

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM ABBEVILLE COUNTY

**Court of Common Pleas
Frank R. Addy, Jr., Circuit Judge**

Appellate Case No. 2018-001067

RECEIVED
DEC 07 2018
SC Court of Appeals

Kenneth H. Kurowski, Respondent,

vs.

Daniel D. Hawk Appellant.

FINAL BRIEF OF RESPONDENT

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Statement of Issues on Appeal

Question I: Did the lower court err in dismissing the Complaint when the Plaintiff failed to file to have the matter transferred to the Court of Common Pleas within 10 days after all pleadings were filed in the Probate Court as is required by S. C. Code § 62-1-302(d)?

Question II: Did the lower court err in dismissing the Complaint when the Plaintiff named Kenneth H. Kurowski as the Defendant when the Plaintiff knew Mr. Kurowski was deceased and that Norma Kurowski was the personal representative of the estate?

Question III: Did the lower court err in dismissing the Complaint when Daniel Hawk failed to allege any grounds upon which relief could be granted as to transferring the case to another county?

STATEMENT OF THE CASE

On March 5, 2018, Daniel Hawk filed a pro se Complaint against Kenneth H. Kurowski in the Court of Common Pleas for Abbeville County. In the Complaint, Daniel Hawk seeks relief for three things. First, he wants Judge C. Mark Summer, the Probate judge for Abbeville County, to be disqualified. Second, he asks that the case be transferred to a county other than Abbeville or Greenwood, alleging, with no specific facts, except that the probate judge for Greenwood County had previously represented Arletta Kurowski, a former wife of Kenneth Kurowski. Third, that Norma Kurowski be removed as personal representative for estate No 2009-ES-01-0096 and Daniel Hawk be appointed as personal representative. The removal request was for alleged “fraudulent moral turpitude.” Complaint at A, B, and C. He sought no monetary relief.

On April 5, 2018, Curtis G. Clark, on behalf of Norma J. Kurowski, as personal representative of the Estate of Kenneth H. Kurowski, filed an Answer, Affirmative Defense, and Counterclaim. The general denial noted that the Will of Kenneth H. Kurowski was admitted to probate as a result of a hearing held on June 10, 2010, and by an Amended Order filed in 2012. In the Affirmative Defense or Counterclaim, Mrs. Kurowski, as personal representative, noted she was appointed as personal representative in 2012. The Affirmative Defense further noted that Daniel Hawk, the Plaintiff, has been aware that the estate is still open and an active estate, but the Plaintiff has not named the estate as a party to this action. In a third defense, Ms. Kurowski asked for attorney fees and costs for the action brought by Mr. Hawk.

Also on April 5, 2018, Ms. Kurowski filed a Motion to Dismiss. In the Motion to Dismiss, Ms. Kurowski alleged that Mr. Daniel had attempted to sue a deceased person when

Mr. Daniel knew since 2010 that Ms. Kurowski had applied to be appointed as personal representative of the estate and no appeal had been taken from the formal order dated June 25, 2012 and amended on October 23, 2012. The Motion further contended that Mr. Hawk sought to disqualify Probate Judge C. Mark Summer from presiding over the estate. The Motion noted that the Complaint contained no grounds as a basis for disqualifying Judge Summer. The Motion further noted that the Complaint sought to allege violations of several South Carolina code sections as they relate to trust, but no trust were set up under the will of Kenneth H. Kurowski; and therefore, there is no basis for such relief. The Motion further noted that the Complaint alleged that Ms. Kurowski had never provided a full estate accounting. At the hearing, this was denied. Mr. Clark noted for the Court that Ms. Kurowski had in fact filed to conclude the estate and requested that she be paid for the funds she had advanced the estate. Rec. on App. At 24, 11 12–19. The Motion noted that Mr. Hawk had filed a Demand for Hearing with the Abbeville County Probate Court but that he had failed and refused to pay the required filing fee so no hearing on any issue has ever been held. The lower court, with Judge Summer present, accepted this representation by Mr. Clark. Rec. on App. at 34, 1 17 to 19, 1 3. Finally, the Motion noted that the Complaint seeks, in the action originally filed in the Court of Common Pleas, to have Ms. Kurowski removed as personal representative and seeks himself to be appointed. The Motion noted that no action had even been filed pursuant to S. C. Code § 62-1-302(d) to have the matter removed to the Court of Common Pleas from the Probate Court, thus the matter is within the exclusive jurisdiction of the Probate Court and, therefore, jurisdiction is not proper in the Court of Common Pleas for Abbeville County.

On May 1, 2018, Mr. Hawk mailed a “Motion to Reject Defendant’s Motion to Dismiss”

to Curtis Clark, the attorney for Ms. Kurowski. In the Motion, Mr. Hawk rejected the concept that he is suing his father, but the caption is just to show the relationship between the parties. In the response to the Motion Ms. Kurowski filed, Mr. Hawk raises an allegation of “Deprivation of Federal Rights” which has no bearing on the Motion to Dismiss. He does not respond to the argument of Ms. Kurowski that Mr. Daniel never filed an appeal from Probate Court nor did he ask for the matter to be transferred to the Court of Common Pleas.

A hearing was held on May 8, 2018, before the Honorable Frank R. Addy, Jr. At the time of the Motion, Mr. Clark also filed an Affidavit of Default as to his Counterclaim. Mr. Daniel acknowledged that he was aware of the hearing by contacting both the Clerk of Court for Abbeville County and Judge Addy. He requested to participate by a telephone conference, but the Court was unable to arrange such a conference. Rec. on App. at 20, ll 1-14. After the hearing, Judge Addy granted the Motion to Dismiss based upon the failure to allege any grounds for the removal of the Probate Judge for Abbeville County, the failure to timely file an action in Probate Court to transfer the matter to the Court of Common Pleas, and the failure to properly name the parties.

Argument

Question I

Did the lower court err in dismissing the Complaint when the Plaintiff failed to file to have the matter transferred to the Court of Common Pleas within 10 days after all pleadings were filed in the Probate Court as is required by S. C. Code § 62-1-302(d)?

While Daniel Hawk in his brief lists some 35 Issues on Appeal, the case is a simple question of whether the lower court erred in dismissing on several grounds the Complaint filed by Mr. Hawk. The South Carolina Probate Code gives exclusive jurisdiction over estate matters to the Probate Court. The code provides:

(a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the Probate Court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court . . .” S.C. Code § 62-1-302(a).

The only exceptions are contained in paragraph (d) which says:

(d) Notwithstanding the exclusive jurisdiction of the Probate Court over the foregoing matters, any action or proceeding filed in the Probate Court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo:

- (1) formal proceedings for the probate of wills and for the appointment of general personal representatives;
- (2) construction of wills;
- (3) actions to try title concerning property in which the estate of a

decedent or protected person asserts an interest;
(4) matters involving the internal or external affairs of trusts as provided in Section 62-7-201, excluding matters involving the establishment of a “special needs trust” as described in Article 7;
(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value; and
(6) actions concerning gifts made pursuant to the South Carolina Uniform Gifts to Minors Act, Article 5, Chapter 5, Title 63.
S.C. Code § 62-1-302(d)

Of the exceptions set forth above, only subparagraph (1) has any application to this case. For actions involving the probate of wills and the appointment of a personal representative, Mr. Hawk would have had to have first brought an action in the Probate Court and then asked to have it removed to Common Pleas Court within 10 days of the filing of the last pleading. Here, Mr. Hawk did neither.

To the extent Mr. Hawk may be claiming a dispute over the assets of the estate, this issue is in the exclusive jurisdiction of the Probate Court. As this Court has said, “A dispute over conversion of estate property would be for the Probate Court to decide. See § 62–1–302(a)(1).” *Brown v. Brown*, 402 S.C. 202, 207, 740 S.E.2d 507, 510 (Ct. App. 2013).

Mr. Hawk has alleged a dispute over a trust, but has failed to allege a trust actually exists or where the trust is allegedly located. He does not name a trustee of the alleged trust. S. C. Code § 62-1-302(d) does permit the removal to the Circuit Court “matters involving the internal or external affairs of trusts as provided in Section 62-7-201.” In this case, no such trust has been alleged nor has any action involving a trust been filed in the Probate Court that could be removed to the Circuit Court. The meaning of S. C. Code § 62-1-302(a) is to give the Probate Court exclusive original jurisdiction as to all probate matters. The only exception would be when,

after an action is filed in the Probate Court, certain matters may then be transferred to the Circuit Court. Mr. Hawk never filed an action in Probate Court that could have been transferred to the Circuit Court. The Court of Common Pleas does not have original jurisdiction for any of the matters alleged in the Complaint. They are all under the exclusive jurisdiction of the Probate Court as a matter of initial filing. The lower court was correct in dismissing his Complaint.

Question II

Did the lower court err in dismissing the Complaint when the Plaintiff named Kenneth H. Kurowski as the Defendant when the Plaintiff knew Mr. Kurowski was deceased and that Norma Kurowski was the personal representative of the estate?

Rule 17 of the South Carolina Rules of Civil Procedure requires that an action by or against a deceased person be brought in the name of the estate of that person. Mr. Hawk did not bring this action against the personal representative of the estate. The personal representative is the real party in interest. The record below, including the pleadings filed by Mr. Hawk, establishes that Mr. Hawk knew that Norma Kurowski was the personal representative of his father's estate. This is an issue he makes in his Complaint. Complaint at 2a. Had Mr. Kurowski appeared at the hearing he could have requested the pleadings be amended to name the personal representative as the proper party. He did not appear nor did he request such relief.

The South Carolina Supreme Court has said:

Rule 17(a) provided *Fisher* an opportunity to cure her failure to meet the real party in interest requirement. If she had asked, the circuit court would have been required to allow time for 'ratification, joinder, or substitution' of the proper party under Rule 17(a) instead of immediately dismissing the action. However, Fisher did not ask for such time, and specifically, she never asked the circuit court to consider whether a special administrator should

be appointed under section 62-3-614, nor did she mention her pending motion in the probate action to appoint one. Under this circumstance, Rule 17(a) permitted the dismissal of the action.” *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 239, 811 S.E.2d 739, 741 (2018), reh'g denied (Apr. 17, 2018).

And in this case, the lower court was correct in dismissing the case as the real party in interest was not named and Mr. Hawk did not request the pleadings be amended to reflect the proper party.

Question III

Did the lower court err in dismissing the Complaint when Daniel Hawk failed to allege any grounds upon which relief could be granted as to transferring the case to another county?

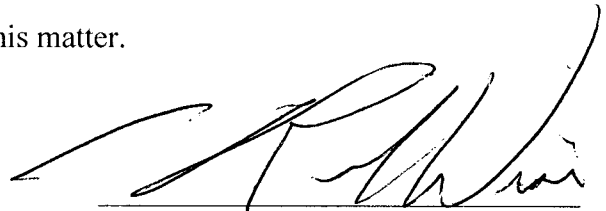
As to a motion to dismiss for the failure to state a ground upon which relief may be granted, the Supreme Court has said, “In considering such a motion, the trial court must base its ruling solely on allegations set forth in the Complaint. If the facts and inferences drawn from the facts alleged in the Complaint, viewed in the light most favorable to the Plaintiff, would entitle the Plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.” *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In a reading of the Complaint, there is no theory or rule of interpretation that states as a cause of action as to why the removal of the probate of this estate to another county should be granted. Mr. Hawk has simply failed to allege any facts upon which such relief could be granted, and this is assuming the Circuit Court even has the jurisdiction to grant such relief in an action originally filed in the circuit court.

Mr. Hawk has not alleged any conflict by the probate judge. He has not alleged bias by the probate judge. The action of a probate judge in accepting a death certificate prepared by the State of South Carolina is hardly a basis for changing the venue of the estate. The only allegation about Judge Summer was that "Judge Summer stated he knew Kenneth yet, did not recuse himself especially when the Death Certificate was falsified [sic]." Complaint at e. Simply knowing a deceased is not a ground to change venue of a probate estate. As no facts were alleged to support removal of the probate judge, the lower court was correct in dismissing the Complaint.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the lower court dismissing the Complaint filed by Daniel Hawk in this matter.

December 3, 2018



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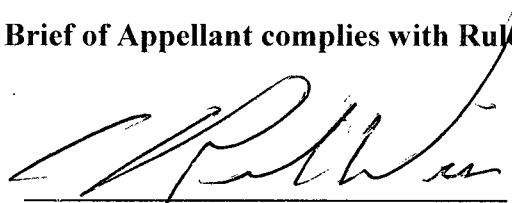
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Dec 3, 2018



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