THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WILLIAMSBURG COUNTY
COURT OF COMMON PLEAS

Circuit Court Case No.: 2017-CP-45-0224
Appellate Case No.: 2017-001077

April Grant Mack as Personal Representative of the Estate of Barrett Demetric Jeremiah Mack, Respondent,

v.

Estate of Harry Washington, Defendant,

Of whom Necole Binyard, as Personal Representative of the Estate of Harry Rufus Emanuel Washington is the Appellant.

FINAL BRIEF OF RESPONDENT

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November 9, 2018

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STATEMENT OF THE CASE

This action arises out of the tragic deaths of Barrett Mack and Harry Washington, who were both killed in a single car accident on July 1, 2016. The vehicle in which they were travelling at the time had been rented in the name of Latasha Cooper, a/k/a Latasha Thomas, Washington's girlfriend. The investigation of the South Carolina Highway Patrol revealed that Washington was the driver of the vehicle at the time of the accident. Weeks after his death, respondent April Grant Mack, the surviving spouse of Barrett Mack, was appointed the personal representative of his estate. Respondent reached a settlement of the estate's wrongful death and survival claims with State Farm and GEICO, which provided automobile insurance coverage to Washington and Mack, respectively. Subsequently, appellant Necole Binyard, in her individual capacity, filed a creditor's claim and a declaratory judgment action against the Mack estate as a result of the accident that took the life of Washington.

The hearing on respondent's petition for approval of the wrongful death settlement filed on behalf of the Mack estate was held on March 30, 2017. Over the objection of the appellant, the trial court approved the settlement. On the same day, appellant filed an application with the Williamsburg County Probate Court to be appointed the personal representative of the Washington estate. The order appointing appellant as personal representative was not entered until March 31, 2017.

This appeal follows the March 30, 2017 judgment of the circuit court.

FACTS

Barrett Demetric Jeremiah Mack died at the age of thirty-six (36) as a result of injuries he sustained in a single car accident on July 1, 2016. Harry Rufus Washington is his maternal uncle (R., p. 44, lines 11-14; p. 168-169). Respondent, who is Mr. Mack's surviving spouse, testified that earlier in the day, Washington arrived at a family cookout driving the same vehicle involved in the accident. This vehicle, a 2015 Chevrolet Camaro, had been rented from Enterprise Leasing Company by Latasha Cooper, a/k/a Latasha Thomas, Washington's girlfriend (R., pp. 44; p. 121; p. 168). Washington was not an authorized driver of the Camaro under the lease agreement between his girlfriend and Enterprise (R., p. 3). Although there were no known, credible eyewitnesses to the accident, Mack and Washington were last seen by members of their immediate family leaving the cookout shortly beforehand with Washington driving the Camaro vehicle and Mack sitting in the front passenger seat (R., p. 45, 52). Washington was grossly intoxicated.

The vehicle was discovered overturned at approximately 11:30 p.m. on Academy Street in the Town of Kingstree, Williamsburg County, South Carolina. Both Washington and Mack were entrapped inside the vehicle and neither was wearing a seatbelt. After an investigation into the accident, law enforcement concluded that Washington was the driver of the vehicle at the time of the collision. Officers determined that Washington had driven east on Highway 527, went through an intersection, and lost control of the vehicle a short distance away. As a result, the vehicle struck a tree and a utility pole

(R., pp. 111-117). Mack and Washington sustained fatal injuries and both were declared dead at the scene.

State Farm Mutual Automobile Insurance Company ("State Farm") issued a policy of liability insurance to Washington of $25,000 per person/$50,000 per accident. In addition, there was available coverage of $25,000 per person/$50,000 per accident of underinsured motorist benefits. Also, Government Employees Insurance Company ("GEICO") provided UIM benefits of $25,000 per person/$50,000 per accident to Mack under a policy of insurance issued to respondent April Mack.

On July 20, 2016, respondent was appointed the personal representative of her husband's estate under Williamsburg County Probate Court file number 2016-ES-45-0188 (R., p. 22). At the conclusion of the law enforcement investigation of the accident, State Farm agreed to offer and respondent agreed to accept $25,000 of the liability policy limits and $25,000 of UIM policy limits in satisfaction of all claims the estate and statutory beneficiaries of Barrett Mack had against State Farm and Harry Washington, his heirs, successors and assigns. In addition, GEICO agreed to tender its UIM policy limits of $25,000 in satisfaction of all claims to which the estate and statutory beneficiaries of Barrett Mack were entitled to receive as a result of the July 1, 2016 accident. The respondent's petition to approve the wrongful death settlement was scheduled for a hearing in the Williamsburg County Court of Common Pleas on March 30, 2017.

Appellant maintains that she filed a declaratory judgment action against

the estate of Barrett Mack on March 3, 2017 in order for the court to determine the identity of the driver at the time of the July 1, 2016 accident. Notably, this action was commenced in the name of Necole Binyard, and not on behalf of the estate of Harry Washington (R., pp. 9-12). Regardless, respondent was not made aware of this suit until she was served in court with the summons and complaint at the March 30, 2017 hearing (R., p. 53, lines 10-14). Although respondent questions the propriety of appellant's filing of a declaratory judgment action solely to determine this very narrow question of fact, this issue will not be addressed in this brief.

On March 13, 2017, appellant, in her individual capacity, filed a creditor's claim against the estate of Barrett Mack (R., p. 75). The respondent timely denied the claim. Despite the fact that Washington had died nearly nine months earlier, appellant did not file an application to be appointed the personal representative of his estate until the day of the scheduled hearing on respondent's petition to approve the wrongful death settlement of the Mack estate. The order appointing appellant as personal representative of Washington's estate was not filed and entered until March 31, 2017, a day after the hearing (R., pp. 173-179). Although appellant was not authorized to act on behalf of the estate of Harry Washington at the time of the hearing, counsel for State Farm nonetheless, as a professional courtesy, notified appellant's counsel of the scheduled hearing to approve the wrongful death and survival claims of the estate of Barrett Mack. The matter was heard by the Honorable Clifton Newman on March 30, 2017. Appellant and

respondent and their respective attorneys appeared. Also present were attorneys representing State Farm and GEICO. Appellant was afforded ample opportunity by the trial court to participate in the hearing and voice her objections to the proposed settlement. After consideration of the verified petition, testimony of the respondent, court exhibits and arguments of counsel, the trial court approved the settlement and executed an order consummating the same. Appellant did not file any exceptions or motions to alter or amend this judgment.

Appellant timely served her notice of appeal, assigning various alleged errors of the trial court in approving the settlement.

ARGUMENTS

A. THE APPELLANT DID NOT HAVE STANDING TO INTERVENE OR THE RIGHT TO RECEIVE NOTICE OF THE HEARING ON RESPONDENT'S PETITION TO APPROVE THE WRONGFUL DEATH SETTLEMENT FILED AGAINST THE ESTATE OF HARRY WASHINGTON BECAUSE SHE WAS NOT A PARTY IN INTEREST INASMUCH SHE WAS NOT APPOINTED THE PERSONAL REPRESENTATIVE UNTIL THE DAY AFTER THE HEARING.

The appellant first alleges that the trial court erred in approving respondent's petition to approve the wrongful death settlement she made on behalf of the estate of Barrett Mack because appellant did not have proper notice of the hearing. Appellant relies on section 62-1-401 of the South Carolina Code of Laws and Rule 17, South Carolina Rules of Civil Procedure as authority that she was an interested party who was entitled to at least twenty (20) days notice of the hearing to approve the settlement. However, appellant's argument ignores the fact that she was simply not an interested party as contemplated by Rule 17, SCRCP. Contrary to appellant's assertion, the rule does not broadly define an interested party "as a party with a real interest or party with whom or in whose name a contract has been made for the benefit of another." Rather, the rule governs the right and obligation of a party having a real interest in the litigation to ***prosecute*** the action in his own name or in a representative capacity on behalf of another for whose benefit the claim is being made. As the duly appointed representative of the estate of Barrett Mack, respondent was the only person authorized by law to bring an action and settle a claim for the estate and statutory beneficiaries of Barrett Mack. The rule has no application to the right of appellant to receive notice of respondent's petition to settle the claims of her

husband's estate.

Appellant's reliance on section 62-1-401 of the South Carolina Probate Code in support of her notice argument is likewise misplaced. This statute reflects that "***if*** notice of a hearing on any petition is required ....., the petitioner shall cause notice of the time and place of hearing on any petition to be given to any interested person or his attorney...." Section 62-1-201(23) states that an interested person:

> includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a ***property right*** in or claim against a trust estate or estate of a decedent, ward, protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular purposes of, and matter involved in, any proceeding.

The hearing on respondent's petition to approve the claims of the Mack estate against the Washington estate did not require notice to appellant in her individual capacity as Washington's surviving spouse because the matter did not affect any property right she or any other heir had in the Washington estate. Appellant was not a named party to the petition and was not required to be. Her consent was not required to release State Farm, GEICO or the estate of Harry Washington from any claims of Mack's heirs and statutory beneficiaries concerning the July 2016 accident. She had no interest or personal stake in the subject matter of respondent's petition because the source for the proceeds of the settlement of her wrongful claim involved property of State Farm and GEICO under their liability and UIM policies and not property of Harry Washington or his estate. The facts in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (S.C. 2013) are markedly

distinguishable because the controversy there involved a will contest and concerned actual assets, including substantial intellectual property rights, of the estate of entertainer James Brown, and the claims of his testate and intestate beneficiaries to those assets. The circuit court in Wilson approved a compromise agreement that affected *assets of James Brown's est*ate over the objection of the testate heirs to *James Brown's estate.* Therefore, the appellant's argument regarding the necessity for the trial court in the instant case to conduct an eligibility test is without merit.

In the instant case, appellant may still pursue a claim in court against the Mack estate and the insurers based on the July 1, 2016 death of Mr. Washington. Respondent's petition and the subsequent order approving it only concerned the rights and claims the Mack heirs and statutory beneficiaries had in the *Mack* estate. Appellant had no beneficial interests in the estate of Barrett Mack, aside from conceivably the creditor's claim that she previously filed in her individual capacity. However, this would not have affected the right of respondent to seek court approval of her settlement. Moreover, appellant certainly cannot claim that she had a right to twenty (20) days' notice of the wrongful death settlement in her representative capacity as executor of the Washington estate because she had not yet been appointed. It appears that she sought to become personal representative of her husband's estate only after she became aware of the hearing on respondent's petition. Her argument that she and her counsel had the responsibility for "the construction and discharge duties of the will" and therefore legal standing as established by their fiduciary duty to pursue an appeal in this

matter is without merit. At the time of the negotiation and the settlement of respondent's claims, appellant had no such fiduciary duty to the estate of Harry Washington.

Section 15-51-41 of the South Carolina Code of Laws grants concurrent jurisdiction to the probate and circuit courts to approve a settlement of wrongful death and survival claims, if no action is otherwise pending. The procedure, which is outlined in the law, requires the court to schedule a hearing and to receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After the court conducts this inquiry, the rule requires to trial court to issue an order approving or disapproving the settlement. Here, the court afforded appellant wide latitude at the hearing in addressing her concerns, including allowing her counsel to make various legal arguments and conduct an extensive cross-examination of the respondent. After consideration of all of the facts of the case, the trial court correctly approved the settlement. Appellant broadly asserts that she was unable to adequately protect the rights and interests of the Washington estate and therefore severely prejudiced by her inability to examine the settlement documents in advance of the hearing. As previously noted, she was not the executor of the Washington estate at the time of the hearing and could not have legally acted on behalf of the estate. Importantly, even after receiving a filed copy of the order approving the settlement, she did not file any Rule 59, SCRCP motions.

The appellant next argues that the trial court erred in approving the settlement of respondent's claims because there was a pending declaratory

judgment and probate action that rendered the approval of the settlement in bad faith. However, the filing of a creditor's claim (which was disallowed) and a declaratory judgment action by Ms. Binyard did not divest the trial court of its authority to approve the settlement in this case. Appellant misconstrues the law when she references in her brief the portion of section 15-51-42(B) that reads: "if no action is pending, the representative can petition either the probate court or the circuit court of this State for approval of a proposed settlement." This statute clearly governs the procedure upon which settlements must be approved rather than to provide litigants a legal means by which they can circumvent the prompt and just resolution of legitimate claims. Subsection (C) specifically provides the means by which wrongful death or survival actions already filed in state or federal court may be approved. Appellant's clear implication that her previously filed declaratory judgment action, which was not a wrongful death or survival action, precluded the court from approving respondent's settlement is erroneous.

B. EVEN IF THE APPELLANT HAD STANDING TO INTERVENE OR THE RIGHT TO RECEIVE NOTICE OF THE HEARING ON RESPONDENT'S PETITION TO APPROVE THE WRONGFUL DEATH SETTLEMENT, SHE DID NOT HAVE AUTHORITY TO OVERRULE THE INSURER'S DECISION TO SETTLE RESPONDENT'S WRONGFUL DEATH CLAIM

In her fourth argument, appellant maintains, among other things that the lower court erred in granting approval of the settlement proceeds when counsel for the personal representative of Harry Washington did not consent to the settlement under Rule 43(a)-l), SCRCP. As noted throughout this brief, no one had been appointed by the probate court as the personal representative of the

Washington estate at the time the settlement was approved. Even if counsel for appellant was acting lawfully on behalf of the Washington estate at the time of the hearing, neither his consent nor that of appellant was required for the circuit court to approve the settlement. Principally, Rule 43 governs the conduct and mode of trials. Subsection k refers to agreements and stipulations of counsel and the process by which they are binding upon the parties. The last sentence of Rule 43(k) states that "settlement agreements shall be handled in accordance with Rule 41.1." The settlement of respondent's claims is not governed by the Rules of Civil Procedure. The approval of the settlement of such claims cannot be made by consent order or written stipulation, or by agreement made in open court and noted upon the record. The approval of such settlements can only be made at the instance of the duly appointed personal representative of the decedent's estate and upon the verified petition of such person. Rather, the settlement was appropriately filed and approved in accordance with section 15-51-42.

Appellant relies on Ashfort Corp. v. Palmetto Construction Corp., 318 S.C. 492, 458 S.E.2d 533 (1995) in further support of her proposition that her consent was required in order for the trial court to approve the settlement. However, Ashfort dealt with parties who had reached an agreement after the commencement of litigation. The parties then notified the court and the case was dismissed based on the settlement. One of the parties had a genuine dispute as to the terms of the agreement and the appellate court declined to enforce the purported agreement as there had been no meeting of the minds. Here, the issue is not whether appellant and respondent have a dispute regarding the *terms* of the

settlement. Instead, appellant simply does not want respondent to settle her claims against Harry Washington's estate and the insurers at all. An insurer in South Carolina has the right to compromise in good faith any and all claims against it and its insured, even to the chagrin of the insured.

Contrary to appellant's direct assertion in her fifth argument, Judge Newman's order did not make an express finding that Mr. Washington ***was the driver of the vehicle at the time of the accident.*** Rather the order reflected that the petitioner (respondent herein) alleged in the petition that Barrett Mack was a passenger in a vehicle operated by Harry Washington that was involved in a single vehicle accident, and that the decedent Barrett Mack died as a result (R., p. 15). The order goes on to state in paragraphs four (4) and five (5) that April Mack alleged that her husband's death was caused by the negligence of Mr. Washington and that the allegation of negligence was not admitted by Mr. Washington or representatives of his estate. Paragraph six (6) of the order specifically states that "the vehicle driven by Harry Washington owned by EAN Holdings, L.L.C. and was a rental vehicle under contract with Latasha Thomas and Enterprise Leasing Company at the time of the accident." The specific finding that the vehicle driven by Harry Washington is consistent with the respondent's testimony at the hearing that Washington and Mack were last seen by her leaving a family barbecue prior to the accident, with Washington driving and Mack in the front passenger seat. Unquestionably, the vehicle involved in the accident was owned by EAN Holdings, L.L.C. and was rented in the name of Latasha Thomas through a lease agreement she had with Enterprise. There is no specific finding that Washington

was the driver ***at the time of the accident.***

However, under the facts and circumstances of the case, it was certainly prudent for State Farm and GEICO to seek to limit their exposure and that of State Farm's insured, Harry Washington, to claims of Mack's estate by tendering their policy limits. For example, there was undisputed evidence that the vehicle involved in the accident had been rented in the name of Washington's paramour rather than anyone associated with Mack. It is likewise undisputed that Washington arrived at and left the cookout driving the 2015 Chevrolet vehicle. It is not reasonable to believe that Washington would have then, conveniently, allowed Mack to drive Washington's paramour's vehicle.

Moreover, law enforcement's investigation concluded that Washington, rather than Mack, was the driver at the time of the fatal accident. The eleventh-hour, uncorroborated and untested statement of appellant's surprise witness, Jermon Cooper, did not affect the insurers' decision to proceed with the settlement of respondent's claims. Had the insurers withdrew their offer to settle respondent's claims by tendering their collective policy limits of $75,000, they would have subjected themselves and the estate of Harry Washington to substantial damages, including punitive damages, that far exceeded their policy limits for the death of Mr. Mack at the tender age of thirty-six (36), who left as his statutory beneficiaries his wife and two minor children. The insurers also would have risked potential exposure to claims of respondent for bad faith refusal to pay insurance benefits. Therefore, the decision of trial court to approve the settlement agreement reached between respondent and the insurers was just and appropriate.

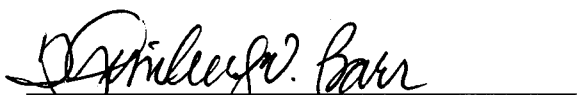
Next, appellant argues that the trial court erred in approving the settlement because the interests of the Washington estate were not fully represented. Respondent avers that section 15-51-42 specifically states that it is not necessary that a personal representative *seeking approval* of wrongful death and survival settlements be represented by counsel. Appellant does not cite and respondent cannot find authority that requires that the estate of a decedent that is released from further liability as a result of that settlement be represented by counsel. However, nonetheless, appellant and the interests of the estate of Harry Washington were more than adequately represented by counsel at the hearing. Moreover, State Farm, who insured Harry Washington at the time as the accident, was also represented by counsel at the hearing.

Lastly, appellant argues that the trial court erred in declaring the beneficiaries of the estates of Barrett Mack and Harry Washington and ordering the distribution of proceeds of the settlement. Again, this argument is without merit. There was no other survival or wrongful death action concerning either estate pending in any circuit or probate court of this state or another as contemplated by section 15-51-42. Neither a creditor's claim nor a declaratory judgment action is a survival or wrongful death action. The trial court's order never reflected a finding or made any reference at all to the beneficiaries of the estate of Harry Washington. Judge Newman, having approved the petition for settlement filed on behalf of the estate of Barrett Mack, made appropriate findings in his order concerning the nature and basis of the claim, the existence of heirs and creditors of the estate, and the terms of the settlement.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the trial court and reinstate in full the order and dismiss this appeal with costs accessed to the appellant.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF COUNSEL

The undersigned certifies that respondent's final brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I served the final brief of the respondent and certificate of counsel appeal on all attorneys of record to this appeal by depositing a copy of it in the United States Mail, postage prepaid, on November 12, 2018 and addressed as follows:

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