

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

RECEIVED
JAN 22 2019
SC Court of Appeals

Appellate Case No.: 2016-001653

William Rice Cook, III Appellant

v.

Benny Richard Phillips, Jr., and the real estate property located at 207 North Avenue, Anderson, SC 29625 TMS # 123-26-08-02 Respondent

RETURN TO PETITION FOR REHEARING OR REHEARING *EN BANC*

The Appellant either mistakenly or has intentionally, misread the quote from the case of Halbersberg v. Berry 302 S.C. 97, 106, 394 S.E. 2d 7, 13 (Ct. App. 1990). The Appellant misinterprets the Court's ruling in Briggs v. Richardson 273 S.C. 376, 256 S.E. 2nd 544 (1979). The Appellant cites the following from Halbersberg v. Berry 302 S.C. 97, 106; 394 S.E. 2nd 7, 13 (Ct. App. 1990) as his basis for claiming a constructive trust.

“A constructive trust arises against one who by fraud, actual or constructive, by commission of a wrong, or by any form of unconscionable conduct artifice... or questionable means and against good conscience, either has obtained or currently holds the right to property (emphasis added) which he ought not in equity and good conscience hold and enjoy.”

There is no distinction between either “has obtained” or “holds the right” which affects the meaning of the phrase.

A constructive trust arises when the circumstances under which property was acquired (emphasis added) make it inequitable that it should be retained by the one holding legal title. Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987). Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990).

A constructive trust arises because the Defendant has, by bad acts, obtained title to property, or holds the right to property. (In the case before the Court, Phillips holds title by will of the decedent, without any actions on his part). It is the “bad act” that creates the remedy of a constructive trust, and the attempt by the Appellant to twist the words and meaning of those words, does not in actuality change the law, or the meaning of the words. The actions of the Defendant in Briggs, supra constituted a “fraud”. Therefore the argument by the Appellants is specious and is wrong.

Phillips obtained and held the right to the property by virtue of operation of law. Phillips had no input into the Will of the decedent. He did not commit any bad act, nor was he holding title by virtue of any bad act. To state that this case is similar to Briggs v. Richardson, supra is misleading, incorrect, and an outrageous interpretation of the holding in that case. The Appellant’s attempt to differentiate between obtaining and holds is specious, unreasonable, and unsound.

There is no situation before the Court, or that has been alleged by Cook, “where money [or property] has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or the violation of a fiduciary duty”. See Appellant’s Brief, page 2.

There are no bad acts committed by Phillips which led to him obtaining or holding the right to property. The right to property is the Deed of Distribution to the

property. Appellant continues to say “holds the property”. It is more properly, “ holds the right to property.” The cases quoted by the Appellant Cook have no precedential value for the legal argument asserted. The actual quote as stated in Dominick v. Rhodes 202 S.C. 139, 24 S.E. 2d 168 (1943) as opposed to that stated in Appellant’s Brief, page 3 is as follows:

“ a constructive trust will arise whenever the circumstances under which property was acquired (emphasis added) make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two (emphasis added) and provided the raising of a trust is necessary to prevent a failure of justice. So, as has been said, the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice.”

Therefore, there must be a bad act by the Defendant which results in the holding of title to the property. The only act resulting in Phillips holding the title to the property, is the will of the decedent, Claudia Harden. The misstatements of the Appellant are myriad in the Motion.

All of the cases cited by the Appellant on page 4 of the Brief contain fact situations which describe bad acts of the Defendant against whom the constructive trust is sought to be imposed. There were no bad acts by Phillips that permitted him to have title to the property in question. The Court did not overlook nor did the Court misapprehend the fact that Phillips’ acquisition of the property was without any action his part. The Court did not overlook or misapprehend the fact that Phillips legally, openly, and equitably held title to the property by the Will of the decedent and by operation of the law. The holding of this Court should stand.

II. Because Cook had an interest in the property regardless of whether Phillips held it in a constructive trust for him, the Court should have reversed as to the partition/equitable title cause of action.

Appellant's Brief attempts to define and redefine "equitable title." The allegations of the Complaint and Cook's Affidavit are full of self-serving conclusions, not facts. The Defendant appears to be attempting to relate his claim of "equitable title" to an agreement which was purportedly signed by Claudia Harden. The Appellant attempts to define his right of "interest" to agreements between he and Claudia Harden which would clearly be barred by the non-claim statute, S.C. Code §62-3-801, 803 et seq. and has nothing to do in any way whatsoever with his purported action against Philips.

The Trial Court was consistently right in dismissing any attempt by this Appellant to base his claim on matters which were barred by the non-claim statute, S.C. Code §62-3-801, 803 et seq. Any action or purported cause of action that this Appellant may have had against Harden to establish his assertion of an "interest" is now and forever barred. There is and cannot be any interest in property or "equitable lien" to be established by Appellant because it would have had to have been established against Harden, who is the only person who is alleged to have had any "agreement" concerning the property, and any work alleged by the Appellant on the property, and if that in fact had existed, the Appellant Cook would have had to raise it against the Estate of Harden.

Cook continues to beat a dead horse with no basis in truth. The only injustice in the case before the Court is the wrongful allegations and acts of Cook in an attempt to assert a claim against a deceased person who cannot speak for herself. There is no injustice in dismissing the false claims of Cook in this case. The injustice would be the

opposite.

The Trial Court's holding as to the fact that the claim against Harden is barred, contains all of the precedent necessary to show that there is no substance in Cook's argument as to whether or not he acquired an interest in the property. The only "interest" that could have been acquired from Harden who is deceased and Cook's claims, if any he had against Harden, are barred by the non-claim statute (S.C. Code of Laws §62-3-801 et seq.)

- III. Because there are independent proper bases for a lis pendens in this case, the Court should have reversed the Trial Court's cancellation of the lis pendens.**
- IV. The Court appears to have misapprehended Cook's argument concerning the conversion cause of action.**
- V. Rehearing *en banc* would be proper.**

This Court properly addressed in its Order and dismissed the conversion claim. In addition, there can be no claim of any legal or equitable interest in the property based upon the fact that no constructive trust claim can arise and likewise, Cook cannot claim any equitable lien or other so-called "interest" in the property, because to do so, he would have to rely on a claim against the decedent's estate which is barred by the non-claim statute. The Appellate Court's Order succinctly addresses these issues and should stand because without an interest in the property, there can be no Lis Pendens.

Cook has no right to a constructive trust. Cook has no right or basis for an "interest" in the property. Cook has no right to file a Lis Pendens, because he does not have any interest in the property under any logical, reasonable, common sense interpretation of the law before the Court, as set forth in the Respondent's Brief and the

Order of the Appellate Court.

The Order of this Court should be upheld in its entirety. No rehearing is justified based upon the Motion. Further, the Motion on the Petition should be barred, based upon Rule 221(c).

Respectfully submitted,

MULLINAX LAW FIRM, P.A.



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ATTORNEY FOR THE RESPONDENT

January 16, 2019

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In The Court of Appeals

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R. Lawton McIntosh, Circuit Judge

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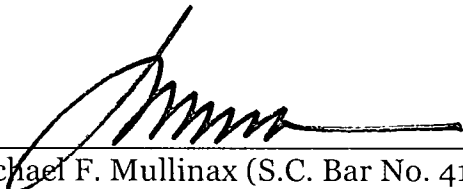
PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing or Rehearing *En Banc* in the above matter on the Appellant, William Rice Cook, III, by depositing a copy of same in the United States Mail, postage prepaid, on January 16, 2019, addressed to his attorneys of record, as follows:

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January 16, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Re: William Rice Cook, III v. Benny Richard Phillips, Jr.
and the real estate property located at 207 North Avenue,
Anderson, SC 29625, TMS #123-26-08-02
Appellate Case No.: 2016-001653

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the Return to Petition for Rehearing or Rehearing *En Banc* in regard to the above matter.

Also enclosed is my original and two copies of my Proof of Service, indicating that a copy of the Return has been served on Mr. Andrew S. Radeker, Mr. Daniel L. Draisen, and Mr. Timothy Nowacki, Attorneys for the Appellant.

I would appreciate your returning clocked copies of the above documents to me in the self-addressed, stamped envelope I have provided.

Thank you for your assistance in this matter.

With kindest regards, I am

Very truly yours,

MULLINAX LAW FIRM, P.A.

Michael F. Mullinax

MFM/lcm
Enclosures

cc: Mr. Andrew S. Radeker
Mr. Daniel L. Draisen
Mr. Timothy Nowacki