, 713 S.E.2d at 805, quoting Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009).

Even if the LEA with its merger clause is not enough to establish the parties' intent, the other documents and the representations made therein, taken in a light most favorable to Appellant show or at the very least, infer an intent to have the Decedent have a vested and marketable title in the property. There is the Deed by which Respondent conveyed Cloverdale to Decedent and in which Respondent M. Tims stated that he would "warrant and forever defend all and singular the said premises unto the said Grantee ... against the Grantor ... and against every person whomsoever lawfully claim or to claim, the same or any part thereof." See Krane Affidavit, Ex. A (emphasis added).

Respondent M. Tims, by conveying title to Cloverdale with the warrant of title, represented that the Decedent had the right to enjoy the land and that her ownership was free from all encumbrances which would include a claim of a resulting trust. Black's Law Dictionary defines "warranty deed" as a "[d]eed in which grantor [M. Tims] warrants good clear title. Conveying title with a warrant is "[t]o stipulate by an express covenant that the title of a grantee shall be good, and his possession undisturbed." Blacks Law Dictionary 1421 (5th Ed.1979). "The usual covenants of title ... [include] right to convey, freedom from encumbrances and defense of title as to all claims." Black's Law Dictionary 1425 (5th Ed. 1979) "A South Carolina general warranty deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) that the seller is seized in fee; (2) that he has a right to convey; (3) that the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) that the land is free from all encumbrances; and (5) for further assurances. The first and second covenants have the same effect as the third and fourth covenants." Morris v. Lain, 176 S.C. 310, ___, 180 S.E. 206, 208 (1935); Martin v. Floyd, 317 S.E.2d 133, 136, 282 S.C. 47 (S.C. App., 1984). M. Tims has publicly proclaimed that the Decedent had good clear title to the property and the right to convey it to

others. In fact, he is obligated under his warranty deed to defend it against S. Tims' and his own claim that it the property is held in a resulting trust.

Respondent transferred the property to the Decedent so that the Decedent could obtain a loan in her name to pay off the Respondent's debt. See Krane Affidavit, Ex. A. This required that she have the entire equitable interest in the property. The LEA shows that Respondent was aware that Decedent was obtaining a loan in her name based on the representation that the property was titled in her name and her property. See Id. Respondent cannot now legitimately argue that he was misleading or defrauding the Mortgagee PSB when he titled the property in Decedent's name.

Looking at the LEA, the only provision for a return of the property to M. Tims is or was "[u]pon the acquisition of the contract of sale of the premises, [the Decedent] agrees to deed the premises back to [Respondent M. Tims] so that there will be no capital gains on the sale of the property as Son's primary residence." See Krane Affidavit, Ex. A (emphasis added). The property expressly was to only be deeded back upon the parties acquiring a contract for the sale of the premises. M. Tims concedes this in his Answer and Crossclaim. See M. Tims' Answer and Crossclaim, para. 33. M. Tims' re-acquisition of the property was not automatic, but contingent on acquiring a contract for sale of the property. And even if Respondent did receive the property back upon acquiring a contract to sell the property, it was only so that it could be sold as residential property, and the parties would "avoid capital gains tax". See Krane Affidavit, Ex. A. There was no intent to deed it back Respondent otherwise or for an otherwise unconditional return of the property.

Without obtaining a contract to sell the property, M. Tims' could not, under the terms of the LEA, force the Decedent to deed the property back to him. If Respondent had approached Decedent while she was alive and demanded the property back, Decedent had a complete defense

in relying on the LEA to refuse to deed the property back without a pending contract for sale of the property. Further, assuming solely for the sake of argument that M. Tims did acquire a contract for sale while the Decedent was alive or within the statutory period set forth in S.C. Code § 62-3-803, if the Decedent refused to deed the property back per the terms of the LEA (also assuming that she was paid in full for her expenses, etc.), M. Tims' remedy would be for breach of the LEA.

M. Tims contends that he conveyed legal title to Cloverdale property to the Decedent for no consideration. However, the facts and inferences therefrom, taken in a light most favorable to Appellant, show the Decedent paid off M. Tims' Note and Mortgage and executed a Note and Mortgage in her name to satisfy the debt M. Tims' owed on the property. PSB extended Decedent credit to Decedent based on Respondent's and Decedent's assertations that Decedent owned the property.

Taking the facts and inferences arising therefrom in a light most favorable to the Appellant, there is no way that a court could plausibly find that a resulting trust existed by clear and convincing evidence. Thus, the circuit court order granting summary judgment to respondents on their claim that there was a resulting trust must be reversed.

VI. THE LOWER COURT ERRED IN DENYING APPELLANT THE RIGHT TO A JURY TRIAL ON HER DEFENSES TO RESPONDENT'S LEGAL CLAIMS OF BREACH OF FIDUCIARY DUTY.

Pursuant to 6th Amendment of the United States Constitution and Article I, § 14 of the South Carolina Constitution, the Appellant is entitled to a jury trial. Appellant timely requested a jury trial when she filed her answer and crossclaims and counterclaims. In response to those crossclaims against M. Tims', Tims filed counter crossclaims alleging that Appellant breached her

fiduciary duties to the Estate and to the other heirs. See M. Tims' Answer and Crossclaims, para. 21 – 23. Appellant denied these claims. See Appellant's Reply.

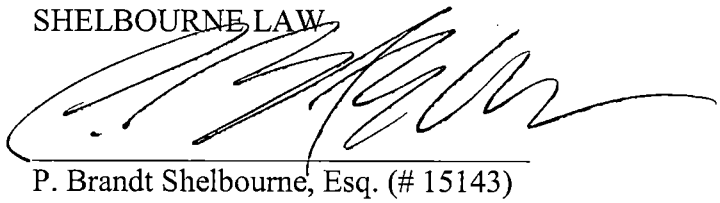
Respondent's allegation that Appellant has breached her fiduciary duties is an action at law and as such, Appellant is entitled to a jury trial on actions at law. The Court erred in focusing solely on the permissive nature of Appellant's claims rather than on the allegations against her. As such, the Lower Court's grant of Summary Judgment to Respondent on Appellant's request for a jury trial should be reversed and Appellant allowed a jury trial as to the breach of fiduciary duty claims.

CONCLUSION

Based upon the aforementioned arguments, the Lower Court's denial of Summary Judgment to Appellant should be reversed and Summary Judgment granted to the Appellant and the lower Court's Summary Judgment against Appellant on Respondent's Motions should be reversed.

RESPECTFULLY SUBMITTED,

SHELBOURNE LAW



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January 4, 2019

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No.: 2017-CP-07-01180

In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent,

Samuel H. Tims, individually and as Co-Personal Representative of

the Estate of Harriet Kathleen Tims,..... Petitioner,

vs.

Michael Tims, individually and as Co-Personal Representative of the

Estate of Harriet Kathleen Tims, ...Respondent,

and

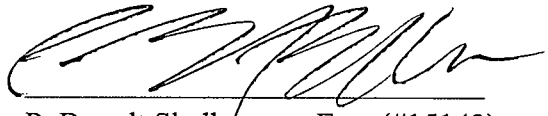
Deborah T. Krane, individually and as Co-Representative

of the Estate of Harriet Kathleen Tims, ...Appellant.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Initial Brief on Michael Tims by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2019 addressed to his attorney of record Mills Morrison, Jr. Esq., Law Offices of Darrell Thomas Johnson, Jr. LLC, P.O. Box 1125, Hardeeville, SC 29927 and Samuel Tims, addressed to 169 Jasmine Hall Road, Seabrook, SC 29940.

SHELBOURNE LAW



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January 4, 2019

Jenny Abbott Kitchings, Clerk
S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent*
Appellate Case No.: 2018-001605
Case No.: 2017-CP-07-01180
Our File No.: 06529

Dear Ms. Kitchings:

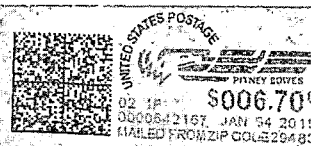
Enclosed please find an original and one (1) copy of the Initial Brief of the Appellant along with a Proof of Service for the Initial Brief. Also enclosed, please find an original and one (1) copy of the Designation of Matter to be Included in the Record on Appeal by the Appellant along with a proof of Service. Please file same and return a copy in the self-addressed stamped envelope provided. Thank you for your assistance in this matter.

With best regards, I am

Best regards,

P. Brandt Shelbourne

Enclosures
cc:
Mills Morrison, Jr. Esq. (via U.S. Mail)
Samuel Tims (via U.S. Mail)
Client (via email)



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