IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2019-000624

Dottie R. Bell.....Appellant,

v.

John C. Bentley .....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

This reply brief is intended solely to respond to the Respondent's contentions that require further discussion for proper determination of the issues raised on appeal. This brief does not respond to issues that Appellant believes were adequately discussed in the Initial Brief of Appellant, and Appellant intends no waiver of these issues by not expressly reiterating them herein.

The trial court erred in denying Plaintiff's motion to substitute parties. The trial court further erred in ruling that Plaintiff had knowledge of Defendant's death pursuant to SCRCP Rule 25(a)(1) (hereafter "Rule 25(a)(1)") on January 25, 2018. Additionally, the trial court erred in finding that Rule 25(a)(1) "mirrors" the Federal Rules of Civil Procedure Rule 25(a). Finally, the trial court erred in interpreting that "reasonable" as used in Rule 25(a)(1) ranges from 90 days to 120 days.

In response to the Initial Brief of Appellant, Respondent argues that Appellant suggested the improper standard of review, despite the fact that the trial Judge, on the face of his Order, clearly provides an interpretation of Rule 25(a)(1) which includes a bright line 90 to 120 day time frame. Respondent further argues that Appellant has framed their entire appeal around Judge Benjamin's first Order and therefore their entire appeal should be barred, although that is not the case. Finally, Respondent continues to argue that the trial Judge did not abuse his discretion in determining that Appellant did not seek substitution of a real party of interest within a reasonable amount of time prescribed by Rule 25(a)(1).

ARGUMENT

I. This Court should review the Trial Court's denial of Appellant's Motion to Substitute Counsel de novo as there exists a question of the Trial Judge's interpretation of Rule 25(a)(1).

This Court must "first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute and our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000) (quoting United States v. Hayes, 482 F.3d 749, 752 (4th Cir. 2007). If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") In this case it seems clear that this is a matter of statutory interpretation.

First, Respondent admits in her own brief that the Appellate Courts of this state have never interpreted what "reasonable" amount of time means in relation to Rule 25(a)(1). Respondent's Brief page 9. Judge Hood's Order spends findings 10 through 12 discussing what reasonable amount of time means in the confines of Rule 25(a)(1). Finding number 12 specifically states, "A reasonable amount of time pursuant case [sic] law ranges from ninety (90) days and no more than 120 days." This is an interpretation of a statute at the bequest of Respondent, and therefore this Court should review this issue de novo. R. pp. 7-8.

Even if this Court finds that any other issues presented should be viewed through the lens of an abuse of discretion standard, the issues surrounding the Trial Judge's erroneous interpretation of Rule 25(a)(1) should be reviewed de novo.

II. Appellant's appeal is not bound by one single issue of Judge Benjamin's Order, although issues raised by Judge Benjamin's Order are proper before this Court as they are intertwined with the procedural history of this case.

Respondent alleges that "Appellant's entire appeal is framed in terms of one issue on appeal relating to Judge Benjamin's hearing and Order" and therefore should be dismissed. Respondent Brief p. 5. This Court only need to look at the face of Appellant's Statement of Issues on Appeal to see that is false. While Appellant chose to frame the issues around Judge Benjamin's original and correct ruling granting leave for Appellant to serve Bryan Caskey, it is obvious from I(b) and I(c) that Appellant takes issue as a matter of law with Judge Hood's findings.

Appellant maintains that the argument regarding the "reasonableness" of time at the February 13, 2019 should not have been heard by Judge Hood. It is clear from Judge Benjamin's Order that she intended to, and in fact did, grant Appellant leave to serve Bryan Caskey (who was already properly named Special Administrator of Respondent's Estate upon the Motion of Appellant and Order by Judge Branham on July 20, 2018). R. p. 3. Respondent failed to bring any other arguments at the October 15, 2018 hearing outside of the issue of service. R. pp. 35-41. Judge Benjamin granted leave and Appellant did what was asked of them by Judge Benjamin. In that regard, Judge Benjamin's Order should remain the law of this case and Appellant should have been allowed the leave to serve Bryan Caskey, which they did. In denying Appellant's Motion to Substitute, Judge Hood effectively disallowed Judge Benjamin's granting of leave.

This Court is allowed to consider this argument. Respondent incorrectly states this consideration is barred as a result of the failure of Appellant to file a Motion after Judge Benjamin's first "denial" of the Motion to Substitute. As a practical matter, there was no

ruling to appeal at the time, as Judge Benjamin granted Appellant leave to properly serve Bryan Caskey. The transcript and the face of the Order make that clear with Judge Benjamin explicitly stating she was granting leave to serve Mr. Caskey in both. R. p. 40 ll. 19-22.

Notwithstanding that fact, Respondent argues that the "law of the case doctrine" bars this Court from considering Judge Benjamin's Order, and thus, bars this Court from hearing this Appeal as untimely. In support of this position, Respondent cites Bone v. United States Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012). Bone deals with a final judgment. Bone also defines the "law of the case doctrine" by stating, "a party is precluded from relitigating, *after* an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." (emphasis added). This is not analogous to what is presently before this Court.

Judge Benjamin's first Order was not a final judgment in this case. Furthermore, Appellant is not trying to relitigate any issue which was raised or should have been raised on appeal. Appellant took the leave granted by Judge Benjamin and came back before the Trial Court as she instructed after effectuating proper service. After Judge Hood denied the Motion to Substitute issue became ripe for appeal.

III. The lower court erred as a matter of law in finding that the time it took Appellant to properly substitute Bryan Caskey as the real party in interest was not "reasonable" under Rule 25(a)(1).

Despite what Respondent wants to say, it is clear that the Trial Judge determined that a reasonable amount of time ranges from 90 to 120, based on the case law. R. p. 8. On its face, Judge Hood's Order shows that he incorrectly relied on case law to determine that there is a bright line rule of 90 to 120 days in determining what constitutes a reasonable

amount of time under Rule 25(a)(1). The Panhorst v. Panhorst case is not on point and Pressley v. Blackwell states the opinion has "no precedential value" and "should not be cited or relied on as precedent in any proceeding." Panhorst v. Panhorst, 301 S.C. 100 390, S.E.2d 376 (S.C. App. 1990); Pressley v. Blackwell, 2005 S.C. App. Unpub. Lexis 231. Not only is it relied upon here, but it is cited in an Order.

As Respondent correctly points out, Judge Hood also states in Paragraph 11 of his Order that "the footnotes indicates [sic] [Rule 25(a)(1)] mirrors the Federal Rules of Civil Procedure which notes the substitution must be made in ninety (90) days." R. p. 7. Respondent is also correct in pointing out that the footnote does not use the word "mirror", but rather the footnote states the South Carolina rule is "substantially the same." This is a very significant difference and an incorrect interpretation of the law.

Although "substantially the same", there are notable differences. Rule 25(a)(1) of the Federal Rules of Civil Procedure states:

> *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days *after service of a statement noting death*, the action by or against the decedent must be dismissed. (emphasis added).

The footnote of South Carolina's Rule 25(a)(1) states, in its entirety, "This Rule 25(a)(1) is substantially the same as Federal Rule 25(a). In the Federal Rule the motion for substitution is to be made within 90 days after *notice of death is suggested upon the record.* This Rule substitutes 'a reasonable time' after *such* knowledge is obtained." (emphasis added).

While Appellant made its Motion for Substitution in a reasonable manner for all the reasons stated it its initial brief, it is also important to note the language used in the

footnote. The legislature determined to substitute the 90 day limitation with "reasonable time." However, they chose to require "such knowledge" to be obtained, in reference to the "notice of death...suggested *upon the record*" (emphasis added).

Respondent argues that Appellant had knowledge of the death of Respondent as of January 25, 2018. In support of this, Respondent cites conversations which occurred off the record at a mediation and emails that were exchanged. However, neither the conversation at the mediation nor any of the subsequent emails provided any actual knowledge of death outside of hearsay. Respondent certainly gave no "notice of death" or any notice "upon the record."

Appellant tried to obtain actual "notice of death" through discovery, by sending Interrogatories and Requests for Production. R. p. 81. When Respondent did not answer the Interrogatories, Appellant sent a letter requesting that they respond to the Interrogatories. R. p. 96. Respondent finally responded to the Interrogatories and Requests for Production on May 10, 2018. This is the first thing regarding death that could be considered on the record. However, Respondent denied knowing: 1. where Respondent is buried; 2. date of death of Respondent; 3. date of Respondent's funeral; 4. knowledge of any obituary of Respondent; 5. knowledge of any funeral home involved; 6. knowledge of any estate that had been opened; and 7. knowledge of any individual who has applied to be the PR of the Estate of Respondent. Additionally, Respondent denied having a copy of Respondent's death certificate or any documents evidencing Defendant's death. Second Supp. R. pp. 1-5.

Meanwhile, Appellant was unilaterally trying to gather any such information. Finally, on June 12, 2018, Appellant obtained the Statement of Death from DHEC (which

the Court should note is substantially similar in verbiage to the "notice of death" referenced in the footnote). R. p. 99. The first document supplying an actual "notice of death" which was "on the record" was provided by Appellant on July 20, 2018, when they sent a proposed Order to the Probate Court to appoint Bryan Caskey as Special Administrator of Respondent's Estate. R. p. 24.[1] Then, on September 10, 2018, Appellant filed their Motion to Substitute, well within any 90 or 120 requirement, much less a "reasonable" requirement. R. p. 30.

The legislature determined to substitute the 90 day limitation with "reasonable time." In the plain language of the footnote, they equated "such knowledge" to be obtained to the "notice of death...suggested *upon the record*" (emphasis added). Therefore, the time taken by appellant was more than "reasonable" and the Trial Court erred in finding it unreasonable.

a. Even if this Court determines the South Carolina Rule "mirrors" the Federal Rule and were to essentially adopt it, Judge Hood still erred in finding Appellant did not file their Motion for Appointment within 90 days.

Respondent argues that this Court should adopt a finding that the South Carolina rule does in fact "mirror" the Federal Rule, as Judge Hood ruled. Appellant disagrees with this suggestion. However, even if this Court determined the South Carolina rule does "mirror" the Federal Rule, the Trial Court still erred in denying their Motion to Substitute.

The Advisory Committee Notes on the 1963 Amendment to Federal Rule 25(a)(1) states that "the amended rule establishes a time limit for the motion to substitute based not

[1] It should be noted that in this instance Appellants also confirmed with the Probate Court that there was no Estate established. So, in addition to the requirements of Rule 25(a)(1) regarding the substitution of parties, Appellant first had to unilaterally open an Estate and have a Special Administrator appointed by the Probate Court. Appellant did not receive the Order from Judge Branham naming Bryan Caskey Special Administrator until August 14, 2018, nearly a month after sending it for her signature.

upon the time of death, but rather upon...a suggestion of death upon the record, i.e., *service* of a statement of the *fact* of death." (emphasis added). The Committee goes on to state, "If a party or the representative of the deceased party desires to limit the time within which another may make the action, he may do so by suggesting death upon the record." Here, none of this has occurred.

The Federal Courts give some guidance regarding the Federal Rule 25(a)(1) should this Court so determine our Rule "mirrors" it. Wilcox v. Ozmint is very analogous to the situation at hand. 2012 U.S. Dist. LEXIS 68598. In Wilcox, an inmate was bringing a §1983 claim against Defendants. The inmate died two months after filing suit, on October 31, 2011. The Notice of Death and Motion to Substitute were filed on February 17, 2012. Defendants filed a Motion to Dismiss. The U.S. Magistrate found the 90-day time limit for filing had not expired. The Magistrate also found that the Estate would suffer irreparable substitution if the action was dismissed, while Defendants would not suffer any prejudice by the substitution.

Much like the current situation, the Court noted that Defendants blamed Plaintiff's counsel for the delay in filing. The Court found that Motions to Substitute under Rule 25 should be "freely granted." In their decision, the Court noted that the time of death and the filing of the Motion for Substitution has no bearing. The Court held the 90 day filing requirement does not start to run until a statement of the decedent's death has been filed and served. The court even went so far as to say that the Defendants could have filed the notice themselves, as the Rule allows either party to file the Notice of Death (which mirrors the Committee's Advisory Notes). The Court found "the intent that motions to substitute be freely granted should be voided only where circumstances have arisen rendering it unfair

to allow substitution." Finally, the Court noted that while there could even be an argument that Plaintiff's counsel could have acted more expeditiously, that did not support what the Court deemed a "sanction" of dismissing the action.

The current situation is extremely similar. Appellant was never served with any notice of death by Respondent. The only formal service of any kind of Notice of Death would be the June 12, 2018 Statement of Death Appellant received from DHEC through their own efforts. Respondent never filed any sort of notice with the Trial Court. And although Appellant's counsel maintains that the timeline shows they acted more than expeditiously, even if this Court found counsel could have acted in a more expeditious manner, the fact remains that a Motion for Substitution was timely filed. Any dismissal would place a huge prejudice on Appellant, while not dismissing the action does not confer any prejudice on Respondent, who claims they have known about the death since January 25, 2018.

Therefore, Even if this Court determines the South Carolina Rule "mirrors" the Federal Rule and were to essentially adopt it, Judge Hood still erred in finding Appellant did not file their Motion for Appointment within 90 days.

CONCLUSION

Based upon the foregoing reasons, Appellant has taken all proper steps in the filing of their Motion to Substitute. No delay as contemplated by the Rules of Civil Procedure, either of this state or federally, has occurred. As this is not a bright-line rule, the Court is given discretion is determining the reasonableness given all the circumstances, which the Trial Judge abused. Even implementing a 90 day or 120 day limitation on Appellant, substitution was still performed properly, as evidenced by the Federal Rules and the

Advisory Committee Notes. Therefore, Appellant prays this Court either reverse the Trial Judge's denial of the Motion to Substitute Bryan D. Caskey, Esquire as Personal Representative or real party in interest for Defendant or, in accordance with S.C.R.C.P. Rule 25(e), substitute on its own the Special Administrator, Bryan Caskey, as the real party in interest.

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CERTIFICATE OF COUNSEL

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

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