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SC Court of Appeals

State of South Carolina
IN THE COURT OF APPEALS

Appeal from Horry County Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Case No. 2020-001291

Julie Irving, Respondent,

v.

Jeanne Poafpybitty, Donald Matthew Rothgeb,
and Steven Taylor Rothgeb.

Defendants,

Of whom Jeanne Poafpybitty, Personal Representative
of the Estate of Donald M. Rothgeb, is the Appellant.

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT:

Respondent's Brief adopts a confusing and scattershot approach. Making conclusory assertions, in a bullet-point-fashion, without legal citation or explanatory analysis, Respondent's Brief lacks a cohesive argument. Being unable to decipher Respondents' argument, Appellant is uncertain how to reply, or even what to reply to.

In her initial brief, Appellant argues, among other things, that the lower court ignored the Decedent's intent and improperly reformed his Last Will and Testament; that it ignored the controlling precedent of the *Sullivan v. Brown and Moses (In re: Estate of Kay)*, 423 S.C. 476 (2018); improperly based its ruling on the South Carolina Trust Code which, by its plain language, explicitly does not apply to a Personal Representative like Appellant; and improperly applied the "Common Fund" doctrine as a basis for awarding Respondent her attorneys' fees, all of which amount to reversible error. However, rather than offering a traditional appellate argument, the majority of Respondent's Brief is a list of numbered paragraphs which make either vague reference to items in the record or make conclusory statements. With only minor exception, Respondent's citation to legal authority appears to be the result of a "copy-and-paste" approach from items already in the record. It is not surprising that Respondent offers little in the way of analysis or explanation of the legal authorities she sites. This is because the law does not support Respondent's statements, just as the law does not support the lower court rulings.

FACTS IN REPLY

The Respondent's Brief contains numerous statements of fact and law which are neither supported by legal citation nor by the record on appeal.

The facts of this matter are born out through the voluminous record and are set forth in detail in Appellant's Initial Brief and do not bear repeating here. It suffices that rather than

offering a statement of facts or a statement of the case as described in the Appellate Court Rules, Respondent makes a series of disjointed, argumentative and seemingly irrelevant statements about what it perceives Appellant's arguments are (or might be). *Contra* Rule 208 (b), SCACR (providing that unless Respondent offers an opposing statement of the case it shall be bound by those stated by Appellant.). Instead of offering something to aid in the understanding of the appeal, Respondent assails Appellant by making statements which lack adequate supporting citation, or, where citations are present, the cited source material often does not support the corresponding point or argument made in the Respondent's Brief.[1] Respondents' attempts to

[1] For example, in Paragraph 1 of Page 1 of the Respondent's Brief, the Respondent claims the Appellant "maintains that the Respondent's request for financial information was not detailed enough," but does not cite the record for the location of any such assertion. The same paragraph also notes that, at "another time, Appellant has argued that, without filing a certain pleading with the Probate Court, Estate beneficiaries could have anticipated limits with Appellant communications." *See* Resp. Brief, at p. 1. The footnote (actually, an endnote) reference contained within this quote, however, points the reader to a footnote contained in the Appellant's Motion for Reconsideration, filed with the Probate Court below on May 4, 2018, which is actually merely an observation that the Respondent and Plaintiff below, Julie Irving, never filed a Demand for Notice in the Probate Court below, which she did not. Additionally, the Respondent notes that a "Demand for Notice" is merely an administrative form filed in the probate court; it is not a "pleading" as that term is generally defined, which is how the Respondent characterizes the Appellant's position (incorrectly) in her Brief.

Likewise, paragraphs 2 and 3 on page 2 of the Respondent's brief contain numerous rather sweeping statements of fact that are also not cited to the record, and which, in fact, are not supported by the record in this case. Among these are the claims that Appellant has argued (apparently, allegedly, falsely), that she had "no choice" but to pay off the mortgages on the properties in the Estate before transferring properties to beneficiaries. (Appellant's argument has in fact been that the Last Will and Testament of her husband delegated to her the authority to determine the division of real estate assets, and that her husband's wishes should be respected.) (*See* Trial Transcript, at pp. 265, 327, 329, 437, 473, 501.) Respondent's brief also falsely alleges, without citation to the record, that Appellant has alleged or argued that there was an agreement regarding the rehabilitation of her home utilizing Estate funds, or that there was a binding agreement that specified how the Estate's properties were to be distributed. Neither of these claims are true, as the Appellant has made neither argument. With respect to any alleged "agreement" among the beneficiaries and the Appellant Personal Representative, Appellant has never argued that there was an enforceable agreement among the parties, but rather that her actions in the matter were reasonable in light of the communications and representations that she

confuse the issue by raising and discussing irrelevant items rather than the legal issues at bar it's a recurring theme.

ARGUMENT

I. Respondent fails to address the issues presented in this appeal and instead relies on a misapprehended interpretation of the "Law of the Case" doctrine.

In addition to arguing that the trial court improperly reformed the Decedent's Will, Appellant has asserted that the trial court's application of the "common fund" doctrine directly contravenes the Supreme Court's ruling in *Sullivan v. Brown (In re Estate of Kay),* 423 S.C. 476, 816 SE.2d 542 (S.C. 2018). *See* App. Br. Section II. Respondent offers nothing in response to this argument. In fact *Kay* is reference only a single time Respondent's Brief in support of the conclusory statement that "Respondent's brothers are squarely within the intent of the Common Fund Doctrine." (Resp. Br. at Para. "p" p. 10). Notwithstanding that Respondent's brothers are not parties to this appeal, Respondent fails to argue how the brothers, who are shown as adverse in the caption can reap the benefit of the common fund doctrine.

Again, failing to address the substance of the legal issues here, Respondent invokes the "law of the case" doctrine, citing two cases, *D.R. Horton, Inc. v. Westcott Land Company, LLC*, and *Price v. Peachtree Electrical Services, Inc.*, for the proposition that any aspect of a lower court ruling that is not overturned by an appellate court reviewing the matter becomes the "law of the case," and not subject to further review (*see* Resp. Brief, at p. 3 (citations omitted)).

As a threshold matter, it's unclear whether Respondent is actually invoking the "law of the case" doctrine or an altogether different concept known as the "two-judge rule." To the

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received from the stepchildren's counsel. (Trial Transcript, at pp. 437, 448-49, 454-55, 462, 474.)

extent Respondent is invoking the "two judge rule," this rule was reversed in *Kay*—the very case Respondent fails to address. In *Kay* the Supreme Court explicitly ruled:

> [W]e hold today that the two-judge rule has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, as here, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderence of the evidence. Accordingly, we analyze this case through this broad lens.

Sullivan, 423 S.C. at 481. Accordingly, to the extent that Respondent's Argument of the "law of the case" is a mis-labeled reference to the "two-judge rule," the rule has been explicitly overturned and is no longer applicable in this setting. *Id.*

To the extent that Respondent is actually invoking the "law of the case" doctrine, the Respondent has misinterpreted this doctrine — which also is inapplicable here. "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 524, 769 S.E.2d 453, 463 (Ct. App. 2015) *citing Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Respondent's argument points out a seemingly disconnected series of factual claims that, even if true, do not finally determine a substantial right, nor do they, standing alone, require affirming. *See e.g., Zinn v. CFI Sales & Mktg.,* 415 S.C. 93, 109, 780 S.E.2d 611, 620 (Ct. App. 2015) (recognizing the concept of the "law of the case" where unappealed rulings require affirmance). Respondent invokes the doctrine as if it requires Appellant to appeal every factual point in the record. However, not only does the law not require an appeal of every factual issues, it would not make sense in the context of a case in which this Court can take its own view of the evidence. *See Sullivan*, 423 S.C. at 481 (*supra*).

II. Appellant did not Breach her Fiduciary Duty.

Much like her argument regarding the law of the case, Respondent's argument on this point is just an exercise in repetitive factual sniping, primarily to suggest the improper use of Estate funds to repair the marital residence that she had previously shared with the Decedent. (*See* Resp. Brief, at p. 4, ¶ 5; p. 5, ¶ 10; p. 19, ¶ (ii)). Yet, Respondent overlooks that the evidence and filings repeatedly demonstrate that Appellant deducted the approximately $20,000 cost of the repairs in question from her proposed distributions to herself as a beneficiary of the Estate. (Trial Transcript, at p. 486.) Moreover, and as argued extensively in Appellant's initial brief, the fiduciary duties that the trial court found violated were those set out in the Trust Code, not the Probate Code, and for which the law plainly states are not applicable to a Personal Representative, like Appellant. Appellant's paramount fiduciary duty was to serve the intent of the Decedent, which is plainly set forth in the Will as providing her with discretion to determine the specific distribution of Estate assets, so long as the result was "approximately equal" for Estate beneficiaries. (*See* Decedent's Will at p. 2, Item IV.)

That the Will plainly provides Appellant with this discretion dovetails into the next point as well.

III. The Respondent's suggestion that the Trial Court did not Reform the Will is simply wrong.

The Respondent, asserts that the Probate Court did not reform the terms of Dr. Rothgeb's Will. (*See* Resp. Brief, at p. 11.) Even a passing review of the record in this case, and of the Decedent's Last Will and Testament, will disabuse the Court of this notion. Respondent notes in her brief that, "[p]roperly, the Probate Court ruled that will reformation is not what occurs, when a Court [sic] takes authority away from a fiduciary who has substantially abused this authority."

(Id.) And speaking of authority, there is no citation, either to caselaw, the record on appeal, or any other legal source, for this rather sweeping proposition. (Id.) However, the Decedent's will, rather presciently in retrospect, stated unambiguously, as has been noted throughout this longsuffering litigation, that the Decedent's Wife, the Personal Representative, had the "sole discretion" to determine the distribution of assets from the Decedent's Estate, so long as the result for the Estate's four beneficiaries were "approximately equal." (*See* Decedent's Will at p. 2, Item IV.) It would appear the Decedent, with the wisdom of Solomon, foresaw exactly what has now transpired, that his children would be unable to agree with his wife on a mutually acceptable arrangement for distributing Estate assets, and therefore left the determination to the largely unfettered discretion of his wife. For her part, the Appellant Personal Representative was unwilling to agree to the in-kind distribution proposal advanced by Julie Irving because she knew that she would be swapping one lawsuit (this appeal) for ten lawsuits (partition actions filed in connection with each of the Estate's real estate parcels). One must be fairly well-divorced from reality to believe that the end result of these proceedings has been constructive, or that the Decedent was not acting with great wisdom when he delegated the authority to determine the distribution of Estate assets to his wife. It is most unfortunate (and also, reversible error), that the courts below did not give the testator's intent, as expressed in his last will and testament, the rightful deference it is afforded under our law.

It is worth noting, and this Court should not overlook, the specific part of the will that the lower court excised was the part that delegated to the Personal Representative the authority to determine which specific real estate assets went to each beneficiary, and the reason it was excised was because the Personal Representative, relying on such language, sought to effect the Decedent's will by utilizing the authority she had been explicitly delegated. In short, that

provision of the Will was deleted because the Appellant complied with it. And this occurred despite the fact that there is no evidence that the division was not "approximately equal," but because it was not the distribution that the Respondent Julie Irving wanted.

IV. Respondent's Brief suggests that certain issues not properly raised in the trial court below should nonetheless be considered because the Personal Representative was "clearly aware" of the Respondent's concerns over her Estate administration. However, "Awareness" is not a standard that has been recognize or upon which the Respondent can rely in this setting.

Respondent's brief suggests that Appellant's concerns over a lack of raising certain issues, such as the allegation of "bad faith" on the part of the Personal Representative, or the trial court's award of relief that was not requested, such as the appointment of a special administrator, are in fact permissible because the Circuit Court found that the pre-trial written communications established the "Appellant's awareness, that her removal as Personal Representative was among the contested issues, in this matter." (*See,* Brief Respondent, at p. 6, ¶ 16.) "Awareness," however, is not a standard to be brought before this Court to support such rulings by a lower court. It is well-settled hornbook law that, in order to be ruled upon, issues must be *raised* and *argued*, at trial, especially, as here, where they are not raised in the complaint and the pleadings are not amended. *See*, *Staubes v. City of Folly Beach*, 339 S.C. 406, 414, 529 S.E.2d 543 (S.C. 2000) (claim was "implicitly amended" when, at a summary judgment hearing, the additional claim (negligence) was argued by the Plaintiff, and an affirmative defense (the Tort Claims Act) was argued by the other); *see also*, *Sun Villas Homeowners Assoc. v. Square D Co.*, 301 S.C. 330, 391 S.E.2d 868 (S.C. App. 1990) (issues not raised in the pleadings may be tried by express or by implied consent, but where the record is devoid of a stipulation, and the parties do not discuss at trial an issue not raised in the pleadings, then there is no consent, either express or

implied, and such may not be properly ruled upon by the court). A showing as the Respondent purports to make that the Appellant was "aware" that this case was about her removal, her "bad faith," or any other issue that was not explicitly raised, or consented to by the express or implied statements of the parties at trial, does not establish that the issue was properly before the court. Ii is axiomatic, but nonetheless, bears repeating: issues that are not properly before a court cannot be ruled upon. *Id.*

CONCLUSION

For these reasons set forth herein, together with those stated in Appellant's Brief, this Court should reverse and remand.

Respectfully submitted,

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