

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Leonard R. Jordan, Jr., as Personal
Representative of the Estate of Lil B. Jordan,

Petitioner,

v.

Marian J. Kirk and Lucy J. Fuller,

Respondents.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2018CP4000726

VERDICT AND JUDGMENT

RECEIVED

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SC Court of Appeals

This matter came before the Court on August 20 and 21, 2019 for non-jury trial pursuant to Rule 39(a), SCRPC. Petitioner appeared along with his counsel, Steven R. Anderson, Esquire; and Respondents were present with their counsel, Stephen M. Cox, Esquire. Only two witnesses testified at trial – Petitioner and Respondent Kirk. The parties also introduced certain evidence and made legal arguments. Having fully considered the testimony, evidence and arguments, the Court now makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner commenced this action in the Richland County Probate Court on November 22, 2017 by filing a Summons and Complaint.¹ Respondents timely answered the Complaint and removed the action to this Court. In his Complaint, Petitioner has asserted claims on behalf of the Estate of Lil B. Jordan with respect to three separate sums: (1) the sum of \$23,980.82 in Wells Fargo Bank accounts (the “Wells Fargo Claim”); (2) the sum of \$2,480 in a check from Bankers Life Company (the “Bankers Life Claim”) and (3) the sum of \$21,857.80 in a Bank of America account (the “Bank of America Claim”). Petitioner contends that all of these sums were

¹ See case number 2012-ES-40-01470

assets of the Estate of Lil B. Jordan and that Respondents converted these sums to their own use. In their respective Answers, Respondents denied Petitioner's allegations.

By Order filed on November 2, 2018, partial summary judgment was granted on behalf of Petitioner, finding that Respondents had wrongfully converted the sum of \$21,857.80 that was the subject of Petitioner's Bank of America Claim and the sum of \$2,480 that was the subject of Petitioner's Bankers Life Claim. Petitioner was awarded \$21,857.80 in actual damages on the Bank of America Claim, plus \$12,140.81 in prejudgment interest. He was also awarded \$2,480 on the Bankers Life Claim, plus \$1,260.98 in prejudgment interest.

Petitioner's Wells Fargo Claim, as well as his claim for punitive damages associated with his Bankers Life Claim and Bank of America Claim, were not the subject of Petitioner's Motion for Partial Summary Judgment and thus were not addressed by the Court at that time. Those matters are addressed herein.

FINDINGS OF FACT

1. Petitioner and Respondents are the three adult children of Lil B. Jordan ("Decedent"), a Columbia resident who died on June 5, 2012.
2. Petitioner, a member of the South Carolina Bar since 1975, was appointed by the Richland County Probate Court as the Personal Representative of Decedent's estate. Prior to such appointment, and since the 1970s, Petitioner had the authority to act as attorney-in-fact for Decedent pursuant to a durable power of attorney.
3. Near the end of 2005, Petitioner and Respondents concluded that Decedent was no longer capable of independently managing her financial affairs. A couple of her checks had "bounced," and she had gotten into the habit of subscribing to large numbers of magazines that she did not need. For a time, however, Decedent was otherwise competent to live independently

– doing her own shopping, living independently, cooking her own meals, and driving herself to the beach occasionally.

4. Also near the end of 2005, Respondent Kirk had discussions with Decedent about Decedent's need for assistance in managing her financial affairs. Decedent responded by making Respondent Kirk a joint account holder on her checking account at Wells Fargo Bank (the "1206 Account") and on an investment account that Decedent maintained at Morgan Stanley.

5. Petitioner had both actual and constructive knowledge that Respondent Kirk had been added to Decedent's 1206 Account and to the Morgan Stanley account. In fact, for several months after Respondent Kirk had become a joint account holder, Petitioner received bank statements for the 1206 Account at his home (by virtue of his being an attorney-in-fact for Ms. Jordan) which bore the names of both Decedent and Respondent Kirk as joint account holders.

6. Petitioner lodged no challenge or objection to Respondent Kirk being added to Decedent's accounts. He testified at trial that he trusted his sister to act in Decedent's best interest.

7. Later in 2006, Decedent left her home and moved into an independent living facility. Several years later, she moved to another facility that provided assisted living care. Ultimately, she became eligible for long-term care proceeds pursuant to a policy she had maintained with the Bankers Life Company.

8. Respondent Kirk ensured that all necessary paperwork was submitted to Bankers Life Company so that Decedent could receive payments under her long-term policy. Respondent Kirk also deposited the long-term care proceeds checks from Banker's Life Company into one of Decedent's joint accounts (generally, Account 1783) when they were received each month.

9. After Decedent had vacated her home, Respondents did the majority of the work required to ready the house for sale, including cleaning and moving Decedent's furniture and other possessions out of the house. In addition, Respondent Fuller showed the house to prospective buyers on several occasions and ultimately negotiated a successful sale of the property for approximately \$440,000.

10. Petitioner and Respondents disagreed strongly over how the proceeds from the sale of Decedent's house should be invested. Respondents believed that the money should be conservatively invested in Certificates of Deposit while Petitioner believed that the funds should be more aggressively invested. Ultimately, Respondents invested the portion for which they were responsible (by virtue of Respondent Kirk's status as a joint account holder on the Morgan Stanley account) in CDs, and Petitioner invested the portion for which he was responsible (as Decedent's attorney-in-fact) in an investment account at Merrill Lynch. The Merrill Lynch funds were initially invested by Petitioner in June 2007.

11. After the stock market crashed in 2008, Respondents repeatedly attempted to learn from Petitioner how much of Decedent's funds that he had invested at Merrill Lynch had been lost. These efforts were unavailing. In fact, in his testimony, Petitioner did not deny that he had hung up on his sisters when they phoned him asked such questions. At one point, Petitioner delivered a box of Merrill Lynch records to Respondent Kirk for review, but these records did not include statements from 2008. Respondents subsequently procured the missing statements directly from Merrill Lynch, which indicated that the account had lost over \$35,000 by the end of 2008. Petitioner submitted at the hearing a 2010 account summary from Merrill Lynch suggesting that the account had lost a total of \$15,000 at the time the funds were withdrawn in 2010.

12. In approximately 2009, Respondent Kirk opened a joint savings account at Wells Fargo Bank in the name of Decedent and herself (the "1783 Account"). According to the testimony, this account was opened at the suggestion of a Wells Fargo employee, because it offered a better interest rate than Decedent's checking account.

13. In 2010, Respondent Kirk transferred \$21,857.80 from a joint account that she held with Decedent at Wells Fargo Bank to an account at Bank of America that she maintained in her own name. Respondent Kirk testified at trial that she made this transfer to take advantage of a special interest rate offered by Bank of America.

14. Decedent passed away on June 5, 2012. Petitioner submitted Decedent's Will to Richland County Probate Court and, in accordance with the terms of that Will, had himself appointed as Personal Representative of Decedent's Estate.

15. In the summer of 2012, in order to prepare the Inventory and Appraisement that he was required to submit to the Probate Court, Petitioner asked Respondent Kirk how much money was in Decedent's joint accounts with Morgan Stanley and Wells Fargo. Respondent Kirk responded with the figures of \$60,460.84 for Morgan Stanley and \$23,980.82 for Wells Fargo. The Wells Fargo amount represented the sum of the amounts in Account 1206 and Account 1783 (referred to above) at the time that Petitioner made his inquiry.

16. Respondent Kirk acknowledged at trial that she did not tell Petitioner about the existence of the \$21,857.80 that she had transferred to Bank of America two years earlier. She further testified that she had forgotten about that account at the time of Decedent's death.

17. Although Petitioner conceded at trial that he could have consulted Wells Fargo directly or reviewed the Wells Fargo bank statements himself to determine the balances in Account 1206 and Account 1783 at the time of Decedent's death, he did not do so. Petitioner

also failed to open an estate account or take any other action to claim possession or control of the accounts at Wells Fargo Bank on which Decedent had been a joint account holder.

18. On January 11, 2013, Petitioner filed an Inventory and Appraisement in Probate Court that included \$23,980.92 in the Wells Fargo accounts (the sum that Respondent Kirk had provided him several months earlier). In December 2012, just a short time prior to that filing, Respondent Kirk had deposited an old Banker's Life Company check for long-term care insurance proceedings into Account 1783. Petitioner did not take steps to learn of this deposit or to update the Inventory and Appraisement to reflect it.

19. On October 7, 2013, after being notified by Probate Court that he was delinquent in closing Decedent's estate, Petitioner filed an Application for Settlement. In that Application, he represented to Probate Court that he had collected the assets of the estate and either had already distributed or proposed to distribute those assets to the heirs of the estate. In a Receipt and Release filed the same day, Petitioner represented that he had received one-third of such assets as one of Decedent's heirs.

20. At trial, Petitioner acknowledged that the representations that he made to Probate Court were false with respect to the Wells Fargo accounts. Though Petitioner included such amounts on the Inventory and Appraisement, he never collected, distributed, or received those funds.

21. Based on Petitioner's representations, Richland County Probate Court issued its Order closing Decedent's estate on October 9, 2013.

22. In May 2014, Respondents divided between themselves the \$21,857.80 that Respondent Kirk had transferred to Bank of America from Decedent's joint account in 2010 (and that had been sitting in the same Bank of America account since that date). Respondents did not

tell Petitioner about the existence of the funds in that account or about their distribution of those funds.

23. Respondent Kirk testified at trial that she and Respondent Fuller felt justified in splitting the \$21,857.80 representing the Bank of America Claim between themselves because (i) their brother had lost so much money in the market, over their objection and without disclosing the extent of such losses, and (ii) she and her sister had performed so much uncompensated work for Decedent to move her into her living facilities and to ready and sell Decedent's home, while Petitioner and his wife had compensated themselves for sitting with Decedent for a time at her living facility. Respondent Kirk acknowledged, however, that neither she nor Respondent Fuller ever filed a claim against Decedent's estate to be compensated for their efforts or to challenge Petitioner's conduct as attorney-in-fact.

24. Petitioner filed this action against Respondents on November 22, 2017 – over four years after the January 2013 Inventory and Appraisement characterizing the Wells Fargo bank accounts as estate assets and well after the Probate Court had issued its October 2013 Order closing Decedent's estate.

CONCLUSIONS OF LAW

I. The Wells Fargo Claim

Petitioner's Wells Fargo Claim, made with respect to the \$23,980.82 in Wells Fargo accounts identified on the Inventory and Appraisement that Petitioner filed on January 11, 2013, must be dismissed for three, independent reasons:

A. Joint Account Status

The sums that are the subject of the Wells Fargo Claim were contained in joint accounts on which Respondent Kirk and Decedent were joint account holders. The status of these

accounts as joint accounts was not contested by Petitioner at the hearing and was conclusively demonstrated by Respondent Kirk's testimony, the admission of account-opening documents and bank statements showing Respondent Kirk as a joint account holder.

Under former S.C. CODE ANN. §62-6-104, the statute in effect at the relevant time, "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is a writing filed with the financial institution at the time the account is created (or subsequently as provided under § 62-6-105) which indicates a different intention." Petitioner offered no evidence of any "writing . . . which indicates a different intention." Accordingly, the \$23,980.82 in Wells Fargo account numbers 1206 and 1783 (identified on the Inventory and Appraisement that Petitioner filed with the Probate Court in January 2013) were not assets of the estate and passed automatically to Respondent Kirk upon Decedent's death.

B. Judicial Estoppel

Even if the Wells Fargo accounts had been estate assets, Petitioner is estopped from claiming them for the Estate. Petitioner knowingly misrepresented to the Probate Court that he had collected and distributed (or proposed to distribute) those accounts as Personal Representative of the Estate. Furthermore, in his personal capacity as one of Decedent's heirs, he knowingly filed with the Probate Court a Receipt and Release representing that he had received one-third of those accounts as of October 7, 2013. As he conceded at trial, however, Petitioner had done none of these things. Instead, he left the sums in question in the Wells Fargo Bank accounts. By the time he filed the Inventory and Appraisement with the Probate Court, however, the sums in those accounts had passed by operation of law to Respondent Kirk.

Under these circumstances, Petitioner's Wells Fargo Claim is barred by the doctrine of judicial estoppel, which "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252 (1997). Petitioner falsely represented to the Probate Court that he had collected the Wells Fargo accounts and had received his share of those accounts as an heir of the estate. He did so in the face of a reminder from Probate Court that he had been delinquent in closing the estate – an apparent effort to discharge his responsibilities as Personal Representative. Relying on Petitioner's misrepresentations, the Probate Court closed Decedent's estate.

Had Petitioner been truthful to the Probate Court about the facts surrounding the collection, distribution and receipt of the sums in the Wells Fargo accounts that he had listed on the Inventory and Appraisal, any dispute concerning the status of those accounts as a potential estate asset could have been resolved at that time. Petitioner cannot take one position before the Probate Court in order to obtain a benefit as a Personal Representative (i.e., closure of Decedent's estate) and later take the opposite position for pecuniary gain.

C. Statute of Limitations

Petitioner's claims are governed by the three-year statute of limitations found in S.C. CODE ANN. §15-3-530. This statute was tolled for eight months upon Decedent's death on June 5, 2012 pursuant to S.C. CODE ANN. §62-3-109. Petitioner knew that Respondent Kirk held the Wells Fargo accounts at least as early as January 11, 2013, when he filed an Inventory and Appraisal characterizing those accounts as an estate asset. At the latest, then, Petitioner had to file this action no later than September 11, 2016 (three years and eight months after he knew that his sister was in possession of assets that he believed belonged to the estate). He did not file

this action, however, until over a year later, on November 22, 2017. Thus, this claim is barred by the statute of limitations.

II. The Bankers Life Claim

Respondents have urged this Court to revisit the November 2, 2018 Order granting partial summary judgment, which awarded Petitioner \$2,480.00 in actual damages on his Banker's Life Claim, as well as associated prejudgment interest. Respondents argue that, because that court declined to certify the ruling as a "final" judgment, it is "subject to revision" at any time prior to final judgment pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure. Nevertheless, this Court declines Respondents' request to revise that ruling² and instead chooses to incorporate it by reference into the instant Order. Therefore, Petitioner, in his capacity as Personal Representative of Decedent's Estate, is entitled to recover for the estate the sum of \$2,480 in actual damages on his Banker's Life Claim, as well as \$1,459.55 in prejudgment interest (from December 19, 2012 to September 10, 2019).

However, Petitioner's claim for punitive damages is denied. "In order to recover punitive damages, [Petitioner] must present clear and convincing evidence that the [Respondents'] conduct was willful, wanton or in reckless disregard of the [Petitioner's] rights." *Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 624 (Ct. App. 2011). The particular factors relevant to a punitive damages award are: "(1) [Respondents'] degree of culpability; (2) duration of the conduct; (3) Respondents' awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the [Respondents] or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) [Respondents'] ability to pay; and finally . . . 'other factors' deemed appropriate." *Gamble v. Stevenson*, 305 S.C. 104, 112 (1991) (internal citations and quotations omitted).

² The November 2, 2018 decision was made by another Circuit Court Judge, not the undersigned.

Respondents' conduct with respect to the \$2,480 that is the subject of the Bankers Life Claim does not justify an award of punitive damages. Those funds were initially held in the form of a check issued by the Bankers Life Company for long-term care insurance proceeds for Decedent. Respondent Kirk deposited those funds in Wells Fargo Account No. 1783 in December 2012, just as she had regularly done with respect to other such checks. There is no evidence that she attempted to conceal this deposit from Petitioner or to prevent him from claiming the funds as an asset of the estate. To the contrary, as Petitioner conceded at trial, he could easily have determined the amounts in the Wells Fargo accounts by consulting the bank directly or by reviewing the account statements. However, he neither did that nor did he attempt to exercise any control over the \$2,480 Banker's Life deposit prior to applying to the Probate Court for the closure of the estate. Any delay in the estate's ability to take possession of the \$2,480, then, has been due to Petitioner's own conduct, not to the conduct of Respondent Kirk. Therefore, punitive damages are not here.

III. The Bank of America Claim

The Court also adopts and incorporates the November 2, 2018 ruling with respect to the \$21,857.80 that is the subject of Petitioner's Bank of America Claim. Petitioner, in his capacity as Personal Representative of Decedent's Estate, is entitled to recover for the estate the sum of \$21,857.80 in actual damages on that claim, together with prejudgment interest in the amount of \$11,978.39 (from June 6, 2012 to September 10, 2019).

Petitioner's claim for punitive damages is, again, denied. It is clear that Respondents failed to tell Petitioner of the existence of the Bank of America account and that they neglected to inform Petitioner that they were dividing those funds between themselves in May 2014. However, the Court has already found those actions to have been a conversion, and Petitioner

will receive his one-third share of those funds when they are returned to the Estate (with prejudgment interest).³

There is no evidence that Respondents were attempting to act in “conscious disregard” of Petitioner’s rights when the Bank of America account was created in 2010. Respondent Kirk testified that she created that account solely to obtain a better interest rate for Decedent’s assets (an outcome urged by Petitioner himself). Her testimony was buttressed by the fact that the funds sat in the Bank of America account for four years before being divided between Respondents. In fact, as far as her purely personal interests were concerned, Respondent Kirk would have been better off leaving the money in Decedent’s joint account rather than moving it to a Bank of America account in her own name, because funds in a joint account would have passed to her alone at Decedent’s death.

Respondents’ principal wrongdoing with respect to the Bank of America funds took place in May 2014, when Respondents divided the Bank of America funds between themselves without telling Petitioner. At that time, Respondents were convinced that they were entitled to claim Petitioner’s share of those funds as their own because of what they believed to be his mismanagement of Decedent’s investment in a Merrill Lynch account, his persistent refusal to account for the substantial loss of that investment, and the disproportionate, uncompensated efforts that they undertook for Decedent in moving her to assisted living facilities and in readying her house for sale.

Respondents were clearly wrong in attempting to exercise “self-help” with respect to the Bank of America funds. If they believed that Petitioner should have been held accountable for loss of the Merrill Lynch funds, or that they should have received compensation for their efforts

³ As Petitioner has acknowledged, any amounts recovered by the estate by virtue of this Order must be equally divided among Petitioner and Respondents, as the sole heirs of the estate.

on Decedent's behalf, they should have made a claim against Decedent's estate. Nevertheless, though their failure to do so may make them liable for conversion, this Court finds it inequitable to penalize them for their actions. This is especially so when one considers Petitioner's own poor conduct in handling Decedent's estate, in making false representations to the Probate Court, and in failing to be transparent to Respondents about the losses in the Merrill Lynch account. Moreover, Respondents' conduct with respect to the Bank of America account was an isolated incident; otherwise, their handling of Decedent's funds and affairs prior to her death was above reproach.

An award of punitive damages here would not have any beneficial deterrent effect particularly because, with this Order, the affairs of the Decedent's estate will be completely resolved; and there are no other estate assets over which Respondents exercise custody or control. Finally, Petitioner offered no evidence at the hearing concerning Respondents' ability to pay an award of punitive damages – an important factor in the Court's consideration of such an award. For the foregoing reasons, Petitioner's request for punitive damages with respect to the Bank of America Claim is denied.

IT IS, THEREFORE, ORDERED that Petitioner Leonard R. Jordan, Jr., on behalf of the Estate of Lil B. Jordan, is awarded (1) the sum of \$2,480 in actual damages plus the sum of \$1,459.55 in prejudgment interest on his Banker's Life Claim; and (2) the sum of \$21,857.80 in actual damages and the sum of \$11,978.39 in prejudgment interest on his Bank of America Claim.

IT IS FURTHER ORDERED that, because it would be both burdensome and inefficient for Respondents to be required to pay into the estate their own one-third shares of this award, Respondents Marian J. Kirk and Lucy J. Fuller may fully satisfy and discharge their obligations

under this Order by paying one-third of this award (or \$12,591.91) to the estate, together with an instrument renouncing any claims that they may have to that amount. In that event, Respondents will remain liable for any reasonable expenses incurred by the estate in collecting this amount, as determined by the Probate Court.

AND IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Lil B Johnson vs Marian J Kirk , defendant, et al

Case Number: 2018CP4000726

Type: Order/Other

So Ordered

Jocelyn Newman

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