THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

Opinion No. 2018-UP-365 (S.C. Ct. App. Filed Sep. 19, 2018)

In RE: Estate of Norman R. Knight, Jr., (deceased), and Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Petitioners,

v.

Beatrice A. Whitten, as a Special Administrator, and Chloe Knight-Tonney, Claimant, Respondents,

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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 December 13, 2018.

QUESTIONS PRESENTED

1. Whether S.C. Code Ann. 62-3-806(b) claim filed in Probate Court after 1985 is legal without filing and serving a Summons.

2. Whether a Person who is not a Qualified Elector of the County where a probate court matter is properly located can serve as a Probate Court judge for that county in any capacity.

3. Did the trial court commit an abuse of discretion prejudicing Petitioners' right to a fair trial by quashing a certain subpoena and not unredacting a certain letter?

4. Whether Respondent Knight-Tonney's S.C. Code Ann. 62-3-806(b) claim is an equitable action subject to de novo review and other equitable principles.

5. Whether the Lower courts in this case failed to recognize S.C. Code Ann. 62-1-308(c) and its Automatic Stay.

6. Whether conscious, intentional failure to disclose financial arrangements to Mildred Knight as required by court appointment and equitable principles is conduct substantiating Fraud in the Inducement to Enter a Contract.

7. Whether lower courts allowed Respondent Knight-Tonney's claim against the greater weight of the evidence.

8. Whether Respondent Knight-Tonney's creditors' claim was timely filed as required by S.C. Code Ann. 62-3-801 and 62-3-803.

QUESTIONS PRESENTED
(Cont.)

9. Whether lower courts erred in holding that Chloe Knight-Tonney satisfied the legal requirements for the case-in-chief.

10. Whether, in a probate court matter, money given as Attorney Fees in a family court matter can be claimed in repayment as Attorney Fees where the actual party died during the litigation with no family court order awarding the deceased party Attorney Fees and be paid with full interest on the judgment herein.

11. Whether Special Administrator who fails to regard the intent of the Decedent's will is qualified to manage the affairs of the Decedent's Estate.

STATEMENT OF THE CASE

In 2004, relations between Norman R. Knight, Jr., Mildred C. Knight, and their daughters, Chloe Knight-Tonney and Linda Jones became adversarial. In 2004, Mr. and Mrs. Knight revoked their Power-of-Attomey to their daughters. In 2004, the Charleston County Department of Social Services investigated the Knight home pursuant to allegations of elder abuse. In 2004, the investigation was terminated and the allegations were classified as unfounded (R.p.iii-8.36). Relations between the parties continued to deteriorate, becoming litigious and contentious. While an appeal was pending in the Circuit Court, Mr. Knight was removed from the home in 2006. He died in a nursing home on March 2008.

On January 20, 2009, Respondent Knight-Tonney filed a claim for reimbursement of moneys expended allegedly for the care of her father, Norman R. Knight, Jr. The Special Administrator, Beatrice E. Whitten, disallowed the claim and on or about April 20, 2009, Respondent filed a petition to allow the claim. After several years of litigation and appeals, on November 28, 2012, Beaufort County Probate Judge, Kenneth E. Fulp, Jr. was appointed Special Probate Judge for Charleston County, exclusively for the Estate of Norman R. Knight Jr.

On May 29, 2013, Petitioners filed a Summons and Complaint seeking the removal of the Special Administrator. On July 17, 2013 the initial set of motions were argued and an order filed on July 29, 2013.

Petitioners were the only movants; all motions were denied. On December 13, 2013, Petitioner filed and served an Amended Complaint to Remove the Special Administrator. Numerous pre-trial motions were filed and argued. Petitioner filed two series of Motions to Dismiss, Motion to Compel Discovery with issues of redaction, Motion to Amend Complaints

STATEMENT OF THE CASE

(CONT.)

and other motions regarding venue, all filed in pre-trial.

On December 17, 2013, a motion hearing by phone was held and an order issued on December 23, 2013. This hearing was significant because the Court held certain documents had to be unredacted to comply with Petitioners' motion to Compel. A second set of pre-trial motions were argued by telephone on January 6, 2014 and an order was filed on January 17, 2014. Petitioners' Motion to Amend Special Administrator's Complaint was granted. Bishop Gadsden withdrew its claim.

On April 22, 2014, Judge Fulp quashed Petitioners' subpoena duces tecum to the Morgan Stanley Company, Morgan Smith-Barney. The subpoena required Morgan Stanley to provide information on the "deposit and withdrawal activity/records including identity of depositors and payees for the years 2004 through 2009 involving account holders: Linda Jones, Chloe Knight-Tonney, and Queenie."

This matter was tried before the bench in non-jury for two separate days, March 31, 2014 and April 28, 2014. Including post-trial proceedings, i.e. written closing arguments, a final order was filed on July 11, 2014. The trial court ordered the Estate to pay Knight-Tonney $23,914.73 plus interest from May 2009.

After post-trial motions, a **Notice of Intent to Appeal** was filed on September 3, 2014 by the Estate of Mildred C. Knight, and Bobby Knight. This is an appeal of the orders of Special Probate Judge for Charleston County, Kenneth E. Fulp, Jr. and Common Pleas Court Judge, J.C. Nicholson, Jr. Judge Nicholson denied a **"Motion to Appeal"** on January 27, 2016 although Petitioners did not file a "motion to appeal." Post-trial motions were denied with Notice of Entry of Judgment being received by Petitioners on March 11, 2016.

The Court of Appeals affirmed the judgment of the circuit court. In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Petitioners, v. Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents. CASE NO. 2014-CP-10-5355, Appellate Case No. 2016-000748. Petitioners seek a writ of certiorari to review that decision.

ARGUMENTS

I. LOWER COURTS ERRED BY ACTING ON A PETITION FILED AND SERVED WITHOUT SUMMONS.

Since 1985, the South Carolina Rules of Civil Procedure, through Rules 1 and 81, and pursuant to S. C. Code sec. 14-23-280 and sec. 62-1-304, have always required the filing of a summons and complaint in Probate Court matters. See, In Re: Estate of Timmerman, 331 S.C. 455, 502 S.E.2d 920, 922 (Ct. App. 1998); Weeks v. Drawdy, 495 S.E.2d 454 (Ct. App. 1997); Truluck v. Synder, 362 S.C. 108, 606 S.E.2d 792 (Ct. App 2004); LaFaye v. Timmerman, 502 S.E.2d 920 (Ct. App. 1998). See Summons Subcommittee: Probate, Estate Planning and Trust Section, Summons in Probate Court, p. 5-7 (January 21, 2010) (R. p. 283). "In South Carolina , a civil action is commenced by filing and serving a summons and complaint. Until an action is commenced, there is no proceeding pending and, thus, nothing to refer." Chabek v. Nationwide Mutual Fire Ins. Co., 303 S.C. 26,28, 397 S.E.2d 786,787 (Ct. App. 1990). Respondent Knight-Tonney did not file and serve a summons with her petition.

Respondent, Chloe Knight-Tonney, did not commence an action in the probate court and nothing that occurred has legal substance. Ms. Knight-Tonney's claim is **void ab initio**. Chalek v. Nationwide Mutual Fire Ins. Co., id. Please note that Petitioner filed and argued the commencement issue before Judge Fulp (R.p.23, L. 10), and raised the issue in post- hearing motions before Judge Fulp issued his rulings on the challenged petitions. The motions were denied. (R.p. 24, L.19-25).

" A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely voidable. 46 AmJur 2d, Judgments 331 (1994). Generally, a judgment is void only if a court acts without jurisdiction. Ross v Richland Co., 270 S.C. 100, 240 S.E.2d 649 (1978).

Irregularities which do not involve jurisdiction do not render a judgment void. Genobles v. West. 23 S.C. 154 (1885)." See, Thomas & Howard Company Inc. v. T.W. Graham and Co., 318 S.C. 286, 457 S.E.2d 340 (1995). " A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court.

Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907).

Proceedings in the Probate Court that are taken without the jurisdiction of the court are **void ab initio** and such proceedings are not adjudications that can bind any party to the action. See Bradley, v. Rodelsperger, 17 S.C. 9 (1882). In Earle v. Cureton, 13 S.C. 19 (1880), the court observed that the Defendant, Cureton, had not been summoned to answer in the matter regarding his obligation as surety, then held that " Under such circumstances the judgment is wholly void...The obligation of Cureton in this case did not waive the right of defense or furnish any authority for taking a judgment against him..."

In the United States Supreme Court case, Elliott v. Perisol, 1 Pet. 328, 340, 26 U.S. 328, 340, 7 L.Ed. 164 (1828), the court ruled as follows ".... But if [a court] acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification, and all persons concerned in executing such judgments or sentence are considered in law as trespassers." " The language of Rule 5(d) is clear: the summons and complaint must be filed prior to their service."

McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994) (per curium).

II. THE LOWER COURTS ERRED BY ALLOWING THE CHARLESTON COUNTY PROBATE COURT TO ACT WITHOUT A QUALIFIED ELECTOR OF CHARLESTON COUTY SERVING AS THE SPECIAL JUDGE.

S.C. Code Ann. 14-23-1040 sets a clear standard for who may serve as a judge in the probate court: no person is eligible to hold the office who has not become a qualified elector of the county in which he is to be a judge.

The probate court allows for lay person judges and persons who are attorneys to serve as probate court judges. According to the Attorney General, an Associate Probate Judge must be a qualified elector of the county in which he or she is to be a judge. S.C. Op. Atty. Gen. (August 30, 2010) 2010 WL 3505049. The availability of other qualified electors to act as probate judges is the core of co-existence between the statutes involved in this issue. See, Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d. 96 (1991) (legislative repeals by implication will not be recognized, insofar as two statutes are capable of co-existence " absent a clearly expressed congressional intention to the contrary"); Palmettonet, Inc. v. S.C. Tax Com'n., 318 S.C. 102 ,456 S.E.2d 385 (1995).

Beaufort County Probate Court Judge Kenneth E. Fulp, Jr. is a Beaufort County resident. The appointment of Judge Fulp to the Probate Court for Charleston County expands his office to another county. Dual office holding is patently incorrect. Richardson v. Town of Mt. Pleasant. 350 S.C. 291 (2002). Judge Fulp cannot sit as a Special Probate Judge for Charleston County, and his rulings and authority are null and void.

"A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid.

It is clear and well established law that a void order can be challenged in any court." Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907).

The Law provides that once State and Federal jurisdiction has been challenged, it must be proven. Main v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 55 (1980).

Petitioners did not concede the venue issue. Judge Fulp agreed to hold all hearings in Charleston County. The venue issue was raised in 2010 before one of the disqualified judges. Judge Blunt was replaced after the orders of the disqualified judges were vacated. The orders issued by Judge Fulp and Judge Blunt must be vacated.

III. THE TRIAL COURT COMMITEED AN ABUSE OF DISRETION AND PREJUDICED APPELLANTS' DEFENSE BY QUASHING A TRIAL SUBPOENA AND ADMITTING AN UNREDACTED LETTER WITHOUT DISCLOSING THEIR CONTENTS

A reviewing court may find abuse of discretion where a Petitioner shows that the lower court's conclusion is based upon an error of law or without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Judge Fulp committed an abuse of his discretion by supporting Respondent Knight-Tonney's efforts to hide relevant, discoverable material. This material would have determined the origin and ownership of funds used to pay Mr. Knight, Jr's expenses. The subpoenaed information was scheduled for presentation and delivery on the day of the final hearing. At the second hearing, Petitioner Bobby Knight testified that "Queenie" was Louise Reynolds who owned savings bonds worth $180,000.00, and that she lived with her partner who was equally endowed, and who predeceased her, Mr. Knight, and Mrs. Knight.

In Knight-Tonney's initial responses to Discovery Requests, she redacted the " Queenie" name from the subject items (R.p. 303-306). After arguing Motions to Compel, Knight-Tonney was required to reveal all the text on the checks. The "Queenie" name was

revealed. At trial, Knight-Tonney did not want to discuss Louise Reynolds aka " Queenie" (R.p. 74-75). The trial court sustained her efforts during the hearing and Petitioners sought to obtain the information by trial subpoena. The Trial court quashed the subpoena without viewing the material.

During the Motion to Compel arguments, the trial court ruled that a certain letter dated October 16, 2007 (R.p.105) could not be redacted because of the attorney-client privilege. There is no attorney-client privilege in a letter written to non-clients or letters including clients and non-clients. Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47(Ct. App. 1984). Moreover, Rule 26(b)(1) SCRCP says, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The letter was offered to establish the amount of money Respondent Knight-Tonney wanted to be reimbursed. Without privilege, everything about this letter is discoverable. " The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Cel Products, LLC v. Rozelle, 357 S.C.125, 132, 591 S.E2d 643, 646 (Ct.App. 2004). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 186, 708 S.E.2d 787, 795 (Ct. App. 2011) and " unless the party that failed to comply establishes a lack of prejudice, reversal is required." Conway v. Charleston Lincoln Mercury, Inc., 363 S.C. 301,308, 609 S.E.2d 838, 842 (Ct.App. 2005). Even now, Respondent is asking the Court to guess at the content and import of redacted information that is clearly relevant and would give information on the value Of this claim. "The South Carolina Rules of Civil Procedure expressly require the disclosure

the nature of evidence prior to any claim of privilege so that other parties may assess the applicability of the privilege or protection." Samples v. Mitchell, 329 S.C.105, 495 S.E.2d 213, 216 n. 5 (Ct. App. 1997). The disclosure of the information sought by Petitioners could lead to evidence that impacts this claim. The trial court's denial of disclosure has no evidentiary support.

Without seeing the "quashed" material and the information redacted in the October 16, 2007 letter (R.p. 105), Petitioners' defense is prejudiced. The trial court's rulings had no evidentiary support. Petitioners' cite to Knight v. Lee, 262 S.C. 17, 202 S.E.2d 19 (1974) was used to support our contention on both " pro forma machinations," i.e. withdrawing the " Queenie" claim (R.p. 19-22) (R.p. 303-306), and redacting the information in the October 16, 2007 letter. (R.p. 105).

Petitioners cited Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App 2003) to support our contention of an error of law. Crawford, id., requires the party seeking to quash a subpoena to move for a protective order contemporaneous to the motion to quash. Respondent did not file a motion for a protective order.

Please note that the Respondent is asking for $9,283.06 in attorney fees and a great portion of that was for the family court matter. (R.p. 111, 107, 10). The uncontroverted family court attorney fee total is $7,695.00.

Petitioners should be allowed access to the subject material and the opportunity to pursue the issues accordingly. Affirming the failure to unredact documents, and quashing the subpoena prevented Petitioners from receiving a fair trial. Knight v. Lee, 262 S.C. 17, 202 S.E.2d 19 (1974).

IV. RESPONDENT KNIGHT-TONNEY'S CLAIM IS AN EQUITABLE ACTION SUBJECT TO DE NOVO REVIEW AND OTHER EQUITABLE PRINCIPLES.

Chloe Knight-Tonney's claim is an equitable action. "This action for money paid was the appropriate action when the plaintiff's claim was in respect of money paid, not to the defendant, but to a third party, from which the defendant had derived a benefit. Historically, the plaintiff had to show that the payment was made at the defendant's request : but we shall see that the law was prepared to "imply" such a request on certain occasions, in particular where the payment was made under compulsion of law or, in limited circumstances, in the course of intervention in an emergency on the defendant's behalf, which in this book we shall call necessitous intervention" Robert Goff & Gareth Jones. The Law of Restitution 3 (3d ed. 1986), (Harvard Law Review Association 1969). The words 'reimbursement' , 'restoration', and 'restitution' are strong synonyms and carry the same meaning and implications for "returning status". See, In Merriam-Webster's dictionary(11th ed), Springfield, MA, Merriam Webster; Bryan A. Garner, Black's Law Dictionary at 1290, 1315 (10th ed. 2014).

Knight-Tonney testified that she wanted to be reimbursed. (R.p. 81: tr. p. 174 L. 7-13; R.p.82: tr.p. 182 L. 13-19). Moreover, Tonney submitted an exhibit entitled reimbursement breakdown. (R.p. 83: tr. p. 173, L 18-19). During oral argument in the Circuit Court, Claimants' attorney repeatedly said that his client wanted to be reimbursed. (R.p. 57:L.24). Respondent Knight-Tonney gave notice only to the Conservator and the Guardian that she would be seeking restitution of funds used for expenses resulting from her father's removal (R.p. 76; tr. p. 22; 77: tr. p. 31; 78: tr. p. 119; 79-80: tr. p. 84-83). Knight-Tonney always Initiated this aid. Characterization of an action as equitable or legal depends on the 'main purpose' in bringing the action. Ins. Fin. Services., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293,

247, S.E.2d 315, 318 (1978). Restitution is an equitable remedy. Wallace v. Milliken & Co., 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991); restitution and disgorgement are equitable remedies. See, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215-16, 122 S. Ct. 708 (2002)."The essential elements of a quasi-contract are : (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value." 66 Am. Jur. 2d Restitution and Implied Contracts Section 4 (1973); Anno. 62 ALR. 3d 288, 294 (1975); Ellis v. Smith Grading and Paving Inc., 294 S.C. 470, 366 S.E.2d 12 (1988). Webb v. First Federal Sav. & Loan Ass'n of Anderson, 300 S.C. 507, 388 S.E.2d 823 (Ct. App. 1989) (citing 66 Am. Jur.2d Restitution and Implied Contracts Section 2 (1973)).

The decedent in the Howard case was far different from Norman R. Knight's circumstances, Howard, Matter of., 315 S.C. 356, 434 S.E.2d 254 (1993). The Howard case involved executed promissory notes with interest obligations and other loans, all obtained by the decedent during his lifetime through his bargaining and business behaviors.

Generally, in matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity prevail. Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253 (C.A.S.C. 1984).

V. LOWER COURTS FAILED TO UPHOLD S.C. CODE SEC. 62-1-308 (c) AND THE AUTOMATIC STAY.

When an appeal, according to the law, is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. S.C. Code Sec. 62-1-308(c)(1999). The Probate Court Order on appeal at the pertinent time was the Order changing the status of Mildred C. Knight, the decedent's widow. Norman R. Knight, Jr.

was alive at this time and the order under appeal was issued by the therapeutic division of the Charleston County Probate Court (R.p. 163). The status of Mildred C. Knight was front and center as it relates to the Automatic Stay. All parties were aware of the appeal. The stay permitted her to remain as her husband's guardian. There was another order issue by Circuit Court Judge Roger M. Young that clarified the authority and status of the guardians. (R.p. 219-220). Mildred Knight was to remain both Guardian and Conservator pending the appeal. (R.p. 219).

The Appeal was argued in the fall/early winter of 2005 and a decision was issued in January 2006 dismissing the appeal but a timely Motion for a New Trial was filed and served on all parties. Respondent Tonney knew that the matter was under review as indicated by her Motion to Dismiss. (R.p.174). The automatic stay was still in place at the time Respondent Tonney and Kaufman acted to remove Mr. Knight from the home. (R.p.91-92: tr. p. 124 L. 22-125 L. 11).

According to the response to a letter from the Guardian Ad Litem to the Circuit Court Judge, the Guardian ad Litem was advised to prepare a Rule to Show Cause (R.p. 170), an approach more consistent with the automatic stay. There were two guardians hovering around the case at that time, but according to the October, 2005 circuit court order, the Guardian (Kaufman) who participated in removing Mr. Knight from his home was relieved of any authority during the appeal. (R.p. 219). A series of exhibits substantiate the appeal status. (R.p. 169-174).

Walter Kaufmann was not authorized or recognized to perform any functions during the pending appeal. (R.p 219-220). Further, Judge Young directed that any conflicts with his order or previous orders "should be cause for a Rule to Show Cause..."

Judge Young directed the Rule to Show cause when contacted by the Guardian ad Litem (R.p.170). All of Kaufmann's actions from that point and during the appeal were illegal, null, and void. Turner v. Malone 24 S.C. 398, 401-02 (1885);

The behavior of Kaufman and Knight-Tonney created the added expense to Norman R. Knight, Jr's estate. Kaufmann and Knight-Tonney moved Mr. Knight on allegations that were unsubstantiated and in some aspects contrary to professional medical opinion. (R.p. 157-158, 64-65). These failures by Respondent Knight-Tonney cannot be disregarded.

VI. CONSCIOUS, INTENTIONAL FAILURE TO DISCLOSE FINANCIAL ARRANGEMENTS TO MILDRED KNIGHT AS REQUIRED BY COURT APPOINTMENT AND EQUITABLE PRINCIPLES IS CONDUCT SUBSTANTIATING FRAUD IN THE INDUCEMENT TO ENTER A CONTRACT.

In this case, our Court of Appeals and the trial judge overlooked Knight-Tonney's, the alleged guardian, and conservator's failure to disclose pertinent, material details to Mrs. Knight, i.e. suppression of the truth.

" It is fundamental that a suppression of truth may constitute fraud as much as a false suggestion, provided that it is material to the transaction. A distinction must be drawn, however, between passive and active concealment. The former involves mere silence or failure to disclose a fact, while the latter involves a purpose or design. It is only when there is a duty to reveal the fact that mere non-disclosure constitutes fraud." 14 Fla. Jur. Fraud and Deceit, sec. 27, pp. 555-556; Franklin v. Brown, 159 So.2d 893 (Fla.App., 1964). (See Extrinsic Fraud: Extrinsic Fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. " Hilton Head Ctr., Inc., v. Pub. Serv. Comm'n, 294 S.C. 9,11, 362 S.E.2d 176, 177 (1987); Chewning v. Ford Motor Co., 346 S.C. 28, 550 S.E.2d 584 (Ct.App. 2001).

Extrinsic fraud " refers to frauds collateral or external to the matter tried such as bribery or other misleading acts which prevent the movant from presenting all of his case or deprives one of the opportunity to be head." H. Lightsey & J. Flanagan, South Carolina Civil Procedure 407 (2d ed. 1985) at. 486; Chewning id. at 34).

Respondent Knight-Tonney, the alleged Guardian, Walter Kaufmann, and the Conservator, Family Services, Inc., by and through their agent, Iris Albright, misled the wife, Mildred C. Knight, into accepting the arrangement of care for Mr. Knight. The appointees made no effort to notify Mrs. Knight of any pertinent details despite their legal obligations to involve her in these decisions. (R. p. 159-160); (R.p. 61, L.19-63, L.4); (R.p. 296 – 297).

Respondent Knight-Tonney did not share her plan with Mrs. Knight (R.p. 62,L.14-20). The conduct of Knight-Tonney, the alleged Guardian, and Conservator was their false representation. M.B. Kahn Const. Co. v. South Carolina Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). See, Restatement (Second) of Contracts 161 and 173 (when the parties are in a fiduciary relationship, there is a duty to disclose material facts; failure to do so may constitute Fraud). The three actors knew Ms. Knight would contest this arrangement and they acted to avoid any challenge. Mr. and Mrs. Knight were induced into this agreement.

The failure to disclose these material facts prevented Petitioners from contesting the arrangements at the time of conception and eliminated Petitioners' court appearances on those issues, i.e. deprived of the opportunity to be heard.

VII. LOWER COURTS' ALLOWANCE OF RESPONDENT KNIGHT-TONNEY CLAIM IS AGAINST THE GREATER WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION

This claim is not an action at law, but a claim for equitable relief entitling the Petitioner to de novo review. A reviewing court may find abuse of discretion where a Petitioner shows that the lower courts' conclusion is based upon an error of law or without evidentiary support.

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). In Judge Young's Order to Stay Proceedings Pending Appeal, he ruled as follows: " Violations of previous orders or the terms set forth in this order, that shall be cause for a Rule to Show Cause" (R.p. 220). Respondent Knight-Tonney and the others authored unsubstantiated allegations in a separate new action and created these unnecessary costs. (R.p. 84 L. 13-24).

In 2006, Respondent Knight-Tonney and Kaufman alleged abuses (Supp.R.p. 28, L.14-23) and there was no finding of abuse. As to Kaufman's allegations of abuse, his testimony at trial is not credible; Kaufman was appointed by order of the probate court on August 25, 2005 and that order was appealed on September 1, 2005. (R.p. 163).

The automatic stay suspended Kaufman and remains in place until a decision on the Motion for New Trial filed by Petitioner Bobby Knight on January 30, 2006. (R.p. 161-162),(R.p.169). Kaufman had no obligation to visit and did not visit, as he was instructed by Judge Roger Young in open court on September 30, 2005. (R.p. 92, L. 12-18), (R.p. 219). Kaufman's testimony on March 31, 2014, and before Judge Curry on January 31, 2006 is not supported by the facts existing at the time of his exparte petition for an emergency order.

The de novo review will show that Mrs. Knight was not represented during the period of Mr. Knight's removal (R.p. 188–189), and because she was never informed of the arrangements to give restitution to Respondent Knight-Tonney, she was induced into cooperating with the arrangements.

The Respondent offered no evidence of abuse or neglect. Knight-Tonney offered no evidence that Mr. Knight's removal from his home was necessary for his care. Respondent Knight-Tonney offered no evidence to establish that Mr. Knight's removal from his home delivered him from death. Howard, Matter of., 315 S.C. 356, 434 S.E.2d 254 (1993).

Further, the de novo review would show that after her husband's removal, Mrs. Knight was left with no substantial income, because she was completely dependent on her husband and she had to contest the contempt of Respondent Knight-Tonney in order to maintain basic necessities (R.p. 195) (R.p. 81, L. 19-22) (Trp. 103, L. 4-6). Mr. and Mrs. Norman R. Knight, Jr. had been married for nearly sixty (60) years and Mr. Knight always was the breadwinner (R.p. 178). This relationship was no secret to the Respondent Knight-Tonney, but she totally disregarded her parents' relationship.

VIII. LOWER COURTS ERRED IN HOLDING THAT RESPONDENT KNIGHT-TONNEY'S CLAIM FOR REPAYMENT WAS FILED TIMELY

Ms. Knight-Tonney filed in the wrong county according to the order that moved the case to Dorchester County, (R.p. iii – 8.36). Ms. Knight-Tonney filed her claim in Charleston County on January 20, 2009, and then the claim was not filed or received in Dorchester County until January 22, 2009, at the earliest. (R. p. 251). See, S.C. Code Sec. Ann. 62-3-801(a), - 803(a)(2).

As a creditor, January 20, 2009 was the final day for filing claims against the estate. Knight-Tonney's claim is untimely. Phillips v. Quick, 399 S.C. 226 , 731 S.E.2d 327 (Ct. App. 2012).

IX. LOWER COURTS ERRED IN HOLDING THAT RESPONDENT KNIGHT-TONNEY HAD SATISFIED THE LEGAL REQUIREMENTS FOR CASE - IN- CHIEF

Respondent failed to establish the required foundation for properly presenting her Case-in-chief, i.e. eligibility for the relief she sought. The "case-in-chief" is the evidence presented at Trial by the party with the burden of proof. See Beck v. Clarkson, 300 S.C. 293, 387 S.E.2d 681 (1989).

The "burden of proof" is a party's duty to prove a disputed assertion, allegation or claim. See, Bryan A. Garner, Black's Law Dictionary at 190 (10th ed. 2014). To fulfill this duty **at trial** all elements of the claim must be established **at trial**. Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993) note 7 citing In re Estate of Kruger, 235 Neb. 518 455 N.W.2d 809 (1990) (in probate court, burden of proof is upon claimant against decedent's estate.) The validity of a claim upon an estate begins with the statutory requirement that the claim is (a) filed within a certain period of time, (b) delivered to specified entities and individuals, (c) presented in a particular format, (d) occurred at a point in time, (e) identified as necessary, reasonable, and beneficial, (f) and contained a particular value. These factors must be presented at trial. Defendant Tonney only presented evidence on items (d) through (f). S.C. Code Sec. 62-3-801,et seq. (1988).

The Petitioners' intent when citing S.C. Code Ann. 62-3-801. et. seq. (1980) was to refer only to Part 8, Creditors' Claims. The citation meets the standard recited in In Re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001). When including the other authority cited in the argument, Howard, Matter of , 315 S.C. 356, 434 S.E.2d 254 (1993) note 7 citing In re Estate of Kruger, 235 Neb. 518 455 N.W. 2d 809 (1990) and Stump v. Stump, 91 Md. 699, 47 A. 1034 (1900). Stump v. Stump, id., mentioned here because it is contained in the note. We do not believe Respondent Tonney was persuasive on any element mentioned and our reference to any item identified is to recognize the mere attempt.

X. LOWER COURTS ERRED BY REIMBURSING RESPONDENT KNIGHT-TONNEY FOR ATTORNEY FEES IN PARENTS' FAMILY COURT MATTER AND ALLOWING FULL INTEREST ON JUDGMENT

If Respondent Knight-Tonney was a party in a family court proceeding and died at the stage of litigation as Mr. Knight died, Knight-Tonney would be the deceased spouse in a family

court matter that was dismissed with nothing owed to her. Louthian & Merritt, P.A. v. Davis, 272 S.C. 330, 251 S.E.2d 757 (1979).

Respondent Knight-Tonney does not qualify to receive repayment of Attorney's fees involving Family Court litigation. The Family Court did not order attorney's fees to Respondent Knight -Tonney. Family Court attorney's fees in this situation are provided according to S.C. Code Ann. 20-3-145 (1979). Matter of Jennings 321.S.C.440, 468 S.E.2d 869, rehearing denied (1996) and Huff v. Jennings , 319 S.C. 142, 459 S.E.2d 886, rehearing denied, appeal dismissed (S.C. App. 1995) demonstrate the requirements for recovery of attorney's fees, i.e. Respondent Knight-Tonney is not an attorney. Attorney's fees are a peculiar item according to law. Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990).

It is well established that attorney's fees are not recoverable unless authorized by contract or statute. Jackson v. Speed, 326 S.E. 289, 307, 486 S.C.2d 750. 759 (1997). Knight-Tonney cannot meet these tests for receiving attorney's fees. There is no contract or statute that provides her eligibility for attorney's fees. Finally, judgment interest must be adjusted according to period when the judgment becomes final. Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993).

XI. BEATRICE WHITTEN SHOULD BE REMOVED AS SPECIAL ADMINISTRATOR

The Record on Appeal contains the cross-examination of Beatrice Whitten (R.p 234-236). During the testimony she testifies that the Annuity documents raised no concern for Mr. Knight's only heir. (R.p. 234). She testified to e-mailing opposing counsel and not including all counsel. (R.p 234, 236). The record shows that she disregarded a direct order of the Probate Judge (R.p 293). In Petitioners' Motion for New Trial and to Alter or Amend the Judgement filed on July 28, 2014, Petitioners expanded on the concern with how Respondent Whitten transferred ownership of a vehicle left to Mrs. Knight but somehow was delivered to his estranged grandson

(R.p. 97-99). Respondent Whitten did not have an explanation for this deviation from Mr. Knight's will. The Record substantiates that Whitten should not be the administrator for the Knight Estate. S.C. Code Ann. 62-3-703(a) (2005).

CONCLUSION

For the reasons stated, Petitioners ask the court to grant the petition for a writ of certiorari.

Respectfully Submitted,

January 14, 2019

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

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JAN 16 2019

S.C. SUPREME COURT

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

J.C. Nicholson, Circuit Court Judge

Opinion No. 2018-UP-365 (S.C. Ct. App. Filed Sept. 19, 2018)

In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Petitioners

v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents,

PROOF OF SERVICE

I certify that I have served 1 Original Petition For Writ of Certiorari, 1 Original Proof of Service, and the Unbound and Bound Appendixes, and 7 Copies on the South Carolina Supreme Court by depositing a copy to them in the United States Mail, postage prepaid, on January 14, 2019, addressed to: Daniel Shearouse, Clerk, South Carolina Supreme Court, Post Office Box 11330, Columbia, South Carolina 29211 and served the Petition For Writ of Certiorari on: Beatrice A. Whitten, Special Administrator, 1110A Queensborough Blvd., Mt. Pleasant, SC 29464; and C. Mac Gibson, Jr., 1473 Stuart Engles Blvd. Mt. Pleasant, SC 29464.

January 14, 2019

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