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SC Court of Appeals

The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Hon. J. Derham Cole, Circuit Court Judge

Case No. 2019-CP-10-1887
Probate Case No. 2016-ES-10-02054
Appeal Case 2020-000853

In the Matter of re Estate of Annie Mae Crosby:

Jessie Fred Crosby and Robert Edward Crosby, Jr., Respondents

v.

Rose Mae Crosby Walsh, individually and as personal representative of the Estate of Annie Mae Crosby, and Kelvin Wayne Crosby, Respondents,

Of Whom Rose Mae Crosby Walsh, individually and as personal representative of the Estate of Annie Mae Crosby is the Appellant.

Appellants' Initial Reply Brief

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Table of Contents

Table of Cases, Statutes and Other Authorities

Cases

Statutes, Court Rules and Other Authorities

REPLY ARGUMENT

In Reply, Appellants make only these few points:

1. As reflected in a hearing transcript of April 23, 2018, the May 16, 2018, consent order was preceded by, and reflected, agreement of all parties made on the record.

As noted in the opening brief, when the terms of a consent order are faithfully executed, parties to that consent order cannot be "aggrieved" so as to appeal the outcome. Respondents contend the May 16, 2018, order was not a consent order, contending that the order failed to satisfy SCRCP 43(k): a puzzling, and flatly wrong, argument, given that one of the various alternative ways to satisfy SCRCP 43(k) is for a consent order to be "made in open court and noted upon the record"—precisely what happened in this proceeding.

The May 16, 2018, order that sets out the agreement of all parties on the bid procedure and the options for relief after that bidding refers, on p. 1, to a hearing held April 23, 2018. The transcript of the April 23, 2018, hearing reflects, starting on page 3 and extending to page 5, that the parties placed on the record both the essential terms of what was referred to as a "compromise" for selling by bid the property at 3283 Von Oshen Road (hearing transcript at p. 3: "we have a compromise"), and their agreement with those essential terms. The transcript is Exhibit A to the motion to alter or amend made by Ms. Walsh to the circuit court. In other words, there was "an agreement between counsel affecting the proceedings," as SCRCP 43(k) provides.

In that April 2018 hearing starting at p. 4 of the transcript, counsel for Ms. Walsh as personal representative, Anne Kelley Russell, laid out the terms for selling "3283 Von Oshen Road to the highest bidder between petitioner, Rose Walsh, and Jesse Fred Crosby, with established parameters of the bidding as follows. . . ." The record then reflects that Ms. Russell set forth the details of the terms for the bid process, which were undisputedly followed, and she concluded, on pages 4-5:

> if the highest bidder cannot make such payment within ten days of making the final bid, then the other party may submit a bid equal to $171,000 and shall be the highest bidder. The $171,000 is the amount that Rose [Walsh] would have otherwise been allowed to

sell the property at.

The Probate Court then paused counsel's recitation of agreements on other matters to elicit the reaction of the other parties to counsel's recitation of the bid terms for the property at 3283 Von Oshen Road. David Michel, counsel for Jessie and Robert Crosby (Respondents to this appeal) stated (on page 5), "we're in agreement regarding that process regarding this first property, your Honor," and Dennis O'Neill, counsel for Kelvin Crosby,[1] stated (also on p. 5), "we don't intend to bid on it. We have no objection to how they've arranged it between themselves."

The parties to the April 23, 2018, hearing then went through other matters on which agreement had been reached. The proceedings conclude on page 13, with this colloquy:

> The Court: Do you want to do it in the form of a consent order, or how would you like to do it?
>
> Ms. Russell: We would like to do it in the form of a consent order and maybe email—I'll guess we'll circulate that, prepare it, and send you the final copy for your signatures.
>
> The Court: Very good. I'm glad you were all able to work it out.

That transcript of proceedings reflects, as SCRCP 43(k) requires in part, agreement among counsel "made in open court and noted upon the record." Note also that in the transcript of proceedings of December 5, 2018, *passim*, all parties repeatedly referred to the May 2018 order as a consent order.

The trial court erred in concluding, out of the blue, what no party had argued: that the written order signed by the court to reflect that agreement placed on the record in open court was *not* a consent order.

2. Ms. Walsh has contended from the beginning that no party was aggrieved by the consent order having been followed.

To preserve an issue for appeal an issue must be timely raised with specificity. E.g., *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907

[1] The transcript records Mr. O'Neill as stating that he represented "Calhoun Crosby," but it is undisputed that he represented the only other party, Kelvin Crosby.

(2007) (quoting Toal, *Appellate Practice in South Carolina*). Respondents contend that somehow the "all parties consented" issue has not been preserved, arguing it has not been previously raised "either to the probate court or to the circuit court." Brief at 8. This argument is also factually incorrect. The issue has been raised repeatedly.

The issue was first raised by Ms. Walsh at the first opportunity in the probate court: in her June 25, 2018, Return to the Petition to Enforce Sale and Remove Personal Representative. R. App. 331 to 339, which refers repeatedly to the sale having been by a consent order. E.g., R. App. 332, and which states (emphasis in original):

> at the hearing all parties ***consented*** to a method for sale for property. That consent was placed on the record at the hearing and the order which embodied that consent was approved of and signed by the court. The Petitioners failed to comply with the consent order, and now challenge the procedure to which they previously consented. This is in keeping with Petitioners' explicitly stated intention to drain the estate of as much value as possible. Complaining of even things to which they had consented is one method of fulfilling that explicitly stated intention. . . .

See also, R. App. 338, paragraph 26 in the same pleading, which states, in part:

> [T]he petition challenges the property sale which took place pursuant to the provisions of a consent order; Petitioners are objecting to a process to which they consented. Petitioners cannot now complain about terms to which they themselves consented.

Indeed, the Return filed for Ms. Walsh individually sought costs and attorney fees under multiple theories for Ms. Walsh having complied with the consent order in good faith while Respondents to this appeal (Petitioners in the Probate Court after the sale) objected to and challenged procedures they had consented to and impeded the sale of property despite their agreement in the consent order. E.g., R. App. 338 – 339. In case it does not go without saying, that Return filed in the probate court is part of the record submitted to the trial court.

But Ms. Walsh did not stop there. On appeal to the circuit court the Appellants also reiterated the argument, as set forth by counsel at page 14 of the January 2020 hearing transcript:

> Because everyone consented to this order, to the bid structure, how it was going to go, and to the possible outcomes, it's my position on her behalf individually that no one is aggrieved by the outcome of this order. Everybody consented to one of the forms of relief that was going to happen once this property bidding was over.

When the trial court concluded what no party had argued, and which the record belied, that the May 16, 2018, order was not a "consent order" (Order in the footnote at p. 12), appellant filed a motion pursuant to SCRCP 59(e), the appropriate procedure when a trial court orders relief not requested or raises an issue for the first time in an order. E.g., *Fryer v. South Carolina Law Enforcement*, 369 S.C. 395, 399, 631 S.E.2d 918, ___ (2006)("A post-trial motion must be made when the trial court either grants relief not requested or rules on an issue not raised at trial"); *Pelican Building Centers v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, ___ (1993) (59e motion proper when first notice of issue comes in order); *Anderson Cnty v. Joey Preston & the S.C. Ret. Sys.*, 420 S.C. 546, 570, 804 S.E.2d 282, 294 (Ct. App. 2017)(59e motion proper when issue first arose in court order). That Rule 59(e) motion also explicitly argues, at p. 3, that because of the consent order, "no beneficiary was aggrieved by the outcome of the bid process, so had no standing to object to either the bid outcome when the consent order was fully complied with by Ms. Walsh in her capacity as personal representative, or to move for her removal as personal representative."[2]

This issue, on which this appeal turns, has been timely and consistently raised by Ms. Walsh individually, and is preserved for appeal.

3. There was no dispute about the sums to be paid to perfect the bid.

Respondents contend (Brief at p. 5) "there were disputes between the parties as to the amount of money that should be deposited with the Personal Representative." While this echoes the trial court, Order at 3, it is no more factually correct for being repeated by Respondents. There was no dispute among the parties.

As reflected by the emails in the record, all counsel agreed that the bid of $312,000 required a payment of $159,000 to perfect the $312,000 winning bid, after the credit permitted by the consent

[2] In her capacity as personal representative, it is undisputed that Ms. Walsh has consistently argued that she should not be removed, as no personal representative should be removed, for having complied with the consent order (or any other court order).

order. In the Record at p. 771 is the post-bid email from David Michel, counsel for Respondents, setting forth in detail his calculation of what needed to be paid in ten days to perfect his clients' $312,000 bid, and concluding that the total due to be paid in ten days was $159,000. All counsel agreed, as the exchange of emails reflected.[3]

In short, the courts below have erred in re-writing the consent order to change its terms, setting it aside in part for benefit of Respondents and then penalizing Rose Walsh as Personal Representative for having followed that order, as she was obligated to do—exactly the judicial conduct prohibited by *Johnson v. Johnson*, 425 S.E.2d 46, 46 - 47 (S.C. App. 1992) (a consent order "cannot . . . be set aside in part so that one party is absolved from the duty imposed by it, while the same party retains the benefits it confers.")

CONCLUSION

The lower courts have erred under S.C. Code § 62-3-703(a) in removing Rose Walsh as Personal Representative. This Court should reinstate Rose Walsh as personal representative. At minimum, the court should require that 3283 Von Ohsen Road, Summerville, South Carolina 29485 be deeded to Rose Walsh under the fallback provision of the Consent Order, in exchange for her payment to the estate of $171,000.00, an outcome to which all parties had consented in advance would occur should a bid not be perfected.

Respectfully submitted,

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[3] The failure to perfect the bid by paying $159,000 rendered moot Jessie Crosby's other arguable non-conformity with the consent order: his bidding in combination with Robert Crosby, as opposed to what the consent order provided.

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Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Appellant's Initial Reply Brief

By transmitting a copy of the documents via email to counsel of record for the Respondents, Tom Lydon, sent to: tlydon@mgclaw.com to reach him at:

Tom Lydon
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And by placing a copy of the document in the United States mail, first-class postage pre-paid, addressed to:

Kelvin Crosby
181 Azaelea Drive
Waynesville NC 28786

Done August 10, 2021

s/ Gregg Meyers

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