(6)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Hon. Jennifer B. McCoy, Circuit Court Judge
The Hon. Tamara C. Curry, Probate Court Judge

Case No. 2017-CP-10-5198
Appellate Case No.: 2018-01680

Elizabeth Murray as Personal Representative of the Estate of Minnie H. Murray and Elizabeth Stylesetters,..... Appellants,

v.

The Estate of William H. Murray,..... Respondent.

INITIAL BRIEF OF APPELLANT

Oana D. Johnson
304 Meeting Street
Suite 203
Charleston, SC 29401
(843) 203-4195
oana@odjlaw.com

George J. Kefalos, Esquire
George J. Kefalos, PA
46-A State Street
Charleston, SC 29401
(843) 722-6612
george@kefaloslaw.com

Barry I. Baker, Esquire
P.O. Box 31265
Charleston, SC 29417-1265
(843) 766-9007
bbaker@bakerlawsc.com

Stephen Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd, Suite 100
Mount Pleasant, SC 29464
(843) 577-6321
steve@slotchiverlaw.com

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. **Should the lower courts have concluded that Appellant, as PR for her Mother's Estate, does not have standing to prosecute the Estate's Claim against her Father's Estate because of an agreement the beneficiaries made among themselves on how they would divide the proceeds due to their Mother's Estate?**

II. **Did the lower courts erroneously conclude that the Mother's Estate's claim against Respondent is barred by the statute of limitations or the doctrine of laches?**

III. **Should the claim of Elizabeth Stylesetter's have been dismissed on summary judgment on a theory of judicial estoppel?**

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's affirmance of a Probate Court's grant of summary judgment to the Estate of William E. Murray ("Decedent") on two creditor's claims. Mr. Murray died testate on August 7, 2007, as a resident of Charleston County, South Carolina. Hilton C. Smith, Jr. and Hongjiang (James) Ma were appointed as Co-Personal Representatives on September 21,2007. Appellant, Elizabeth Murray, is one of three daughters of Minnie H. Murray and William H. Murray. The other two daughters of that marriage are Pamela Holmes Murray, and Catherine Murray-Smith. Appellant's Mother, Mrs. Murray, was a resident of New York when she died on June 18, 1967. Appellant was appointed as a successor Executrix of her Mother's Estate in 1975.

Following Mr. Murray's death and the appointment of the current PR's for his estate, on June 3, 2008, Appellant, Elizabeth Murray filed two creditor's claims against the Estate of William E. Murray. The first claim was filed by Appellant in her representative capacity on behalf of the Estate of Minnie Holmes Murray in the amount of $6,260,845.70. The second claim

was filed on behalf of Ms. Murray's company, Elizabeth Stylesetters, in the amount of $538,034.00 for work she had done for her father prior to his death.

The claim on behalf of the Estate of Minnie Holmes Murray was predicated on a Settlement Agreement, dated April 22, 1980, between the Decedent and his three (3) older daughters who are the beneficiaries of the Estate of Minnie Holmes Murray, namely: Elizabeth Edwards Murray, Pamela Holmes Murray, and Catherine Peronneau Murray-Smith, (Hilton Smith's Wife).

The claim on behalf of Elizabeth's Stylesetters was made by Elizabeth Murray as president of the interior design company. The claim is based on reimbursement of various expenditures of her business for work done at the Inn of Quogue ("the Inn"), a hotel and restaurant formerly owned by the Decedent and Hilton Smith and other work Stylesetters performed on various properties owned by William E. Murray.

On August 21,2008, Hilton C. Smith, Jr., as Co-Personal Representative of the Estate of William E. Murray, filed a Notice of Disallowance of Claim as to the claims made both the Estate of Minnie Murray and Elizabeth's Stylesetters, stating that the claims were not properly made and were barred by the statute of limitations.

On September 22, 2008, Appellant filed a Petition for Allowance of Claim for both claims. After a lengthy discovery, on October 31, 2016, the Estate of William E. Murray filed its Motion for Summary Judgment which the Probate Court granted on September 28, 2017.

Appellant timely appealed to the Circuit Court which ultimately affirmed the grant of summary judgment on August 15, 2018. This appeal follows.

STATEMENT OF FACTS

In 1967, the Decedent borrowed $142,685 from his wife, Minnie Holmes Murray. Following the death of Minnie Holmes Murray, on June 18, 1967, the note became the property of her Estate. On April 22, 1980, the Decedent entered into a Settlement Agreement ("1980 Agreement") with his three (3) older daughters, namely: Elizabeth Edwards Murray, Pamela Holmes Murray, and Catherine Peronneau Murray-Smith, as the beneficiaries of the Minnie Holmes Murray Estate. In the 1980 Agreement, the Decedent agreed to pay $240,000 plus 8% interest rate and a default interest rate of 12%. The Decedent also transferred a life insurance policy to the Estate of Minnie H. Murray in the amount of $385,000, to compensate for losses related to the unpaid debt. Mr. Murray made six (6) yearly payments pursuant to the 1980 Settlement Agreement, however, he stopped paying after the February 24, 1986 payment. Mr. Murray also stopped paying the premiums on the life insurance policy.

Between 1998 and 2006, relying on the advice of Hilton Smith, now the PR for Mr. Murray's Estate, and in a misguided attempt to preserve the statute of limitations, Appellant wrote her father, the Decedent several letters reminding him of the 1980 Agreement and asking the Decedent to make payment on the debt or to reestablish the debt owed. These letters were largely ignored by Decedent. However, as he grew older, Decedent came to acknowledge the old debt with the result that when Appellant wrote a letter to her father on February 9, 2006, asking him to make payments pursuant to the 1980 Agreement, he signed the letter to evidence his recognition that the debt was still owed. Mr. Murray died the following year and his Estate now disputes the validity of his signature on the 2006 letter affirming his debt to his late wife's estate.

The second disallowed claim belongs to Elizabeth's Stylesetters, which is an interior decorating company owned and operated by Appellant, Elizabeth Murray. Elizabeth's Stylesetters, filed a claim in the amount of $538,034.00 for work at the Inn at Quogue hotel and restaurant and on multiple properties owned by Mr. Murray and used by him as residences. Elizabeth Stylesetters expended large sums of money in order to remodel and redecorate Mr. Murray's residences and it expended large sums of money at times to help with the expenses at certain commercial properties owned by Mr. Murray. All these expenses were documented over the years and acknowledged by Mr. Murray prior to his death. Furthermore, all the receipts and accounting documenting the debt to Elizabeth Stylesetters were submitted to Mr. Ma, the co-personal representative, prior to Mr. Murray's death and again were submitted to Mr. Murray's Estate in support of the claim submitted. Mr. Murray even began to repay Elizabeth Stylesetters for the expenses it incurred, before his death. (ROA at pp. 1972 to 1979, Affidavit of Elizabeth Murray).

In April of 2007 Mr. Murray signed an acknowledgement of the debt in in front of a notary and Brian Canaday. (ROA at pp. 1431, Exhibit B - Canaday letter accompanying Mr. Murray's letter).

Mr. Murray continued to make monthly payments towards his debt until May 2007, when Mr. Smith took over the handling of Mr. Murray's finances and stopped making the payments. There was no issue of payment to Elizabeth's Stylesetters until then. Up until that point, Mr. Murray was paying the debt as previously agreed. See also Letter to Elizabeth Murray during her divorce (ROA at pp. 1431 to 1432, Exhibit B). (ROA at pp. 1394 to1395, PRs' Memorandum at pgs. 4 -5).

Becoming concerned that Mr. Murray may not be aware that the payments were not being made since he was no longer handling his finances, Ms. Murray along with her sister Pamela (the one not married to Mr. Smith), discussed the situation with Mr. Murray and asked to again affirm the debt and his intention that the debt to Elizabeth Stylesetters be paid. On July 21, 2007, Mr. Murray reaffirmed his debt to Elizabeth Stylesetters by signing a letter in the presence of his daughter Pamela, her fiancé at the time, Larry Bump and their neighbor Jeffrey Young. (ROA at pp. 1589 to 1601; 2320 to 2321; 2177; Exhibit 1 to Estate's Motion for Summary Judgment, Deposition of Jeffrey Young pages 39-42, deposition of Larry Bump (Pages 69:19 to 71:1). Mr. Young and Mr. Bump both testified that Mr. Murray was coherent, recognized them, was able to hold a conversation and understood what Pam read to him prior to signing. (ROA at pp. 2317; 2174; Deposition of Jeff Young Pages 28:10 to 29:3; Deposition of Larry Bump Pages (Page 60:19 to 60:25). Significantly, Elizabeth Murray was not present for the July 2007 signing. Mr. Murray died on August 4, 2007, and Hilton Smith, on behalf of the Estate has continued to take every step imaginable to thwart Appellant's claims for compensation.

ARGUMENT

Standard of Review

Because this is an appeal from the grant of summary judgment, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. *In re Estate of Hover*, 407 S.C. 194, 202, 754 S.E.2d 875, 879 (2014). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Id. citing Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is only proper when there are no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C.

531, 611 S.E.2d 922 (2005). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App.2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 607 S.E.2d 63 (2004); *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219–20, 616 S.E.2d 722, 729–30 (Ct. App. 2005) *citing Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004) and *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App.2004).

I. The lower courts erroneously concluded that Appellant lacked standing to prosecute the claim of her Mother's Estate against her Father's Estate.

The Circuit Court and the Probate Court erroneously concluded that Appellant Elizabeth Murray, as PR for the Minnie H. Murray Estate, lacked standing to prosecute her mother's estate's claim against her father's estate. The Claim of the Estate of Minnie H. Murray consists of a debt originally made by William E. Murray on April 22, 1980 (Mr. Murray made payment under the original Note until 1986.) (ROA at 1422 to 1430, Note). Mr. Murray renewed his acknowledgement of the note February 09, 2006.

The Court's' decision that Ms. Murray lacked standing is based entirely on an agreement made among the beneficiaries of the Estate of Minnie Murray in 1992. By that time Mr. Murray had stopped making payments on account of the debt to the Estate of Minnie Murray. The Estate of Minnie Murray had contemplated the creation of a trust to receive the money from Mr. Murray (and others). However, with no payments being made, the three sisters, who were the beneficiaries of the Minnie Murray Estate, wished to be relieved of the obligation to establish a trust as directed by their Mother's will, because doing so would be expensive and pointless at that juncture (ROA at p. 1834). Therefore, in 1992, as a result of Hilton Smith's negotiations and based on his advice, the beneficiaries of Minnie Murray's Estate reached an agreement that

> "the total obligation owing from William E. Murray **to the Estate** as outlined in a prior agreement dated April 22, 1980 between William E. Murray and the above-mentioned three beneficiaries, as well as accrued interest, penalty interest ... which may become due, shall become community property between Pamela Murray Stack, Elizabeth E. Murray and Catherine Peronneau Murray Smith on a joint, not several basis...", **(emphasis added)**

By doing so, the beneficiaries believed they eliminated the need to create a trust as required by Minnie Murray's last will and testament and avoided the necessity of incurring the expense of maintaining a trust that was unfunded. (ROA at pp. 1968 to 1971, Exhibit 10 to Elizabeth Murray and Pamela Murray Affidavits). Rather than viewing the Agreement as it was intended, to be a means of avoiding the expense and trouble of creating a trust with no current income producing assets, both the Probate Court and the Circuit Court mistakenly ruled as a matter of law, that the agreement constituted a transfer of the debt from the Estate of Minnie Murray to the individual beneficiaries. The court went on to rule that the agreement among the beneficiaries effectively extinguished the debt from their Father to their Mother's Estate. (ROA at pp. 39 to 40; 22 to 23; Circuit Court Order at pp. 6 –7; Probate Court Amended Order at pp. 7 – 9

referencing what the Court refers to as a "Release, Refunding, Receipt and Indemnity Agreement, signed and notarized by the three sisters and beneficiaries of the Minnie H Murray Estate on December 12, 1992.) Both judges fundamentally misconstrued the import of the 1992 Agreement.

The courts failed to appreciate that the 1992 Agreement in which Ms. Murray and her sisters, collectively the beneficiaries of their mother's estate, agreed among themselves as to how they would hold the proceeds of the Claim once it was liquidated did ***nothing*** to convey ownership of the claim out of their mother's estate or change the real party in interest holding the claim against William Murray. Instead, their private agreement (which was not signed by Ms. Murray in her representative capacity as the PR for his mother's estate but only as herself as one of the beneficiaries[1]) did nothing more than relieve them of the obligation to establish a trust when the funds were ultimately recovered from their father and had ***no*** legal effect as to what entity owned the claim against William Murray. The Circuit Court relied on the fact that the 1980 Settlement Agreement involved all three daughters in their individual capacities and expressly contemplated concluding the administration of the Estate of the late Minnie Holmes Murray. (ROA at p. 39, Circuit Court Order at p. 6).

The Courts took an ambiguous document out of context and attributed to it, legal significance without taking testimony regarding the intent of the parties.

Beyond that, the Circuit Court ignored the fact that the Note originally belonged to Minnie Murray and that her Estate in West Chester County, New York was reopened in July of

[1] Ms. Murray, the duly appointed PR of her mother's estate, is prosecuting the claim against her father's estate in her representative capacity as PR for her mother's estate. While Elizabeth Murray is one of three beneficiaries of her mother's estate who stand to gain from the successful prosecution of the Estate's claim, she is not the current holder of Note, the Estate is. Elizabeth Murray and her mother's estate are not the same jural person and are not the same "party."

2010 expressly to allow Ms. Murray, as the PR for Minnie Murray's Estate, to bring the Claim against her Father's Estate (ROA at p. 1980). (This action was confirmed by an Order signed by Judge Condon on August 15, 2015, and filed in West Chester County, New York on December 31, 2014 which confirmed the Estate of Minnie Murray still had a claim to pursue).

The Circuit Court also ignored the reality that there is no other party to prosecute the Claim other than the duly appointed personal representative of the Mother's estate. "Under the modern Probate Code, the personal representative is the central figure responsible for the orderly management of a decedent's estate". *Fisher ex rel. Shaw-Baker v. Huckabee*, 415 S.C. 171, 179, 781 S.E.2d 156, 160 (Ct. App. 2015), reh'g denied (Jan. 21, 2016), cert. granted (Jan. 13, 2017) (citing S.C. Code Ann. §§ 62–3–701 through –721 (Supp. 2014)). The personal representative is afforded the same standing to sue that the decedent had immediately prior to death. *Id.* citing S.C. Code Ann. § 62–3–703(c) (Supp. 2014), and, the personal representative also may prosecute and defend against claims for the protection of the estate. *Id.* citing S.C. Code Ann. § 62–3–715(20) (Supp. 2014). The Circuit Court should have reversed the Probate Court's finding that the 1992 Agreement operated as a divesture of the Estate's claims and should have concluded that Appellant, as the PR of her Mother's Estate indeed did have standing to pursue the still viable claim. This Court should correct the error of law and hold that Appellant has standing to pursue the Claim.

II. The claim of the Minnie H. Murray Estate against Respondent is not barred by the statute of limitations or the doctrine of laches.

As a separate sustaining ground, the Circuit Court also improperly concluded that Mr. Murray's Estate was entitled to summary judgment as to the debt owing to the Estate of Minnie H. Murray based on the statute of limitations and the doctrine of laches.

Where there is conflicting evidence as to when a reasonable person in Plaintiff's situation would have known some legal right of hers had been invaded, the proper discovery date becomes a question of fact for the jury to decide. *Turner v. Milliman*, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (citation omitted), aff'd in part, rev'd in part on other grounds, 392 S.C. 116, 708 S.E.2d 766 (2011).

Here, when Mr. Murray stopped making payments as required by the Note, the beneficiaries of the Estate of Minnie H. Murray, Elizabeth Murray, Pamela Murray and Catherine Murray retained the services of Hilton C. Smith (the current Co-Personal Representative of the Estate of William E. Murray) to advise them as to how to proceed further in assuring that the Note ("the ongoing asset of the Estate" (ROA at p. 1966, Exhibit 8 to Elizabeth and Pamela Murray's Affidavits) as Mr. Smith called it in his letter to the beneficiaries dated December 2, 1992) would be paid. (ROA at pp. 1963; 2147; Exhibit 6 to Elizabeth Murray and Pamela Murray's affidavits and deposition of Hilton Smith (Page 97:9 to 97:14). Mr. Smith undertook to represent the Estate of Minnie Murray and was compensated for his services (ROA at pp. 1960 to 1962, Exhibit 5 to Elizabeth Murray and Pamela Murray's affidavits).

As a result of the negotiations, led by Mr. Smith, the beneficiaries of the Estate of Minnie H. Murray were advised to present notices of default to Mr. Murray on a bi-annual basis, including details of the debt owed with interest. Elizabeth Murray as the Executrix of the Minnie H. Murray Estate, relying on Mr. Smith's advice, delivered such notices every other year at their Christmas luncheon, See affidavit of Elizabeth E. Murray. In fact, Mr. Smith drafted the first demand letter to be sent on behalf of Minnie Murray's Estate. (ROA at pp. 1964 to 1965, Exhibit 7 to Elizabeth Murray and Pamela Murray Affidavits).

A. Whether Mr. Murray acknowledged and reaffirmed the debt flowing from the 1980 Settlement Agreement is a quintessential question of fact which neither the Probate Court nor the Circuit Court should have resolved as a matter of law.

The PRs' primary argument on summary judgment was their belief Mr. Murray did not reaffirm his debt to his wife's estate in 2006. They argued that the statute of limitations for claims arising from the 1980 Settlement Agreement would have expired in 1991, six years after Mr. Murray's last payment per the terms of that Agreement. However, the PRs did acknowledge that debt could have been revived and still be valid as of Mr. Murray's death ***if*** he had acknowledged the debt in a manner as would imply a new promise to pay the debt. 4 Williston on Contracts §8:20 (4th ed.); 51 Am. Jur. 2d Limitation of Actions §301 ("a new promise to pay a debt, or an unqualified acknowledgement of a debt, from which a promise to pay may be implied, tolls or removes the bar of the statute of limitations"); 51 Am. Jur. 2d Limitation of Actions §314 ("Any language of the debtor that clearly admits the debt and shows an intention to pay it will be considered an implied promise to pay and will take the case out of the statute of limitations"); *Suber v. Richards*, 61 S.C. 393, 401, 404 (S.C. 1901) ("Where a new promise is relied on to recover a debt which is barred by the statute of limitations, such new promise must be a clear and explicit promise to pay the debt sued on, or such an unqualified and unequivocal admission that this particular debt is still due as will imply a promise to pay such debt," and "it should contain nothing inconsistent with an intention on the part of the debtor to pay it." *C.f., Middlebrooks v. Cabaniss*, 193 Ga. 764, 767, 20 S.E.2d 10, 12, *aff'd*, 194 Ga. 26, 20 S.E.2d 574 (1942) (A new promise, in order to renew a right of action already barred, or to constitute a point from which the limitation shall commence running on a right of action not yet barred, shall be in writing, either in the party's own handwriting, or subscribed by him or someone authorized by

him, and, an acknowledgment in writing of the existing liability is equivalent to a new promise to pay.).

The history of the 2006 renewal, taking the facts in light most favorable to the non-moving party as required by the Rules and case law of this state, is as follows:

By February of 2006, Elizabeth Murray, as PR of her mother's estate, had become concerned that the debt would not be paid by her father's estate, despite repeated assurances from Mr. Smith. Consequently, Elizabeth Murray met with her father, William E. Murray, on February 10, 2006. She requested that her father review the Note and the accounting of the amount owed under the note, and then acknowledge the debt. On February 10, 2006. Mr. Murray met Elizabeth Murray and a witness, Gil Mestler, at a restaurant in New York to renew the Note; however, Mr. Murray had difficulties writing his name in full, so he renewed it by signing his initials and writing the word "agreed" on the note. (ROA at pp. 2188 to 2189; 2191 to 2192; 2192 to 2193; Mestler Depo. pgs. 4:13 to 5:19; 13:2 to 20:2; 20:11 to 21:22). Later that afternoon, when he was feeling better, Mr. Murray signed the acknowledgment again, this time with his full signature in the presence of Dana Flavin, an old friend of Mr. Murray. (ROA at pp. 2220 to 2221; 2223; 2229; 2248 to 2249; 2258; 2262; 2303; 2307 to 2308). Flavin Depo. Pages 36:23 to 39:10; Pages 45:25 to 46:4; 69:13 to 70:6; 147:17 to 151:10; 186:8 to 186:22; 204:10 to 204:16; Pages 367:5 to 368:12; Pages 382:17 to 386:20).

In the February 9, 2006 Letter signed by Mr. Murray on two occasions before two different witnesses on February 10, 2006, Mr. Murray acknowledged his debt to his wife's estate was still owing and that it would be due upon his death as a valid claim against his estate. The PRs did not dispute the legal effect of this letter; instead, they made factual assertions that the

signature on the Letter is not that of Mr. Murray. Clearly, the factual assertion should not have been used to prevail on summary judgment as it creates a genuine issue of material fact.

Petitioner offered significant evidence that Mr. Murray did in fact sign the acknowledgment. First, on February 10, 2006, Mr. Murray signed the note twice. The first signing was with his initials in the presence of Gilbert Mestler, an United States Army Lieutenant Colonel and an attorney known to WEM, and Elizabeth Murray. At that time, he was unable (due to his physical condition) to write his full signature, so he wrote the word "agreed" and his initials. (ROA at pp. 2188 to 2189; 2191 to 2193; 2369; Mestler Depo. Pages 4:13 to 5:19, Pages 15:1 to 24:2; Elizabeth Murray Depo. (Pages 153:3 to 154:4). Later that same day, in the late afternoon, Mr. Murray signed again. This time he was able to sign his full signature in the presence of his friend, Dana Flavin, a physician, who testified Mr. Murray was perfectly competent when he signed. (ROA at pp. 2220 to 2221; 2223; 2229; 2248 to 2249; 2258; 2262; 2303; 2307 to 2308; Flavin Depo. Pages 36:23 to 39:10; Pages 45:25 to 46:4; 69:13 to 70:6; 147:17 to 151:10; 186:8 to 186:22; 204:10 to 204:16; Pages 367:5 to 368:12; Pages 382:17 to 386:20).

The PRs attempted to challenge the authenticity of the signature by alleging the signature on the reaffirmation letter does not look like that of Mr. Murray's, despite the sworn testimony of two independent witnesses, both with medical training, who say they saw him sign the document. Obviously, whether the signature is that of Mr. Murray is a quintessential question of fact that cannot be resolved as a matter of law. *Pee Dee Prod. Credit Ass'n v. Joye*, 284 S.C. 371, 375, 326 S.E.2d 650, 653 (1984) (factual dispute regarding whether someone signed a document is properly submitted to the trier of fact for resolution).

Both the Circuit Court and the Probate Court side-stepped this essential factual dispute as to whether Mr. Murray actually signed the 2006 document reaffirming the debt to jump to the conclusion that even if he had signed it, as matter of law, Mr. Murray could not have intended for his signature to have indicated his intent to repay the debt. (Circuit Court Order at pp. 9 – 10). In so doing, again both lower courts ignored the well-settled law of South Carolina that intent is nearly always a question of fact rather than a question of law. "The determination of the parties' intent is a question of fact." *S. Bank Tr. Nat. Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009) (*citing S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 81, 562 S.E.2d 482, 485 (Ct. App. 2002). "To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered." *Id.* *C.f.*, *State v. Meggett*, 398 S.C. 516, 527, 728 S.E.2d 492, 498 (Ct. App. 2012) ("The question of the intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.")

At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination at trial for summary judgment to be denied. *Anders v. South Carolina Farm Bureau Mutual Insurance Co.*, 307 S.C. 371, 415 S.E.2d 406 (Ct. App. 1992). Here, despite the lower courts' ignoring of the substantial and material questions of fact, Appellant more than met her burden of production as to Mr. Murray's reaffirmation of the debt by producing the signed letter and the sworn testimony of Gil

Mestler and Dana Flavin, and producing the document itself which is evidence of Mr. Murray's intent to reaffirm the debt. This contradictory evidence creates exactly the sort of factual dispute that cannot and should not be resolved on summary judgment and should have been decided only at trial. The Estate's summary judgment motion should have been denied, and this Court should reverse and remand this matter back to the Probate Court for a full trial on the merits.

B. The Estate's Claim is not barred by the doctrine of laches or any other equitable defense.

Inexplicably, the Circuit Court refused to entertain Appellant's argument that laches is an equitable defense that does not apply to the legal claim to collect on the debt. Instead, the Circuit Court glibly stated that, "Whether the particular ground be statute of limitations or laches, in either, the ultimate conclusion is that the claim was presented far too late." (ROA at p. 44, Circuit Court Order at p. 11). This Court should reverse the lower courts because it is well-settled law in South Carolina that a legal claim is not subject to equitable defenses. *Edens v. Edens*, 312 S.C. 488, 491, 435 S.E.2d 851, 852 (1993). "The statute of limitations rather than laches applies to all legal claims against an estate." *Id. citing Kirksey v. Keith*, 32 S.C.Eq. (11 Rich.Eq.) 33 (1859). "A claim based upon breach of contract is a legal as opposed to equitable claim. Therefore, laches does not apply." *Id.*

Even if the Claim sounded in equity rather than law, the PRs are still not entitled to judgment as a matter of law. Any delay in asserting the Claim was entirely understandable given the familial relationship between the heirs of Minnie Murray and their father. The Personal Representative of the Estate clearly recognized the debt owing to Minnie Murray's Estate, especially in light of his correspondence to Elizabeth, Pam and Catherine, where Mr. Smith advised that there should be an agreement determining how to deal with the continuous asset (the note) to Minnie Murray's estate. Mr. Smith understood that given the relationship between the

parties, a suit needed to be avoided and ever since 1992 periodically undertook to advise the beneficiaries of Minnie Murray's estate on how to preserve the on-going validity of the debt. (ROA at pp. 1954 to 1971, Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10 to Elizabeth Murray and Pamela Murray Affidavits). Furthermore, if anyone comes to court with unclean hands, it is Mr. Smith who advised the beneficiaries on how to handle this debt and induced them to believe that by entering into the agreement in December of 1992, there was no need to create a trust. (ROA at pp. 1968 to 1971, See Exhibit 10 to Elizabeth Murray and Pamela Murray Affidavits).

Moreover, any alleged complaints about the administration of Minnie Holmes Murray's estate are not properly raised by the PRs of Mr. Murray's estate and have nothing to with the subject matter of this litigation and cannot possibly have prejudiced them because they are no interest whatsoever in Mrs. Murray's estate. "A party will have unclean hands where the party behaves 'unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'" *Id. quoting Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000).

Neither the Probate Court nor the Circuit Court should have found summary judgment appropriate based on laches or unclean hands and this Court should remand the matter for a full trial on the merits.

III. The Claim of Elizabeth Stylesetter's should not have been dismissed on summary judgment on a theory of judicial estoppel.

Elizabeth Stylesetters is an interior design company owned by Elizabeth Murray, and it provided various interior design services for multiple properties owned by Mr. Murray and used by him as residences. Elizabeth Stylesetters expended large sums of money in order to remodel and redecorate Mr. Murray's residences and it expended large sums of money at times to help

with the expenses at certain commercial properties owned by Mr. Murray. All these expenses were documented and Mr. Murray agreed to repay Elizabeth Stylesetters for the expenses it incurred (ROA at pp. 1972 to 1979, Affidavit of Elizabeth Murray). Mr. Murray acknowledged the debt in April of 2007 and did so in front of a notary and Brian Canaday. (ROA at pp. 1431 to 1432, Exhibit B - Canaday letter accompanying Mr. Murray's letter).

Mr. Murray continued to make monthly payments towards his debt until July 2007. Mr. Smith had taken over the handling of Mr. Murray's finances and stopped making the payments. There was no issue of payment to Elizabeth's Stylesetters until then. Up until that point, Mr. Murray was paying the debt as previously agreed. See also Letter to Elizabeth Murray during her divorce (ROA at pp. 1431 to 1432, Exhibit B). Only when Mr. Smith took over paying on Mr. Murray's behalf did he stop the payments to Elizabeth's Stylesetters. (ROA at 1394 to 1395, PRs' Memorandum at pgs. 4 -5).

As a result, Ms. Murray along with her sister Pamela (the one not married to Mr. Smith), discussed the situation with Mr. Murray and asked to affirm the debt and his intention that she be paid, which he did on July 21, 2007. (ROA at pp. 1589 to 1601; 2320 to 2321; 2177 Exhibit 1 to Estate's Motion for Summary Judgment, Deposition of Jeffrey Young pages 39-42, deposition of Larry Bump (Pages 69:19 to 71:1). Mr. Young and Mr. Bump both testified that Mr. Murray was coherent, recognized them, was able to hold a conversation and understood what Pam read to him prior to signing. (ROA at pp. 2317; 2174; Deposition of Jeff Young Pages 28:10 to 29:3; Deposition of Larry Bump Pages (Page 60:19 to 60:25). Elizabeth Murray was not present at that time. However, even without Mr. Murray's signature in 2007, the ongoing validity of the debt claimed remains. Mr. Murray incurred the debt and reaffirmed it in 2006 long before his estate alleges he lost the capacity to sign a reaffirmation of the debt.

The Elizabeth Stylesetter's claim should not be barred under the theory of judicial estoppel. First, both the Probate Court and the Circuit Court erred by assuming that the only possible theory under which the Elizabeth Stylesetter's claim remains viable is if Mr. Murray was competent to sign the July 21, 2007 letter reaffirming his obligation to pay for work performed by Elizabeth Murray doing business as Elizabeth Stylesetters. In fact, the ongoing validity of the debt remained because Mr. Murray recognized the debt, was paying the debt and reaffirmed it in 2006 long before his Estate alleges he lost the capacity to sign a reaffirmation of the debt in 2007. The Circuit Court erroneously concluded that the viability of this Claim turns on Mr. Murray's competence in 2007and entirely ignored the argument of Appellant as to the 2006 reaffirmation. (ROA at pp. 44 to 45, Circuit Court Order at pp. 11 – 12).

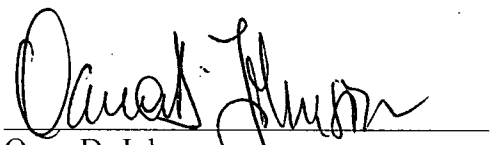
Second, even if the Elizabeth Stylesetter's claim did depend on the efficacy of the July 2007 letter, (which it does not), neither the Probate Court nor the Circuit Court should have granted summary judgment on a judicial estoppel theory. For the doctrine of judicial estoppel to apply, the PRs must prove: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215–16, 592 S.E.2d 629, 632 (2004); *Carrigg v. Cannon*, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001). Judicial estoppel is an equitable concept that must be applied with caution and only in the narrowest of circumstances, *Id.* at 84, 552 S.E.2d at 772 (*citing Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir.1982) and 28 Am.Jur.2d Estoppel & Waiver § 75 (2000)). The lower courts incorrectly

asserted that because Ms. Murray questioned her father's capacity at various periods during his declining years, she could not assert his competence weeks before his death.

In the Freeman Trust litigation beginning at the end of 2006, there was never any judicial determination that Mr. Murray was incompetent to act as trustee there. (Mr. Murray's daughters only claimed that at times Mr. Murray's mental capacity was impaired periodically and he was subject to undue influence by Hilton Smith). Ms. Elizabeth Murray never took a position on that question during that litigation and, therefore, could not be said to have taken a "totally inconsistent" position. The Freeman Trust litigation was not the same or a related proceeding to this one. And, finally, Mr. Murray was not found incompetent in the Freeman litigation and Ms. Murray received no benefit from raising what were, at the time, quite legitimate concerns about her father's condition and susceptibility to undue influence. In short, the PRs demonstrated none of the elements of judicial estoppel and their motion for summary judgment should have been denied. This Court should reverse the lower court and remand this Claim back to the Probate Court for a full trial on the merits.

CONCLUSION

For the reasons stated above, the lower courts should be reversed, and the case should be remanded for further proceedings.



Oana D. Johnson
304 Meeting Street
Suite 203
Charleston, SC 29401
(843) 203-4195
oana@odjlaw.com

George J. Kefalos, Esquire
George J. Kefalos, PA

46-A State Street
Charleston, SC 29401
(843) 722-6612
george@kefaloslaw.com

Barry I. Baker, Esquire
P.O. Box 31265
Charleston, SC 29417-1265
(843) 766-9007
bbaker@bakerlawsc.com

Stephen Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401
(843) 577-6321
steve@slotchiverlaw.com

ATTORNEYS FOR APPELLANTS

This 3rd day of June, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Hon. Jennifer B. McCoy, Circuit Court Judge
The Hon. Tamara C. Curry, Probate Court Judge

Case No. 2017-CP-10-5198
Appellate Case No.: 2018-01680

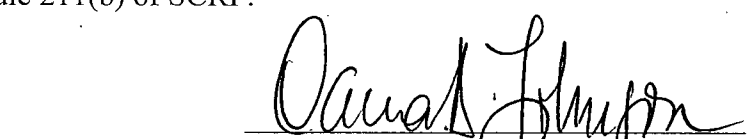
Elizabeth Murray as Personal Representative of the Estate of Minnie H. Murray and Elizabeth Stylesetters,..... Appellants,

v.

The Estate of William H. Murray,..... Respondent.

CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b) SCRAP

The undersigned certifies that the Initial Brief of Appellant and Initial Reply Brief of Appellant comply with Rule 211(b) of SCRP.



George J. Kefalos, Esquire
George J. Kefalos, PA
46-A State Street
Charleston, SC 29401
(843) 722-6612
george@kefaloslaw.com

Oana D. Johnson
304 Meeting Street
Suite 203
Charleston, SC 29401

(843) 203-4195
oana@odjlaw.com

Barry I. Baker, Esquire
P.O. Box 31265
Charleston, SC 29417-1265
(843) 766-9007
bbaker@bakerlawsc.com

Stephen Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd, Suite 100
Mount Pleasant, SC 29464
(843) 577-6321
steve@slotchiverlaw.com

ATTORNEYS FOR APPELLANTS