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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2018-CP-40-00726

Appellate Case No. 2020-001257

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

v.

Marian J. Kirk and Lucy J. Fuller are..... Respondents.

BRIEF OF APPELLANT

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SUPPLEMENTAL STATEMENT OF FACTS
(Agreed-Upon (or Not Denied) Facts)

1. In 2010 (two years before Mrs. Jordan's death), Respondent Kirk removed monies belonging to Mrs. Jordan from their joint bank account and placed these monies, amounting to $21,857.80, in an account in Kirk's own name. (R.p. 1)

2. Kirk did not mention this transfer to Appellant either: (1) contemporaneously with the taking in 2010 (R.p. 197, lines 12-15); (2) in mid-June 2012, following Mrs. Jordan's death; (3) in late-2012, when Kirk reported to Appellant the other monies she maintained for Mrs. Jordan (R.p. 198, lines 19-24) ; (4) in May 2014, when she divided these monies with Respondent Fuller (and purchased her house the following month) (R.p. 204, lines 10-20; p. 205, lines 1-20); (5) in September 2015, when Appellant and Respondents met together to discuss a final disposition of (other) estate monies (R.p. 172, lines 4-24); or (6) in 2016, after Appellant (individually) instituted a prior suit against Kirk to recover other monies not turned-over by Kirk to the Estate.

3. Only as a result of discovery initiated by Appellant in the 2016 suit, did Kirk finally admit on July 27, 2017, that she converted these monies. (R.p. 102, lines 11-23).

4. This conversion was without justification, as admitted by Respondents. As stated in the Brief of Respondents: "To be sure, none of these circumstances justified Respondents' conversion . . . . "(R.Brief, p. 16).

ARGUMENTS

I. JUDGE NEWMAN DID NOT INTEND TO OVERRULE JUDGE MANNING AT ALL. SHE AFFIRMED AND INCORPORATED JUDGE MANNING'S ORDER IN HER ORDER.

Curiously, Respondents wasted two full pages of their Brief discussing why Judge Newman was entitled to change Judge Manning's Order before admitting that Judge Newman

declined to revisit Judge Manning's ruling. (R.Brief, p. 8)

At trial, Judge Newman stated, "[a]s to the partial summary judgment granted by Judge Manning, I don't intend to disturb that. That will become final judgment. . . as to the balance awarded by Judge Manning already, I affirm that, for lack of a better word, and that will become final judgment in this case." (R.p. 234)

Respondents' Brief declared that, "[j]ust as Judge Manning had done, Judge Newman granted the Estate its actual damages and prejudgment interest" on the subject claims. (emphasis added) (R.Brief, p. 8)

To be clear, Judge Newman stated in her Order: "declines Respondents' request to revise that ruling and instead chooses to incorporate it by reference." (R.p. 19)

Judge Manning's Order, as affirmed by Judge Newman, ordered as follows:

1. That the Respondents (jointly) shall **turn-over to the Petitioner the amount of $37,739.59** (together with interest after October 9, 2018, until paid). (emphasis added) (R.p. 5)

2. That if the said amount is not paid to the Petitioner, in full, within ten (10) days after the date of filing of this Order, a judgment against the Respondents, jointly and severally, will be entered in said amount (plus additional pre-judgment interest) upon application of the Petitioner. (R.p. 5)

Judge Newman's Order went further. It also stated the following:

> . . . **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). (R.p. 19) (emphasis added)
>
> . . . 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). (R.p. 20) (emphasis added)

The amount of the judgment debt, as stated in Judge Newman's Order, does not match the

debt amount stated in Judge Manning's Order. Respondents' counsel later admitted, in Respondents' Response to Petitioner's Motion to Reconsider, that "he miscalculated" the debt amount. (R.p. 57) Even with this admission and after an unexplained delay of over eight (8) months, Judge Newman summarily denied Appellant's Motion to Reconsider by an Order which failed to correct the debt amount. Attention is called to Argument III of the Brief of Appellant, which includes a correct calculation of the judgment debt (as of November 1, 2020).

II. JUDGE NEWMAN SIGNIFICANTLY ALTERED JUDGE MANNING'S ORDER WITHOUT MAKING ANY FINDINGS AND CONCLUSIONS WARRANTING SUCH CURIOUS ACTION.

After adopting, without change, Judge Manning's Order, Judge Newman then, without any related findings or other explanation, proceeded to significantly alter Judge Manning's Order (and her own ruling), as follows:

> . . . [b]ecause 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. (R.pp. 22-23)

It should be noted that Judge Newman's Order – and especially the foregoing paragraph – was composed by Respondent's counsel. (R.p. 257) There were only minor, non-substantive changes made by (or on behalf of) Judge Newman. As would be expected, since the Order was prepared by Respondent's counsel, the tone of, and the findings contained in, the Order, as well as the omitted findings, effectively reflect the singular point of view of Respondents. It is important to understand this when considering Judge Newman's final ruling.

This ruling effectively allows Respondents to claim/retain, up front, a "setoff" of their share

of the gross assets of the Estates when they were never entitled to receive a share of the Estate before payment of Estate expenses.

Importantly, this relief was not requested by the Respondents – not in their pleadings, not in their memorandum filed in advance of Judge Manning's grant of a judgment against them, not in the Motion to Reconsider filed by them after the judgment was entered, and not at the trial. This matter is more fully discussed in Argument III, *infra*.

Judge Newman mis-quoted Appellant in footnote 3 of her Order, where she stated: "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." (R.p. 21) Appellant's actual testimony was: "The net brought in *after expenses* would certainly be divided one-third, one-third, one-third." (emphasis added) (R.p. 165, lines 1-8) Judge Newman's wording is worrisome especially in light of Respondents' proposed Order, which stated, also in a footnote: "[a]s Petitioner acknowledged at the hearing of this matter, any amounts recovered by the Estate by virtue of this Order and Judgment (*net of reasonable expenses*) must be equally divided among Petitioner and Respondents, as the sole heirs of the Estate." (emphasis added) (R.p. 255)

The Brief of Respondents confirms the foregoing: "Jordan conceded at trial that . . . any sums recovered by the Estate in this action had to be divided among the three of them *after attorney's fees and other expenses had been paid.*" (emphasis added) (R.Brief, p. 6)

In any event, this finding really has no business in this litigation. The Probate Court will ultimately consider and approve the final disbursement of expenses (including attorney's fees) and the heirs' respective shares. This Court has not been requested to get involved in those issues.

III. RESPONDENTS CLAIM THAT THEY PLED (STATED THE AFFIRMATIVE DEFENSE OF) "SETOFF," BUT THEY DID NOT DO SO; AND NO EVIDENCE TOUCHING ON THIS ISSUE WAS ACTUALLY PRESENTED.

This claim to a "setoff" (or whatever they want to call it) is an affirmative defense, which was not pled by Respondents. Not only did Respondents not plead this affirmative defense, but also it apparently didn't occur to Respondents to raise this defense even after Judge Manning granted the judgment. Following the entry of Judge Manning's Order, Respondents filed Defendant's Motion to Reconsider, Alter, and Amend (R.p. 36), which made no mention whatsoever of this defense. (That Motion was limited to an argument on statute of limitations.) Also, importantly, Respondents' Response to Motion for Partial Summary Judgment (filed before the motion hearing held by Judge Manning) did not raise this defense.

This alleged affirmative defense was raised by Respondents' counsel, for the first time (if at all), during his closing argument, after Appellant's counsel had rested his case and had presented his closing argument. This is not evidence. ". . . [I]t is well settled that statements by counsel are not evidence. *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ('It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence . . . . ')" *Landry v. Landry* 430 S.C. 153, 163, 843 S.E.2d 491, 496 (2020).

Amazingly, Respondents claim that they did raise this affirmative defense, and they point out that they pled "setoff" in connection with allegations that they were entitled to make a claim for services provided by them to Lil B. Jordan and her Estate. (R.Brief, pp. 9-10) That defense has nothing whatsoever to do with the defense of setoff against a judgment debt entered against them for conversion. The two are completely unrelated.

Respondents then have the audacity to assert that this affirmative defense ("setoff" or the like) was *extensively* argued at the closing of the trial (R.Brief, p. 10), which they claim was

sufficient under Rule 15(b), SCRCP, to amend their deficient pleading to add this affirmative defense. To suggest that, and to cite case law addressing, this affirmative defense was tried by implied consent is laughable. They cite *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("In order to be tried by implied consent, the issue must have been discussed extensively at trial.") (emphasis added), which citation defeats their own argument. There are probably a few descriptive words to characterize the brief discussion of this issue by Respondents, but *extensive* is not one of them.

The Court was not asked to recognize this new affirmative defense. Respondents did not move the Court to amend their pleadings to add this affirmative defense. Rule 15(b) was not invoked in any fashion. If Rule 15(b) had been invoked and Judge Newman had allowed Respondents to amend their pleadings to raise this issue, it would have been incumbent on the Court to memorialize for the record the reasons for allowing the amendment of the deficient pleadings, as required by that Rule, which provides, in relevant part, as follows:

> . . . Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor. (emphasis added)

There is nothing in Judge Newman's Order (or in the record) which indicates that she considered, much less decided to grant, the amendment of Respondents' pleadings.

IV. THERE WAS NO MENTION IN JUDGE NEWMAN'S ORDER OR BY RESPONDENTS, IN THEIR PLEADINGS, MOTIONS OR EVIDENCE AT TRIAL, THAT JUDGE MANNING'S ORDER CREATED A "WINDFALL" TO THE ESTATE, WHICH WAS INEQUITABLE OR SHOULD BE AVOIDED.

Respondents argue, in their Brief, that, "the remedy adopted by Judge Newman *was not in the nature of a setoff* . . . [but that it represented] a means of ensuring that the Estate would not reap a *windfall*." (R.Brief, p. 10) (emphasis added)

Windfall?! That word was uttered exactly one time (ever) in this case. Just a few seconds before winding up his closing argument (after Appellant's counsel had closed his case), Respondents' counsel said, ". . . the Court has the authority to structure things this way so that the estate doesn't end up getting a windfall. . . ." (R.p. 233) That's it. Who knows what that even means?

V. CONTINGENT ATTORNEY'S FEES, BASED UPON A PERCENTAGE OF THE RECOVERY IN CIVIL LITIGATION, IS COMMONPLACE AND IS APPROPRIATE IN THIS CASE TO COLLECT ACTUAL AND PUNITIVE DAMAGES FOR CONVERSION.

Respondents' closing argument is almost exclusively limited to attorney's fees (discussed below), but no suggestion is made by Respondents as to how the attorney's fee should be determined and how it would be paid.

Respondents' counsel stated, "[a]nd to have them pay back what they have held for seven years, only to get it back minus attorney's fees, is ludicrous . . . ." (R.p. 231) Seven years? It is past time to disgorge the gross debt owed to the Estate.

Respondents' counsel also stated, "[Respondents are] supposed to pay the estate's lawyer for recovering that money for them, when it's just going in and coming right back out again?" (emphasis added) (R.p. 231) Money for them? The estate's lawyer is trying to recover money from them for his client: the Estate.

Then Respondents' counsel stated, ". . . what the estate is really entitled to here is one-third of the principal amount, the amount they don't have that they should, not the amounts that these ladies have had for years. They're entitled to pre-judgment interest on that, because Mr. Jordan and the estate haven't had use for that money. So that goes to them too. And there's the attorney's fees they would be entitled to." (R.p. 232) To the contrary, the Estate is entitled to the entirety of

the judgment debt – in accordance with the Orders issued by both judges.

Respondents claim that, ". . . the Judgment makes it clear that Respondents alone are responsible for the *reasonable* expenses incurred by the Estate in collection this amount." (R.p. 54) (Only after many readings, it seems to be that, by "this amount," Respondents probably mean only Appellant's "rightful one-third share.") So, no, the Judgment does not make that clear. Appellants' counsel is contractually entitled to an attorney's fee based upon the gross recovery. To artificially reduce the recovery by 2/3, is completely *unreasonable*. Based upon Respondents' actions up to the filing of Judge Newman's last Order, the likelihood that they will voluntarily pay Estate expenses without additional litigation is not good.

The Estate is entitled to collect the full amount of the judgment entered jointly against Respondents, and it NEEDS to collect the full amount in order to pay Estate expenses, including but not limited to the contracted-for attorney's fees. How else would the Estate be able to pay these expenses?

When the Estate pays expenses, including without limitation attorney's fees, this disbursement will affect the net monies available to be disbursed to the beneficiaries; and in this case, Mr. Jordan would be caused to contribute to the payment of attorney's fees owed by the Estate equally with each Respondent.

To suggest that it would be "burdensome or inefficient" for Respondents to pay the gross amount of the judgment is ludicrous. What was burdensome or inefficient is that Respondents caused Appellant to institute this suit, which has now been pending for three years, to collect the full amount proven to be due and payable by Respondents to the Estate. That's not to mention the 2016 suit, which was how Respondents' conversion was first discovered.

VI. THE VICTIM IN A CASE, WHICH INVOLVES ADMITTEDLY UNJUSTIFIED CONVERSION, SHOULD ROUTINELY BE AWARDED PUNITIVE DAMAGES, AND JUDGE NEWMAN ABUSED HER DISCRETION IN REFUSING TO MAKE AN AWARD OF PUNITIVE DAMAGES WHEN A JUDGMENT FOR THE ENTIRETY OF THE IDENTIFIED ACTUAL DAMAGES WAS GRANTED.

As discussed at length in the Brief of Appellant, punitive damages are appropriate in a case of clear-cut and admitted conversion. Both judges have found that Respondents are guilty of conversion. In the Brief of Respondents, they admit: "To be sure, none of these circumstances justified Respondents' conversion . . . ." (R.Brief, p. 16) Seven years after the conversion, Respondent Kirk finally admitted the malicious act, and then only after the 2016 suit made specific inquiries (discovery requests) about the disposition of a previously unknown bank account; and finally in 2021 Respondents admitted that such conversion was without justification. For years after the conversion was discovered, Respondents made excuses, denied culpability and refused to disgorge the money owed to the Estate. Even after Judge Manning issued a judgment against them, they still refused to pay the debt and still denied culpability, claiming that Mr. Jordan, not them, was responsible. (R.Brief, pp. 12-13)

Respondents' unjustified act of conversion was willful, malicious and reprehensible, and their concealment of such act for seven years is inexcusable. Respondents deserve to be punished. Appellant is seeking a modest punitive damages award; but whatever the award, it should be reasonably related to Respondents' unjustified actions and to the harm caused to the Estate. To deny punitive damages is to reward Respondents for their reprehensible conduct.

CONCLUSION

In conclusion, Appellant requests that Judge Newman's Order be revised: (1) to strike the following:

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 (2) to award punitive damages in an appropriate amount to punish Respondents for their reprehensible conduct or to remand this case to the lower court with instructions to grant Appellant's claim for punitive damages in an appropriate amount.

Respectfully submitted,

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May 5, 2021

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