ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman Jr., Circuit Court Judge

Case No. 2014-CP-26-1665
Appellate Case No. 2015-000680

Emily Carlson and Alice Preyer, ... Petitioners,

v.

John C. Dockery, III, ...Respondent.

In re Emily Cheshire Dockery,

Of whom Emily Carlson and Alice Preyer ..... are the Respondents,

and

Emily Cheshire Dockery ..... is the Appellant.

FINAL BRIEF OF APPELLANT

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January 15, 2016

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STATEMENT OF THE CASE

Respondents, Emily Carlson and Alice Preyer filed a summons and petition for a finding of incapacity as to their mother, Emily Cheshire Dockery and for an order appointing them as guardian and conservator over their mother's well-being and financial affairs (R. pp. 98-106). Ms. Emily Cheshire Dockery filed an Answer and Counterclaim stating she was fully competent and able to make all decisions associated with her financial, physical and social well-being, and did not desire to have a guardian or conservator appointed to handle such decisions for her (R. pp. 107-109). In addition, Ms. Dockery stated that if a guardian or conservator was to be required pursuant to the Court, her desire was for her son, John C. Dockery, III who has been living and taking care of her for many years, be appointed to make such decisions on her behalf. Ms. Dockery also filed a counterclaim alleging the action brought was frivolous and requesting her daughters be responsible for her attorney's fees and the costs of the litigation. Respondents filed a Reply (R. pp. 110-111).

The Probate Court initially appointed Dr. Leonard Goldschmidt, a neuropsychiatrist, as the medical examiner. Upon motion of counsel for Ms. Dockery a second medical examiner, Dr. Jeffrey Benjamin, a neurologist, who was a treating physician of Ms. Dockery, was appointed (R. pp. 12-13). The Court appointed V. Lee Moore as guardian ad litem for Ms. Dockery (R. p. 8).

On July 22, 2011, the parties participated in mediation. Present at the mediation were Respondents, Emily Carlson and Alice Preyer along with their attorney James F. McCrackin; John C. Dockery, III, and his attorney William H. Monckton; Mary Madison Brittain Langway attorney for Mrs. Dockery, and V. Lee Moore, Guardian ad Litem for Ms. Dockery. Ms. Dockery did not attend the mediation. All parties willingly participated in the mediation and attempted to reach a resolution. Ms. Langway consistently reminded all counsel that she would not be able to agree to

anything at the mediation, since her client was not in attendance, but would meet with her client subsequent to the mediation and discuss any potential settlement agreement with her at that time.

An agreement was not reached at the mediation. Those present made progress and were able to agree on a few issues, but not all. No settlement document was signed at the mediation. Subsequent to the mediation, Respondent's attorney, James F. McCrackin circulated a settlement agreement to all counsel for their signature and their client's signature. Neither petitioner John C. Dockery, III nor his attorney signed the document. Ms. Dockery did not sign the document, nor did her attorneys, Thomas C. Brittain and Ms. Langway. The only parties who signed the document were the Respondents and V. Lee Moore (R. pp. 827-831).

On August 31, 2011, Counsel for Respondents filed a motion to enforce the "settlement Agreement" (R. pp. 710-712) Counsel for Ms. Dockery and John C. Dockery objected to the enforcement of this document at the hearing, on the basis that there was no settlement agreement since all parties had not signed it. The Probate Court found that the agreement was enforceable, but not binding on Ms. Dockery and therefore the action would still go forward as to her incapacity (R. pp. 17-21). The probate Court found that the "settlement agreement" was enforceable to the extent that it named John C. Dockery, III as the guardian of Ms. Dockery and stated that a third party would be appointed as the conservator of Ms. Dockery. The Probate Court further held that John C. Dockery would only be allowed to testify at the hearing on capacity to the extent that it was consistent with the "settlement agreement," which stated that Ms. Dockery was incapacitated.

May 4, 2012 and July 6, 2012, the court heard testimony on the capacity of Ms. Dockery (R. pp. 126-376), and ruled on January 22, 2013 that she was incapacitated, and in need of a limited conservatorship, because she was able to participate in decisions affecting her care and well-being, but in need of a conservatorship because she was not able to participate in decisions with respect

to her finances (R. pp. 40-46).

On May 30, 2013, the Probate Court held a hearing to determine who would be appointed as conservator (R. pp. 377-432). At this hearing, counsel for Ms. Dockery and counsel for John C. Dockery, III introduced into evidence Ms. Dockery's power of attorney, which had been drafted and prepared by Cliff Tall, Esquire, in 2007 (R. pp. 841-846). This document named John C. Dockery, III as her power of attorney and it specifically stated that her appointment of him as power of attorney shall survive any determination by a court that she is incapacitated. Respondent's asked that Walter B. Godbold be appointed as a third-party conservator, pursuant to the "settlement agreement." Respondents did not introduce any evidence tending to show that John C. Dockery was incapable of functioning as power of attorney for Ms. Dockery. The only mention of John Dockery's abilities as a conservator came from V. Lee Moore, the Guardian ad Litem, whose positions were generally approved by Ms. Dockery voluntarily gave her "opinion" to the court. The Probate Court enforced the "settlement agreement" and appointed Walter B. Godbold as conservator of Ms. Emily Cheshire Dockery (R. pp. 51-57). Ms. Dockery and John C. Dockery, III filed numerous Motions to reconsider pursuant to Rule 59 (e) (R. pp. 740-764), which were denied by the Probate Court. Ms. Dockery filed her notice of intent to appeal on March 17, 2014 (R. pp. 823-824), and John C. Dockery, III, filed his notice of intent to appeal on March 14, 2014 (R. p. 822).

On October 1, 2014, the Honorable Judge Larry B. Hyman, Jr. heard the appeal from Probate Court (R. pp. 459-478). The Circuit Court found no error in the application of South Carolina Code §62-5-410, which governs the appointment of a conservator, nor any abuse of discretion by the Probate Court in passing over John Dockery and appointing an independent party. On October 13, 2014, Judge Hyman signed his Order affirming the Probate Court (R. pp. 83-95).

Ms. Dockery filed a Motion to Reconsider/Alter or Amend pursuant to rule 50 (e) on October 30, 2014 (R. pp. 815-821). Judge Hyman denied Ms. Dockery's motion on February 4, 2015 (R. pp. 96-97). Now comes this appeal.

ARGUMENT

I. DID THE CIRCUIT COURT ERR IN FINDING THAT ANY ERRORS OF THE PROBATE COURT WERE HARMLESS AND/OR NOT AN ABUSE OF DISCRETION, AND THEREBY ERR IN AFFIRMING THE PROBATE COURT'S FINDING THAT MS. EMILY C DOCKERY IS INCAPACITATED AND IN NEED OF A THIRD-PARTY CONSERVATOR?

The Circuit Court incorrectly held that any error made on the part of the Probate Court were harmless error and/or did not amount to abuse of discretion on the part of the Probate Judge. The Probate Court failed to follow the rules of evidence and the statutory requirements with respect to many areas of the trial. Each of these errors are detailed below, and each one of them are significant errors on the part of the Probate Court that kept Ms. Dockery from having a fair and unbiased hearing regarding one of the most important things in life, her ability to make her own decisions. "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property; 62-5-101 South Carolina Code of Laws. At the hearing below in the Circuit Court, Counsel for Respondents as well as the Guardian ad litem Lee Moore, repeatedly told the Court that even Dr. Benjamin (Ms. Dockery's witness) opined that Ms. Dockery needed assistance in doing certain things, such as paying bills, dressing herself and going to the bathroom. Respondents, Ms. Moore, the Probate Court, and now the Circuit Court have all misunderstood that the statue does not state that a person is incapacitated based on what things he or she can or cannot do for themselves. It requires that a person not be able "to make or communicate responsible decisions concerning his person or property." The simple fact that Ms. Dockery needs assistance with physically carrying out her decisions does not mean

that she is an incapacitated person, as defined by the statue. There is nothing harmless about taking away one's right to make his or her own decisions, especially when that person is adamant that she want to continue to make decisions and be in charge of her own life, and affairs. As detailed below, Appellant has appealed the Probate Court's Order finding Ms. Dockery is incapacitated and in need of a limited guardian an a conservator (R. pp. 823-826). Appellants have detailed below the various errors made by the Probate Court that led to Ms. Dockery not receiving the fair trial that she deserved.

II. DID THE CIRCUIT COURT ERR FINDING THE PROBATE COURT DID NOT ERR IN ENFORCING A "SETTLEMENT AGREEMENT" THAT WAS NOT SIGNED BY ALL PARTIES, NOT ENTERED INTO DURING MEDIATION, AND NOT READ INTO THE RECORD?

The Court erred in enforcing a "Settlement Agreement" that was neither signed by all parties nor all counsel, and most importantly, not signed by Ms. Dockery (R. pp. 827-831). On July 22, 2011, the parties participated in mediation with John Leiter, Esq. serving as the Mediator. Several items were discussed orally but a final Agreement was not reached nor were any terms reduced to writing at that time. Subsequently, counsel for the Petitioner prepared and circulated a drafted Agreement via email between the parties. In addition, Petitioner's counsel prematurely communicated to the Court that an Agreement was reached. Upon review of the drafted Settlement Agreement, Ms. Dockery, John C. Dockery, III, and their respective counsels disagreed with the incorporated terms and all refused to sign. There was not a meeting of the minds with regard to the Settlement Agreement. Upon learning that neither John C. Dockery, III nor their mother, Ms. Dockery was willing to sign the circulated settlement agreement, respondents filed a Motion to Enforce Settlement with the Probate Court (R. pp. 710-712). Counsel for Ms. Dockery and John C. Dockery, III strongly objected and explained to the Court that there was no full agreement reached at mediation, that no settlement document had been signed by all parties, either at mediation or subsequent to mediation and that therefore, no agreement had been reached. After a hearing on the matter, the Probate Court found that the unsigned "settlement agreement" should be enforced (R. pp. 17-21).

Rule 43(k) of the South Carolina Rules of Civil Procedure is "intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-94. The rule states as follows:

"No agreement between counsel affecting the proceedings in an action shall be binding

unless reduced to the form of a consent order, or written stipulation signed by counsel and entered in the record, or reduced to writing and signed by the parties and their counsel."

Based on Rule 43(k) of the SCRCP, the proposed "settlement agreement" conveyed to the Court by Petitioner's counsel does not satisfy the requirements under the rule. "In interpreting the meaning of the SCRCP, the Court applies the same rules of construction used to interpret statutes." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634 (2006). Here, the rule clearly applies to the settlement agreement. The "settlement agreement" was not executed by all parties, therefore it is not an Agreement. In addition, the agreement was not reduced to the form of a consent order, nor was it entered into the record. Therefore, it should not have ever been presented to the Probate Court for its consideration, much less approved and enforced by the same. Here, the Probate Court has enforced a "settlement" never signed nor agreed to, which under no circumstance amounts to a "settlement document." The process here is indeed troubling.

Moreover, Rule 8 of the Mediation Rules specifically states as follows:

"Communications during a mediation settlement conference shall be confidential. The parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce evidence in any arbitral, judicial, or other proceeding, any oral or written communication having occurred in a mediation proceeding, including but not limited to...(4) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator."

The mediation process is a special and unique process where parties are encouraged to speak freely and negotiate freely, without having to worry that it will be used against them in Court. However, in this case, Petitioners have used the mediation process against Ms. Dockery, who was neither present at the mediation nor did she sign the proposed settlement document (a

disturbing breach of the rules). Therefore, Petitioners have expressly broken the confidentiality rule of Mediation and have used the fact that Ms. Dockery nor John Dockery were willing to agree and sign the document as evidence to support their position of the case. This behavior is in violation of the mediation process and the core principles that mediation seeks to accomplish. Further evidence that an agreement was not reached at Mediation is the Mediator's Results Report, dated August 2, 2011 (R. pp. 894-895), which states the parties worked in good faith to settle the matter but the matter was only "partially settled" with a mutual understanding of the parties that a settlement agreement was still in the drafting process. As to this point, it does not state that the parties reached an agreement or executed an agreement at the mediation. The Petitioner misrepresented to the Court that an agreement had been reached at mediation, which was inconsistent with the mediator's report but ethically Ms. Dockery cannot subpoena the mediator to testify about the determinations at mediation. Moreover, the simple fact that the Probate Judge who sat as the finder of fact and law at the hearing, was made aware of this "settlement agreement," prior to any testimony being taken, was improper and reversible error. As the finder of fact and law it is not proper for the Judge to hear any negotiations, mediation discussions or other partial agreements between counsel because it is likely to influence the decision.

III. DID THE CIRCUIT COURT ERR IN FINDING THE PROBATE COURT DID NOT ERR IN REFUSING TO ALLOW AND/OR ADMIT TESTIMONY FROM JOHN C. DOCKERY, III, THEREBY ERRING IN FINDING MS. EMILY C. DOCKERY TO BE INCAPACITATED?

In enforcing the "settlement document," the Probate Court also held that John C. Dockery, III (who did not sign the "agreement") was bound by the document and therefore he would only be allowed to testify in his mother's capacity hearing, to the extent that it was consistent with the settlement agreement (R. pp. 17-21). The Agreement states that Ms. Dockery is incapacitated. Therefore, the Probate Court's ruling kept John C. Dockery from testifying about his opinion as to his mother's capacity. The Court erred in refusing to allow and or admit testimony from John Dockery, her constant companion for many years. The mediation process is not to be used against a person and/or keep him or her from being able to meaningfully participate in the trial. The proposed settlement agreement should never have been mentioned to the Court in any form, but most importantly, it should have never been used to keep John Dockery from testifying. By not allowing John Dockery to testify, the Court significantly prejudiced Ms. Dockery. John Dockery has spent more time with Ms. Dockery than any other person who testified. He knows her needs, abilities, desires, and abilities better than any other person in the universe. It is a miscarriage of justice an error on the Court's part to limit his testimony.

IV. DID THE CIRCUIT COURT ERR IN FINDING THE PROBATE COURT DID NOT ERR IN EXCLUDING PORTIONS OF DR. BENJAMIN'S TESTIMONY REGARDING HIS OPINION OF NEUROPSYCHIATRIC TESTING, THEREBY FINDING MS. EMILY C. DOCKERY INCAPACITATED?

The Court appointed two medical examiners in this case. First, the court appointed Dr. Leonard Goldschmidt, a nueropsychiatrist, who performed a lengthy battery of tests on Ms. Dockery. The Court also appointed, Dr. Jeffrey Benjamin, who is a board certified Medical Doctor with a specialty in neurology and who also was one of Ms. Dockery's treating physicians (R. pp. 12-13). In his deposition, Dr. Benjamin stated that he disagreed with Dr. Goldschmidt's report, because he was basing it on a neuropsychiatric evaluation and that three, five or ten neuropsychiatrists in a room with the exact same information would come up with ten different opinions (R. p. 529, lines 12-16). He went on to state that in his opinion a Neuropsychiatric evaluation is worthless in this case and that the if the Court routinely relies on this type of testing to determine competence it is making a huge mistake because it is a lengthy test that's not really designed to determine whether somebody is competent or incompetent (R. p. 529, line 19-p. 530, line 5). In fact, it's extremely subjective. Upon motion of Respondents (R. pp. 725-726), the Court excluded as evidence, those portions of Dr. Benjamin's deposition that dealt with his opinion of the field of Neuropsychiatric testing (R. pp. 27-32). The Court erred in excluding portions of Dr. Benjamin's testimony and written materials because Dr. Benjamin is a medical doctor, specifically a neurologist. Dr. Benjamin is capable and qualified to give an opinion about the field of neuropsychiatric testing. Dr. Benjamin opined that the entire field of neuropsychiatry is not credible and should not be given any weight. As an expert in the field of neurology, his opinion is admissible under Rule 702 of the SCRCP. The Court's decision to exclude portions of Dr. Benjamin's testimony and written report were highly prejudicial to Ms. Dockery.

V. DID THE CIRCUIT COURT ERR IN FINDING THE PROBATE COURT DID NOT ERR IN APPOINTING A PERSON OTHER THAN JOHN C. DOCKERY, III AS CONSERVATOR WHEN JOHN C. DOCKERY, III HAD PRIORITY PURSUANT TO S.C. CODE §62-5-410 AS MS. DOCKERY'S ATTORNEY-IN-FACT?

On November 1, 2007, Ms. Dockery executed a durable power of attorney naming her son, John C. Dockery, III her power of attorney (R. pp. 841-846). This document was drafted by Clifford H. Tall, Esquire of Myrtle Beach, South Carolina. At this point in time, Ms. Dockery's capacity was not at issue. Mr. Tall, testified at the hearing that he believed she had full capacity to execute the power of attorney in 2007 (R. p. 383, lines 14-17). On page 4 of Ms. Dockery's power of attorney, it states as follows, "It is my intention that this power of attorney shall not be affected by my physical disability or mental incompetence, which renders me incapable of managing my own estate...It is further my intention that my said attorney-in-fact (or alternate) shall serve as such and shall continue to exercise the authority granted herein in spite of any attempt to appoint a guardian or conservator on my behalf, it being my specific intent that my said attorney-in-fact (or alternate) shall fulfill the obligations ordinarily reserved for a guardian and conservator, and that no application to court for the appointment of any other person(s) in either capacity shall be effective while my said attorney-in-fact (or alternative) is willing and able to so serve" (R. p. 844).

S.C. Code section 62-5-410 provides in part, "(a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed: (3) an attorney in fact appointed by such protected person pursuant to Section 62-5-501."

Therefore, John C. Dockery, III would have priority pursuant to S.C. Code Section, and the Court could only appoint someone other than John C. Dockery, III for "good cause" shown.

The Court erred in finding that "good cause" was shown to pass over Mr. Dockery, who holds priority pursuant to S.C. Code Section 62-5-410 as Ms. Dockery's attorney-in-fact. Black's law dictionary defines good cause as "a legally sufficient reason. Good Cause is often the burden placed on the litigant to show why a request should be granted or excused." Black's Law Dictionary 235 (8th ed. 2004). Petitioners did not present any evidence proving that John Dockery had mismanaged any of Ms. Dockery's assets or finances. Absent any evidence of John Dockery's mismanagement of funds, it was an error of the Court to find good cause to disregard Ms. Dockery's right to appoint a conservator of her choice and liking. Ms. Dockery selected her preferred conservator at a time when no issue or dispute was present in regard to her capacity.

The Probate Court and the Circuit Court failed to articulate specific reasons why a third party would better serve as a conservator that her son, John Dockery. A mere acknowledgement of sibling rivalry and friction also does not qualify as a finding of good cause.

As such, the Probate Court erred in appointing a person other than John C. Dockery, III as conservator.

VI. DID THE CIRCUIT COURT ERR IN FINDING THE PROBATE COURT DID NOT ERR IN FINDING THAT MS. DOCKERY IS RESPONSIBLE FOR ALL FEES AND COSTS OF BOTH THE GUARDIAN AD LITEM, AND DR. GOLDSCHMIDT?

The Court erred in finding that Ms. Dockery should be responsible for the fees and costs at issue here (R. pp. 49-50). The Court did not cite specific case law or statute supporting its decision to require Ms. Dockery to be responsible for the fees and costs of this action. Ms. Dockery did not bring this action, nor does she believe it was brought out of concern for her well-being. As such, Ms. Dockery should not be forced to pay for the costs of an action she had no choice in bringing, or defending. In order to keep her rights as a citizen, Ms. Dockery had no choice but to hire a lawyer to fight for her rights in Court. She understands that she is responsible for her own attorneys' fees, but it does not seem fair that she also have to be responsible for all the costs associated with this action. More specifically, Dr. Goldschmidt was the examiner preferred and requested by Respondents. He was subpoenaed to testify at the trial by the Respondents. In addition, due to the type of testing he conducts, Ms. Dockery was forced to undergo many different dates of testing, each time for hours at a time. Since Dr. Goldschmidt charges hourly, Ms. Dockery has been made to pay for the numerous hours of testing, all the hours he spent reviewing and preparing reports, his deposition (which was not noticed by her), and his time at trial (she did not call him as a witness).

Further, the services of Lee Moore serving as Guardian ad Litem were a convenience for others. Ms. Dockery desired to have her counsel serve in the role, and asked the Court to remove Lee Moore as guardian ad litem (R. pp. 719-720). The Court did not grant Ms. Dockery's motion and Ms. Moore continued to incur additional fees that Ms. Dockery was then ordered to pay (R. pp. 22-24). Ms. Moore's fees and costs should not be borne by the objecting party or the party objecting to her handling of these matters.

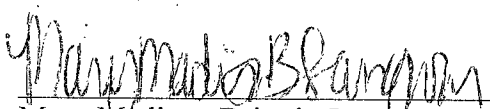
VII. DID THE CIRCUIT COURT ERR IN FINDING THE PROBATE COURT DID NOT ERR IN FAILING TO ADMIT MR. CLIFFORD H. TALL, ESQ. AS AN EXPERT?

As mentioned above, Ms. Dockery called Mr. Clifford H. Tall, Esquire as a witness to testify about the power of attorney he prepared for her, what it states, and what her capacity was at the time she executed the document. Counsel for Ms. Dockery moved the Court to qualify Mr. Tall as an expert witness in the field of probate/estate law, and the Court declined to do so (R. p. 379, line 15-p. 380, line 21). The Court erred in failing to admit Mr. Clifford H. Tall, Esquire, as an expert. Mr. Tall has been practicing probate and estate law since 1980. As a thirty year veteran of the estate and probate practice, he certainly is qualified to testify as an expert and the Court should have allowed him to be admitted as such; it was an error to do otherwise.

CONCLUSION

THEREFORE, Ms. Emily Cheshire Dockery respectfully requests this court to reverse the Circuit Court's Order affirming the Probate Court's Order finding Ms. Dockery is incapacitated and appointing a third-party as conservator and remanding for a new trial.

Respectfully submitted,



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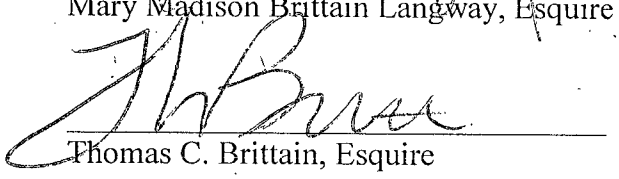

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CERTIFICATE OF COUNSEL

We hereby certify that Appellant's Final Brief complies with Rule 211(b), SCACR.

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