THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

William Rice Cook, III,.....Appellant,

v.

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

REPLY TO RETURN TO PETITION
FOR REHEARING OR REHEARING *EN BANC*

The Appellant, William Rice Cook, III, hereby respectfully submits this reply to Respondent Phillips (hereinafter "Phillips")'s return to Appellant (hereinafter, sometimes, "Cook")'s petition for an order granting rehearing or rehearing *en banc* in this case as to certain issues and submits the memorandum below in support of the same.

I. The precedent of Briggs and the plain language of Halbersberg show that constructive trusts are not limited to circumstances in which a bad actor *acquires* property under inequitable circumstances – and they should not be so limited.

Despite Phillips' insistence to the contrary, in a case that has not been overruled by the court's opinion in this case or in any other, this court observed, quite correctly,

that "[a] constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, *either has obtained or holds the right to* property which he ought not in equity and good conscience hold and enjoy." Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) (emphasis added). This court certainly has no need for Cook or any litigant to expound upon the meaning of the words *either* and *or*. This plain language from Halbersberg speaks for itself. No published opinion of this court or of the Supreme Court has ever stated that a constructive trust cannot lie where a party holds, but did not acquire, property "by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience[.]" Id.

Further, if there were any doubt about whether the above-quoted language from Halbersberg means what it says, that doubt would be dispelled by reference to the Supreme Court's opinion in Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979), in which, as discussed in the petition for rehearing, the Court recognized the proper pleading of a constructive trust where it was alleged that a bad actor *held* property under circumstances justifying a constructive trust, even though he did not *obtain* the property through fraudulent means. Id. In Briggs, the alleged bad actor obtained the property, as Phillips did here, through inheritance by operation of law. Id. The Supreme Court's opinion in Briggs is binding precedent.

Lastly, imposing such a technical requirement of *acquisition* onto existing constructive trust law is antithetical to the spirit that has animated the law of constructive trusts. As discussed in the petition for rehearing, "equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust[,]" Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979), and constructive trusts arise, "broadly speaking, *whenever* necessary to prevent injustice." Dominick v. Rhodes, 202 S.C. 139, 149, 24 S.E.2d 168 (1943) (emphasis added). The situation in the instant case is a situation that a constructive trust is *for*, and prior cases reveal that a rigid formalism is properly brushed aside in favor of equity's demands. See Whitmire, 273 S.C. at 458; Dominick, 202 S.C. at 149.

Most respectfully, Cook must note that this court appears to have decided Cook's appeal as to this cause of action on the basis of an element of a constructive trust that does not exist and which would contravene the flexibility that is one of the marks of this equitable remedy. See Whitmire, 273 S.C. at 458; Dominick, 202 S.C. at 149; Halbersberg, 302 S.C. at 106.

II. This court has already rejected the argument that any of Cook's causes of action in this case are barred by the probate non-claim statute.

Phillips again argues that Cook's cause of action relating to whether he has an interest in the title to the property is barred by the probate non-claim statute, citing S.C. Code Ann. § 62-3-801 and -803. Cook simply notes that this court has already rejected that argument and, correctly, held that the probate non-claim statute is not applicable to this case.

III. Phillips is the proper person with whom Cook should litigate issues about the nature and quantum of his interest in the property.

In addition, it is plain that, unlike what Phillips argues in his return, it is Phillips, not the Estate of Claudia Harden, who is the proper party against whom claims about Cook's interest in the property should be asserted. As Phillips has been quick to point out throughout this case, at the moment of Harden's death, Phillips obtained what been Harden's interest in the property. S.C. Code Ann. § 62-3-101. Accordingly, Phillips, and not Harden's estate, is exactly the party with whom such matters should be litigated.

IV. Rule 221(c), SCACR, does not bar Cook's petition for rehearing.

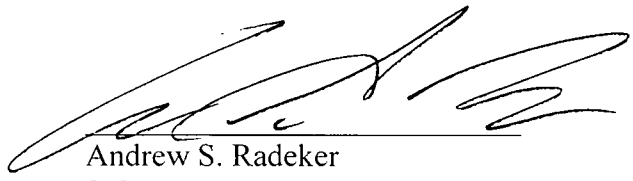
At the end of Phillips' return, he states that the petition for rehearing "should be barred, based on Rule 221(c)." Rule 221(c), SCACR, provides that "[t]he appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Cook's petition for rehearing arises from this court's opinion on the merits of this appeal, not from this court's decision on a motion or petition. Cook is at a loss to see how Rule 221(c), SCACR, could bar his petition for rehearing.

V. The strength of Phillips' invective does not make up for the weakness of his position.

Cook has tried to sift through the vituperation in Phillips' return to find what Phillips' arguments are, and Cook has addressed them above. The rest of Phillips' return appears to be an *ad hominem* diatribe that "only shows the paucity of [Phillips'] own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002).

WHEREFORE Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211

Daniel L. Draisen
S.C. Bar No. 13536
Timothy A. Nowacki
S.C. Bar No. 100967
Krause, Moorhead & Draisen, PA
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000

Attorneys for Appellant

January 22, 2019

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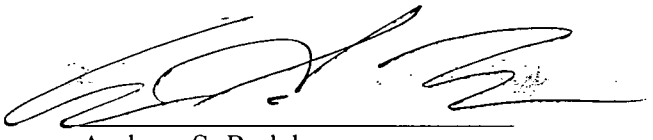
PROOF OF SERVICE

I certify that I served the foregoing reply to return to petition for rehearing or rehearing *en banc* by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Michael F. Mullinax, Esq.
Mullinax Law Firm, P.A.
P.O. Box 2665
Anderson, SC 29622

January 22, 2019



Andrew S. Radeker