No. _____

IN THE

UNITED STATES SUPREME COURT

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In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, ,

Petitioners

v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant,

Respondents.

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On Petition For Writ Of Certiorari

To The South Carolina Supreme Court

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. LOWER COURTS ERRED BY ACTING ON A PETITION FILED AND SERVED WITHOUT SUMMONS AS REQUIRED BY FEDERAL COMMON LAW AND FEDERAL PROCEDURAL DUE PROCESS ?

II. WHETHER A PERSON WHO IS NOT A QUALIFIED ELECTOR OF A COUNTY WHERE A PROBATE COURT MATTER IS PROPERLY LOCATED CAN SERVE AS A PROBATE COURT JUDGE FOR THAT COUNTY IN ANY CAPACITY IN DEROGATION OF PETITIONERS' RIGHT TO VOTE AND THE US CONSTITUTION'S RIGHT OF ONE MAN ONE VOTE ?

III. DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRESTION PREJUCING THE PETITIONERS' RIGHT TO A FAIR TRIAL BY QUASING A CERTAIN SUBPOENA AND NOT UNREDACTING A CERTAIN LETTER IN VIOLATION OF PETITIONERS' DUE PROCESS

## QUESTIONS PRESENTED

RIGHT TO PRESENT EVIDENCE AND PROPERLY CROSS-EXAMIN AN OPPOSING PARTY ?

IV. RESPONDENT KNIGHT-TONNEY'S CLAIM IS AN EQUITABLE ACTION SUBJECT TO DE NOVO REVIEW AND OTHER EQUITABLE PRINCIPLES?

V. THE LOWER COURTS FAILED TO UPHOLD S.C.CODE ANN. 308(c) AND THE AUTOMATIC?

VI. CONSCIOUS, INTENTIONAL FAILURE TO DISCLOSE FINANCIAL ARRANGEMENTS TO MILDRED KNIGHT REQUIRED BY COURT APPOINTMENT AND EQUITABLE PRINCIPLES IS CONDUCT SUBSTANTIATING FRAUD IN THE INDUCEMENT TO ENTER A CONTRACT ?

VII. THE LOWER COURTS' ALLOWANCE OF RESPONDENT KNIGHT- TONNEY'S CLAIM IS AGAINST THE GREATER WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION?

# QUESTIONS PRESENTED

VIII. THE LOWER COURTS ERRED IN HOLDING THAT RESPONDENT TONNEY'S CLAIM FOR REPAYMENT WAS TIMELY FILED?

IX. THE LOWER COURTS ERRED IN HOLDING THAT RESPONDENT KNIGHT-TONNEY HAD SATISFIED THE LEGAL REQUIREMENTS FOR CASE- -IN- CHIEF?

X. THE LOWER COURTS ERRED BY REIMBURSING RESPONDENT KNIGHT-TONNEY FOR ATTORNEY FEES IN PARENTS' FAMILY COURT MATTER AND ALLOWING FULL INTEREST ON JUDGMENT?

XI. BEATRICE WHITTEN SHOULD BE REMOVED AS SPECIAL ADMINISTRATOR ?

## PARTIES TO THE PROCEEDING

The Petitioners are: In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert "Bobby" Knight, III.

The Respondents are: Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents.

## RELATED CASES

There are no related cases.

# TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i - iii

PARTIES TO THE PROCEEDING ..... iv

RELATED CASES ..... iv

TABLE OF CONTENTS ..... v

TABLE OF AUTHORITIES ..... ..... vi - xi

STATUTES & RULES ..... xii

PETITION FOR A WRIT OF CERTIORARI ..... xiii

OPINIONS BELOW ..... xiii

JURISDICTION ..... xiii

CONSTITUTIONAL PROVISIONS INVOLVED.. xiv

INTRODUCTION & STATEMENT OF THE CASE

..... 1 - 4

REASONS FOR GRANTING THE PETITION. 5 -30

CONLUSION ..... 31

APPENDIX ..... END

# TABLE OF AUTHORITIES

Page

14 Fla. Jur. Fraud and Deceit, sec. 27, pp. 555- 556; Franklin v. Brown, 159 So.2d 893 (Fla.App., 1964) ..... 21

46 AmJur 2d, Judgments 331 (1994) ..... 6

66 Am. Jur. 2d Restitution and Implied Contracts Section 4 (1973); ..... 16

Anno. 62 ALR. 3d 288, 294 (1975); ..... 17

Astoria Federal Savings and Loan Association v. Soliminmo, 501 U.S. 104, 111 S. Ct. 2166, H5L.Ed. 2d. 96 (1991) ..... 9

Bryan A. Gamer, Black's Law Dictionary at 1290, 1315 (10th ed. 2014) ..... 15, 26

Bradley, v. Rodelsperger. 17 S.C. 9 (1882) ..... 7

Cel Products, LLC v. Rozelle, 357 S.C.125, 132, 591 S.E2d 643, 646 (Ct.App. 2004) ..... 12

Chabek v. Nationwide Mutual Fire Ins. Co., 303 S.C. 26,28, 397 S.E. 2d 786,787 (Ct. App. 1990) ..... 5

Chabek v. Nationwide Mutual Fire Ins. Co., id. ..... 6

Chewning v. Ford Motor Co., 346 S.C. 28, 550 S.E.2d 584 (Ct.App. 2001) ..... 21, 22

## TABLE OF AUTHORITIES cont'd

Page

Crawford v. Henderson, 356 S.C. 389, 589 S.E. 2d 204 (Ct. App 2003) ..... 14

Conway v. Charleston Lincoln Mercury, Inc., 363 S.C. 301,308, 609 S.E.2d 838, 842 (Ct.App. 2005 ... 13

Elliott v. Perisol, 1 Pet. 328, 340, 26 U.S. 328, 340, 7 L.Ed. 164 (1828) ..... 7

Ellis v. Smith Grading and Paving Inc., 294 S.C. 470, 366 S.E. 2d 12 (1988) ..... 17

Franklin v. Brown, 159 So.2d 893 (Fla.App.,1964)..21

Fontaine v. Peitz, 291 S.C. 536, 354 S.E. 2d 565 (1987) ..... 11, 23

Genobles v. West. 23 S.C. 154 (1885) ..... 6

McLain v. Ingram, 314 S.C. 359, 444 S.E. 2d 512 (1994) (per curium) ..... 6

Great-West Life & Annuity Ins. Co, v. Knudson, 534 U.S. 204, 215-16, 122 S. Ct. 708 (2002). ..... 16

Main v. Thiboutot, 448 U.S. 1, 100 S. Ct.2502, 65 L.Ed.2d 55 (1980) ..... 9

H. Lightsey & J. Flanagan, South Carolina Civil Procedure 407 (2d ed. 1985) at. 486; Chewning id. at 34). ..... 21

TABLE OF AUTHORITIES cont'd

Page

Hilton Head Ctr., Inc., v. Pub. Serv. Comm'n, 294 S.C. 9,11, 362 S.E.2d 176, 177 (1987) ..... 21

Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172,186, 708 S.E.2d 787, 795 (Ct. App. 2011) ..... 13

Howard, Matter of., 315 S.C. 356, 434 S.E. 2d 254 (1993) ..... 17, 25, 27, 29

Howard, Matter of, 315 S.C. 356, 434 S.E. 2d 254 (1993) note 7 citing In re Estate of Kruger, 235 Neb. 518 455 N. W. 2d 809 (1990) and Stump v. Stump, 91 Md. 699, 47 A. 1034 (1900). Stump v. Stump, id. ... 28

Huffy v. Jennings , 19 S.C. 142, 459 S.E. 2d 886.... rehearing denied, appeal dismissed (S.C. App. 1995) .. ..... 27

In Earle v. Cureton, 13 S.C. 19 (1880) ..... 7

In Re McCracken, 346 S.C. 87, 92, 551 S.E. 2d 235, 238 (2001) ..... 27

In Re: Estate of Timmerman, 331 S.C. 455, 502 S.E. 2d 920, 922 ( Ct. App. 1998) ..... 5

TABLE OF AUTHORITIES cont'd

Page

Ins. Fin. Services., Inc, v. S.C. Ins. Co., 271 S.C. 289, 293, 247, S.E.2d 315, 318 (1978). Restitution is an equitable remedy. ..... 16

Jackson v. Speed, 326 S.E. 289, 307, 486 S.C. 2d 750. 759 (1997) ..... 29

Jaffe-Spindler Co. v. Geneseo, Inc., 747 F.2d 253 (C.A.S.C. 1984) ..... 17

Knight v. Lee, 262 S.C. 17, 202 S.E. 2d 19 (1974) .. ..... 13, 14

LaFaye v. Timmerman, 502 S.E. 2d 920 ( Ct. App. 1998) ..... 5

Louthian & Merritt, P.A. v, Davis. 272 S.C. 330, 251 S.E.2d 757 (1979) ..... 28

Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47(Ct. App. 1984). ..... 12

Matter of Jennings 321.S.C.440, 468 S.E. 2d 869, rehearing denied (1996) ..... 28

M.B. Kahn Const. Co. v. South Carolina Nat. Bank of Charleston, 275 S.C. 381,271 S.E. 2d 414 (1980). See, Restatement ( Second) of Contracts 161 and 173... 22

TABLE OF AUTHORITIES cont'd

Page

McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994) (per curium). ..... 8

Merriam-Webster's dictionary (l 1th ed), Springfield, MA, Merriam Webster ..... 15

Old Wayne Mut. L. Assoc, v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907) ..... 7, 9

Palmettonet, Inc, v. S.C. Tax Com'n., 318 S.C. 102,456 S.E. 2d 385 (1995) ..... 9

Phillips v. Quick, 399 S.C. 226,731 S.E. 2d 327 ( Ct. App. 2012) ..... 26

Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E. 2d 642 ( Ct. App. 1990) ..... 29

Richardson v. Town of Mt. Pleasant. 350 S.C. 291 (2002) ..... 9

Robert Goff & Gareth Jones. The Law of Restitution 3 ( 3d ed. 1986), ( Harvard Law Review Association 1969) ..... 15

TABLE OF AUTHORITIES cont'd

Page

Ross v Richland Co., 270 S.C. 100, 240 S.E. 2d 649 (1978) ..... 6

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 216 n. 5 (Ct. App. 1997). ..... 13

Thomas & Howard Company Inc, v. T.W. Graham and Co., 318 S.C. 286, 457 S.E. 2d 340 (1995) ..... 6

Truluck v Synder, 362 S.C. 108, 606 S.E.2d 792 ( Ct. App 2004) ..... 5

Turner v. Malone 24 S.C. 398, 401-02 (1885) ..... 20

Webb v. First Federal Sav. & Loan Ass'n of Anderson. 300 S.C. 507, 388 S.E.2d 823 ( Ct. App. 1989) (citing 66 Am. Jur.2d Restitution and Implied Contracts Section 2 (1973)). ..... 17

Wallace v. Milliken & Co., 305 S.C. 118, 120, 406 S£.2d 358, 359 (1991); restitution and disgorgement are equitable remedies ..... 16

Weeks v. Drawdy, 495 S.E. 2d 454 (Ct. App. 1997).. 5

## STATUTES

Page

28 U.S.C. § 1257(a) ..... ix

S.C. CODE SEC. 14-23-280 ..... 5; App 4 pg 11

S.C. CODE SEC 14-23-1040 .....8; App 3

*See* S.C. CODE SEC 14-23-1080

*See* S.C. CODE SEC 14-23-1150

S.C. Code Ann. 20-3-145 (1979) ..... 28

S.C. CODE SEC 62-1-304 ..... 5; App 4 pg 12

S.C. CODE SEC. 62-1-308 (c) ..... 18

S.C. CODE SEC. 62-1-401 ..... App 4 pg. 05

S.C. Code Ann. 62-3-703(a) (2005) ..... 30

S.C. CODE SEC. 62-3-801 (a), - 803 (a) (2) ..... 26

S.C. Code Ann. 62-3-801. et. seq. (1980) ..... 27

S.C. Code Ann. 62-3-806(b). et. seq. (1980) ..... 1, 2

## RULES

Rule 5(d), SCRCP ..... 8; App 4 pg. 10

Rule 1, SCRCP ..... App 4 pgs.; 14, 15, 17

Rule 26(b)(1) SCRCP ..... ..... 12

Rule 81, SCRCP ..... App 4 pgs.; 14, 15, 17

## PETITION FOR A WRIT OF CERTIORARI

In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

## OPINIONS BELOW

The South Carolina Supreme Court ORDER DATED June 28, 2019. A denial of petitioner's writ of certiorari at App.1.

## JURISDICTION

The South Carolina Supreme Court entered judgment on June 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a)

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution: Fourteenth Amendment

South Carolina Constitution: Article 1 §3;
*See* H-3803 South Carolina Summons Subcommittee: Probate, Estate Planning and Trust Section, Summons in Probate Court, p. 5- 7 (January 21, 2010) (R. p. 283)

S.C. Op. Atty. Gen. (Aug 30, 2010) 2010 WL 3505049.

S.C. CODE SEC. 14-23-280

S.C. CODE SEC 14-23-1040

S.C. CODE SEC 14-23-1080

S.C. CODE SEC 14-23-1150

S.C. Code Ann. 20-3-145 (1979)

S.C. CODE SEC 62-1-304

S.C. CODE SEC. 62-1-308 (c)

S.C. CODE SEC. 62-1-401

S.C. Code Ann. 62-3-703(a) (2005).

S.C. CODE SEC. 62-3-801 (a), · 803 (a) (2)

S.C. Code Ann. 62-3-801. et. seq. (1980);
was to refer only to Part 8, Creditors' Claims

S.C. Code Ann. 62-3-806(b). et. seq. (1980)

# INTRODUCTION AND STATEMENT OF THE CASE

In 2004, relations between Norman R. Knight, Jr., Mildred C. Knight, and their daughters, Chloe Knight-Tonney and Linda Jones became adversarial. In 2004, Mr. and Mrs. Knight revoked their Power-of-Attorney to their daughters. In 2004, the Charleston County Department of Social Services investigated the Knight home pursuant to allegations of elder abuse. In 2004, the investigation was terminated and the allegations were classified as unfounded (R.p.iii-8.36). Relations between the parties continued to deteriorate, becoming litigious and contentious. While an appeal was pending in the Circuit Court, Mr. Knight was removed from the home in 2006. He died in a nursing home on March 2008. On January 20, 2009, Respondent Knight-Tonney filed claim for reimbursement of moneys expended allegedly for the care of her father, Norman R. Knight, Jr. The Special Administrator, Beatrice E. Whitten, disallowed the claim and on or about April 20, 2009, Respondent filed a petition to allow the claim. Respondent Knight-Tonney's S.C. Code Ann. 62-3-806(b) claim is an equitable action subject to de

novo review and other equitable principles. After several years of litigation and appeals, on November 28, 2012, Beaufort County Probate Judge, Kenneth E. Fulp, Jr. was appointed Special Probate Judge for Charleston County, exclusively for the Estate of Norman R. Knight Jr. On May 29, 2013, Petitioners filed a Summons and Complaint seeking the removal of the Special Administrator. On July 17, 2013 the initial set of motions were argued and an order filed on July 29, 2013. Petitioners were the only movants; all motions were denied. On December 13, 2013, Petitioner filed and served an Amended Complaint to Remove the Special Administrator. Numerous pre-trial motions were filed and argued. Petitioner filed two series of Motions to Dismiss, Motion to Compel Discovery with issues of redaction, Motion to Amend Complaints and other motions regarding venue, all filed in pre-trial. On December 17, 2013, a motion hearing by phone was held and an order issued on December 23, 2013. This hearing was significant because the Court held certain documents had to be unredacted to comply with Petitioners' motion to Compel. A second set of pre-trial motions were argued by telephone on January 6, 2014 and an order was filed

on January 17, 2014. Petitioners' Motion to Amend Special Administrator's Complaint was granted. Bishop Gadsden withdrew its claim. On April 22, 2014, Judge Fulp quashed Petitioners' subpoena duces tecum to the Morgan Stanley Company, Morgan Smith-Barney. The subpoena required Morgan Stanley to provide information on the "deposit and withdrawal activity/records including identity of depositors and payees for the years 2004 through 2009 involving account holders: Linda Jones, Chloe Knight-Tonney, and Queenie." This matter was tried before the bench in non-jury for two separate days, March 31, 2014 and April 28, 2014. Including post-trial proceedings, i.e. written closing arguments, a final order was filed on July 11, 2014. The trial court ordered the Estate to pay Knight-Tonney $23,914.73 plus interest from May 2009. After post-trial motions, a Notice of Intent to Appeal was filed on September 3, 2014 by the Estate of Mildred C. Knight, and Bobby Knight. This is an appeal of the orders of Special Probate Judge for Charleston County, Kenneth E. Fulp, Jr. and Common Pleas Court Judge, J.C. Nicholson, Jr. Judge Nicholson denied **"Motion to Appeal"** on January 27, 2016 although Petitioners did

not file "motion to appeal." Post-trial motions were denied with Notice of Entry of Judgment being received by Petitioners on March 11, 2016. The Court of Appeals affirmed the judgment of the circuit court. In Re: Estate of Norman R. Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert 'Bobby" Knight, III, Petitioners, v. Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents. CASE NO. 2014-CP-10-5355, Appellate Case No. 2016-000748. Petitioners seek a writ of certiorari to review that decision.

## REASONS FOR GRANTING THE PETITION

### I. LOWER COURTS ERRED BY ACTING ON A PETITION FILED AND SERVED WITHOUT SUMMONS AS REQUIRED BY FEDERAL COMMON LAW AND FEDERAL PROCEDURAL DUE PROCESS ?

Since 1985, the South Carolina Rules of Civil Procedure, through Rules 1 and 81, and pursuant to S. C. Code sec. 14-23-280 and sec. 62-1-304, have always required the filing of a summons and complaint in

Probate Court matters. See, In Re: Estate of Timmerman, 331 S.C. 455, 502 S.E.2d 920, 922 (Ct. App. 1998); Weeks v. Drawdy, 495 S.E.2d 454 (Ct. App. 1997); Truluck v. Synder, 362 S.C. 108, 606 S.E.2d 792 (Ct. App 2004); LaFaye v. Timmerman, 502 S.E.2d 920 (Ct. App. 1998). See Summons Subcommittee: Probate, Estate Planning and Trust Section, Summons in Probate Court. p. 5-7 (January 21, 2010) (R. p. 283). "In South Carolina , a civil action is commenced by filing and serving a summons and complaint. Until an action is commenced, there is no proceeding pending and, thus, nothing to refer." Chabek v. Nationwide Mutual Fire Ins, Co., 303 S.C. 26,28, 397 S.E.2d 786,787 (Ct. App. 1990). Respondent Knight-Tonney did not file and serve a summons with her petition. Respondent, Chloe Knight-Tonney, did not commence an action in the probate court and nothing that occurred has legal substance. Ms. Knight-Tonney's claim is **void ab initio**. Chalek v. Nationwide Mutual Fire Ins. Co., id. Please note that Petitioner filed and argued the commencement issue before Judge Fulp (R.p.23, L. 10), and raised the issue in post- hearing motions before Judge Fulp issued his rulings on the challenged petitions. The motions were denied. (R.p. 24, L.19-25).

" A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely voidable. 46 AmJur 2d, Judgments 331 (1994). Generally, a judgment is void only if a court acts without jurisdiction. Ross v Richland Co., 270 S.C. 100, 240 S.E.2d 649 (1978). Irregularities which do not involve jurisdiction do not render a judgment void. Genobles v. West. 23 S.C. 154 (1885)." See, Thomas & Howard Company Inc, v. T. W. Graham and Co., 318 S.C. 286, 457 S.E.2d 340 (1995). " A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court. Old Wayne Mut. L. Assoc, v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907). Proceedings in the Probate Court that are taken without the jurisdiction of the court are void ab initio and such proceedings are not adjudications that can bind any party to the action. See Bradley, v. Rodelsperger, 17 S.C. 9 (1882). In Earle v. Cureton, 13 S.C. 19 (1880), the court observed that the Defendant, Cureton, had not been summoned to answer in the matter regarding his obligation as surety, then held that " Under such circumstances the

judgment is wholly void...The obligation of Cureton in this case did not waive the right of defense or furnish any authority for taking a judgment against him".

In the United States Supreme Court case, Elliott v. Perisol, 1 Pet. 328, 340, 26 U.S. 328, 340, 7 L.Ed. 164 (1828), the court ruled as follows " . . . But if [ a court] acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification, and all persons concerned in executing such judgments or sentence are considered in law as trespassers." "The language of Rule 5(d) is clear: the summons and complaint must be filed prior to their service." McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994) (per curium).

II. WHETHER A PERSON WHO IS NOT A QUALIFIED ELECTOR OF A COUNTY WHERE A PROBATE COURT MATTER IS PROPERLY LOCATED CAN SERVE AS A PROBATE COURT JUDGE FOR THAT COUNTY IN ANY CAPACITY IN DEROGATION OF PETITIONERS' RIGHT TO VOTE

AND THE US CONSTITUTION'S RIGHT OF ONE MAN ONE VOTE ?

S.C. Code Ann. 14-23-1040 sets a clear standard for who may serve as a judge in the probate court: no person is eligible to hold the office who has not become a qualified elector of the county in which he is to be a judge. The probate court allows for lay person judges and persons who are attorneys to serve as probate court judges. According to the Attorney General, an Associate Probate Judge must be a qualified elector of the county in which he or she is to be a judge. S.C. Op. Atty. Gen. (August 30, 2010) 2010 WL 3505049. The availability of other qualified electors to act as probate judges is the core of co-existence between the statutes involved in this issue. See. Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d. 96 (1991) (legislative repeals by implication will not be recognized, insofar as two statutes are capable of co-existence " absent a clearly expressed congressional intention to the contrary"); Palmettonet, Inc, v. S.C. Tax Com'n.. 318 S.C. 102 ,456 S.E.2d 385 (1995). Beaufort County Probate Court Judge Kenneth E. Fulp, Jr. is a Beaufort County

resident. The appointment of Judge Fulp to the Probate Court for Charleston County expands his office to another county. Dual office holding is patently incorrect. Richardson v. Town of Mt. Pleasant. 350 S.C. 291 (2002). Judge Fulp cannot sit as a Special Probate Judge for Charleston County, and his rulings and authority are null and void. "A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court." Old Wayne Mut. L. Assoc, v. McDonough, 204 U.S. 8,27 S. Ct. 236 (1907). The Law provides that once State and Federal jurisdiction has been challenged, it must be proven. Main Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 55 (1980). Petitioners did not concede the venue issue. Judge Fulp agreed to hold all hearings in Charleston County. The venue issue was raised in 2010 before one of the disqualified judges. Judge Blunt was replaced after the orders of the disqualified judges were vacated. The Petitioners, Voters, have been **DISENFRANCHISED** of the Right to the Representation as decided by a popular election. Vote(d) rights', the official results of a General Election and expected privileges of the election result

were deprived about these Petitioners without having a Qualified Elector as Probate Judge(s) in their case.

The orders issued by Judge Fulp and Judge Blunt must be vacated.

III. DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRESTION PREJUCING THE PETITIONERS' RIGHT TO A FAIR TRIAL BY QUASING A CERTAIN SUBPOENA AND NOT UNREDACTING A CERTAIN LETTER IN VIOLATION OF PETITIONERS' DUE PROCESS RIGHT TO PRESENT EVIDENCE AND PROPERLY CROSS-EXAMIN AN OPPOSING PARTY ?

A reviewing court may find abuse of discretion where a Petitioner shows that the lower court's conclusion is based upon an error of law or without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Judge Fulp committed an abuse of his discretion by supporting Respondent Knight-Tonney's efforts to hide relevant, discoverable material. This material would have determined the origin and ownership of funds used to pay Mr. Knight, Jr's expenses. The subpoenaed information was scheduled for presentation and delivery on the day of

the final hearing. At the second hearing, Petitioner Bobby Knight testified that "Queenie" was Louise Reynolds who owned savings bonds worth $180,000.00, and that she lived with her partner who was equally endowed, and who predeceased her, Mr. Knight, and Mrs. Knight. In Knight-Tonney's initial responses to Discovery Requests, she redacted the " Queenie" name from the subject items (R.p. 303-306). After arguing Motions to Compel, Knight-Tonney was required to reveal all the text on the checks. The "Queenie" name was revealed. At trial, Knight-Tonney did not want to discuss Louise Reynolds aka " Queenie" (R.p. 74-75). The trial court sustained her efforts during the hearing and Petitioners sought to obtain the information by trial subpoena. The Trial court quashed the subpoena without viewing the material. During the Motion to Compel arguments, the trial court ruled that a certain letter dated October 16, 2007 (R.p. 105) could not be redacted because of the attorney-client privilege. There is no attorney-client privilege in a letter written to non-clients or letters including clients and non-clients. Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47(Ct. App. 1984). Moreover, Rule 26(b)(1) SCRCP says, "It is not ground for objection that the

information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The letter was offered to establish the amount of money Respondent Knight-Tonney wanted to be reimbursed. Without privilege, everything about this letter is discoverable. " The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Cel Products, LLC v. Rozelle, 357 S.C.125, 132, 591 S.E2d 643, 646 (Ct.App. 2004). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172,186, 708 S.E.2d 787, 795 (Ct. App. 2011) and " unless the party that failed to comply establishes a lack of prejudice, reversal is required." Conway v. Charleston Lincoln Mercury, Inc., 363 S.C. 301,308, 609 S.E.2d 838, 842 (Ct.App. 2005). Even now, Respondent is asking the Court to guess at the content and import of redacted information that is clearly relevant and would give information on the value Of this claim. "The South

Carolina Rules of Civil Procedure expressly require the disclosure the nature of evidence prior to any claim of privilege so that other parties may assess the applicability of the privilege or protection." Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 216 n. 5 (Ct. App. 1997). The disclosure of the information sought by Petitioners could lead to evidence that impacts this claim. The trial court's denial of disclosure has no evidentiary support. Without seeing the "quashed" material and the information redacted in the October 16, 2007 letter (R.p. 105), Petitioners' defense is prejudiced. The trial court's rulings had no evidentiary support. Petitioners' cite to Knight v. Lee, 262 S.C. 17, 202 S.E.2d 19 (1974) was used to support our contention on both " pro forma machinations," i.e. withdrawing the " Queenie" claim (R.p. 19-22) (R.p. 303-306), and redacting the information in the October 16, 2007 letter. (R.p. 105). Petitioners cited Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App 2003) subpoena to move for a protective order contemporaneous to the motion to quash. Respondent did not file a motion for a protective order. Please note that the Respondent is asking for $9,283.06 in attorney fees and a great portion of that was for the family court

matter. (R.p. 111, 107, 10). The uncontroverted family court attorney fee total is $7,695.00. Petitioners should be allowed access to the subject material and the opportunity to pursue the issues accordingly. Affirming the failure to unredact documents, and quashing the subpoena prevented Petitioners from receiving a fair trial. Knight v. Lee, 262 S.C. 17, 202 S.E.2d 19(1974).

## IV. RESPONDENT KNIGHT-TONNEY'S CLAIM IS AN EQUITABLE ACTION SUBJECT TO DE NOVO REVIEW AND OTHER EQUITABLE PRINCIPLES.

Chloe Knight-Tonney's claim is an equitable action. "This action for money paid was the appropriate action when the plaintiffs claim was in respect of money paid, not to the defendant, but to a third party, from which the defendant had derived a benefit. Historically, the plaintiff had to show that the payment was made at the defendant's request: but we shall see that the law was prepared to "imply" such a request on certain occasions, in particular where the payment was made under compulsion of law or, in limited circumstances, in the course of intervention in an emergency on the defendant's behalf, which in this

book we shall call necessitous intervention" Robert Goff & Gareth Jones. The Law of Restitution 3 (3d ed. 1986), (Harvard Law Review Association 1969). The words 'reimbursement', 'restoration', and 'restitution' are strong synonyms and carry the same meaning and implications for "returning status". See, In Merriam-Webster's dictionary (11th ed), Springfield, MA, Merriam Webster; Bryan A. Gamer, Black's Law Dictionary at 1290, 1315 (10th ed. 2014). Knight-Tonney testified that she wanted to be reimbursed. (R.p. 81: tr. p. 174 L. 7-13; R.p.82: tr.p. 182 L. 13-19). Moreover, Tonney submitted an exhibit entitled reimbursement breakdown. (R.p. 83: tr. p. 173, L 18-19). During oral argument in the Circuit Court, Claimants' attorney repeatedly said that his client wanted to be reimbursed. (R.p. 57:L.24). Respondent Knight-Tonney gave notice only to the Conservator and the Guardian that she would be seeking restitution of funds used for expenses resulting from her father's removal (R.p. 76; tr. p. 22; 77: tr. p. 31; 78: tr. p. 119; 79-80: tr. p. 84-83). Knight-Tonney always Initiated this aid. Characterization of an action as equitable or legal depends on the 'main purpose' in bringing the action. Ins. Fin. Services., Inc, v. S.C. Ins.

Co., 271 S.C. 289, 293, 247, S.E.2d 315, 318 (1978). Restitution is an equitable remedy. Wallace v. Milliken & Co.. 305 S.C. 118, 120, 406 S£.2d 358, 359 (1991); restitution and disgorgement are equitable remedies. See, Great-West Life & Annuity Ins. Co, v. Knudson, 534 U.S. 204, 215-16, 122 S. Ct. 708 (2002)."The essential elements of a quasi-contract are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value." 66 Am. Jur. 2d Restitution and Implied Contracts Section 4 (1973); Anno. 62 ALR. 3d 288, 294 (1975); Ellis v. Smith Grading and Paving Inc., 294 S.C. 470, 366 S.E.2d 12 (1988). Webb v. First Federal Sav. & Loan Ass'n of Anderson. 300 S.C. 507, 388 S.E.2d 823 ( Ct. App. 1989) (citing 66 Am. Jur.2d Restitution and Implied Contracts Section 2 (1973)). The decedent in the Howard case was far different from Norman R. Knight's circumstances, Howard, Matter of., 315 S.C. 356, 434 S.E.2d 254 (1993). The Howard case involved executed promissory notes with interest obligations and other loans, all obtained by the decedent during his lifetime through his bargaining

and business behaviors. Generally, in matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity prevail. Jaffe-Spindler Co. v. Geneseo, Inc., 747 F.2d 253 (C.A.S.C. 1984). Respondent Knight-Tonney's S.C. Code Ann. 62-3-806(b) claim is an equitable action subject to de novo review and other equitable principles

## V. LOWER COURTS FAILED TO UPHOLD S.C. CODE SEC. 62-1-308 (c) AND THE AUTOMATIC STAY.

When an appeal, according to the law, is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. S.C. Code Sec. 62-1 -308(c)( 1999). The Probate Court Order on appeal at the pertinent time was the Order changing the status of Mildred C. Knight, the decedent's widow. Norman R. Knight, Jr. was alive at this time and the order under appeal was issued by the therapeutic division of the Charleston County Probate Court (R.p. 163). The status of Mildred C. Knight was

front and center as it relates to the Automatic Stay. All parties were aware of the appeal. The stay permitted her to remain as her husband's guardian. There was another order issue by Circuit Court Judge Roger M. Young that clarified the authority and status of the guardians. (R.p. 219- 220). Mildred Knight was to remain both Guardian and Conservator pending the appeal. (R.p. 219). The Appeal was argued in the fall/early winter of 2005 and a decision was issued in January 2006 dismissing the appeal but a timely Motion for a New Trial was filed and served on all parties. Respondent Tonney knew that the matter was under review as indicated by her Motion to Dismiss. (R.p. 174). The automatic stay was still in place at the time Respondent Tonney and Kaufman acted to remove Mr. Knight from the home. (R.p.91-92: tr. p. 124 L. 22- 125 L. 11). According to the response to a letter from the Guardian Ad Litem to the Circuit Court Judge, the Guardian ad Litem was advised to prepare a Rule to Show Cause (R.p. 170), an approach more consistent with the automatic stay. There were two guardians hovering around the case at that time, but according to the October, 2005 circuit court order, the Guardian (Kaufman) who participated in removing

Mr. Knight from his home was relieved of any authority during the appeal. (R.p. 219). A series of exhibits substantiate the appeal status. (R.p. 169-174). Walter Kaufmann was not authorized or recognized to perform any functions during the pending appeal. (R.p 219-220). Further, Judge Young directed that any conflicts with his order or previous orders "should be cause for a Rule to Show Cause..." Judge Young directed the Rule to Show cause when contacted by the Guardian ad Litem (R.p.170). All of Kaufmann's actions from that point and during the appeal were illegal, null, and void. Turner v. Malone 24 S.C. 398, 401-02 (1885); The behavior of Kaufman and Knight-Tonney created the added expense to Norman R. Knight, Jr's estate. Kaufmann and Knight-Tonney moved Mr. Knight on allegations that were unsubstantiated and in some aspects contrary to professional medical opinion. (R.p. 157-158, 64- 65). These failures by Respondent Knight-Tonney cannot be disregarded.

## VI. CONSCIOUS, INTENTIONAL FAILURE TO DISCLOSE FINANCIAL ARRANGEMENTS TO MILDRED KNIGHT AS REQUIRED BY COURT

APPOINTMENT AND EQUITABLE PRINCIPLES IS CONDUCT SUBSTANTIATING FRAUD IN THE INDUCEMENT TO ENTER A CONTRACT.

In this case, our Court of Appeals and the trial judge overlooked Knight-Tonney's, the alleged guardian, and conservator's failure to disclose pertinent, material details to Mrs. Knight, i.e. suppression of the truth.

" It is fundamental that suppression of truth may constitute fraud as much as a false suggestion, provided that it is material to the transaction. A distinction must be drawn, however, between passive and active concealment. The former involves mere silence or failure to disclose a fact, while the latter involves a purpose or design. It is only when there is a duty to reveal the fact that mere non-disclosure constitutes fraud." 14 Fla. Jur. Fraud and Deceit, sec. 27, pp. 555- 556; Franklin v. Brown, 159 So.2d 893 (Fla.App., 1964). ( See Extrinsic Fraud: Extrinsic Fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. " Hilton Head Ctr., Inc., v. Pub. Serv. Comm'n, 294 S.C. 9,11, 362 S.E.2d 176, 177 (1987); Chewning v.

Ford Motor Co., 346 S.C. 28, 550 S.E.2d 584 (Ct.App. 2001). Extrinsic fraud " refers to frauds collateral or external to the matter tried such as bribery or other misleading acts which prevent the movant from presenting all of his case or deprives one of the opportunity to be head." H. Lightsey & J. Flanagan, South Carolina Civil Procedure 407 (2d ed. 1985) at. 486; Chewning id. at 34). Respondent Knight-Tonney, the alleged Guardian, Walter Kaufmann, and the Conservator, Family Services, Inc., by and through their agent, Iris Albright, misled the wife, Mildred C. Knight, into accepting the arrangement of care for Mr. Knight. The appointees made no effort to notify Mrs. Knight of any pertinent details despite their legal obligations to involve her in these decisions. (R. p. 159-160); (R.p. 61, L. 19-63, L.4); (R.p. 296 - 297). Respondent Knight-Tonney did not share her plan with Mrs. Knight (R.p. 62,L. 14-20). The conduct of Knight-Tonney, the alleged Guardian, and Conservator was their false representation. M.B. Kahn Const. Co. v. South Carolina Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). See, Restatement (Second) of Contracts 161 and 173 (when the parties are a fiduciary relationship, there is a duty to disclose

material facts; failure to do so may constitute Fraud). The three actors knew Ms. Knight would contest this arrangement and they acted to avoid any challenge. Mr. and Mrs. Knight were induced into this agreement. The failure to disclose these material facts prevented Petitioners from contesting the arrangements at the time of conception and eliminated Petitioners' court appearances on those issues, i.e. deprived of the opportunity to be heard.

## VII. LOWER COURTS' ALLOWANCE OF RESPONDENT KNIGHT-TONNEY CLAIM IS AGAINST THE GREATER WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION

This claim is not an action at law, but a claim for equitable relief entitling the Petitioner to de novo review. A reviewing court may find abuse of discretion where a Petitioner shows that the lower courts' conclusion is based upon an error of law or without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). In Judge Young's Order to Stay Proceedings Pending Appeal, he ruled as follows: " Violations of previous orders or the terms set forth in this order, that shall be cause for a Rule to Show

Cause" (R.p. 220). Respondent Knight- Tonney and the others authored unsubstantiated allegations in a separate new action and created these unnecessary costs. (R.p. 84 L. 13-24). In 2006, Respondent Knight-Tonney and Kaufman alleged abuses (Supp.R.p. 28, L. 14-23) and there was no finding of abuse. As to Kaufman's allegations of abuse, his testimony at trial is not credible; Kaufman was appointed by order of the probate court on August 25, 2005 and that order was appealed on September 1, 2005. (R.p. 163). The automatic stay suspended Kaufman and _____ in place until a decision on the Motion for New Trial filed by Petitioner Bobby Knight on January 30, 2006. (R.p. Idl- ib?),(R.p. 169). Kaufman had no obligation to visit and did not visit, as he was instructed by Judge Roger Young in open court on September 30, 2005. (R.p. 92, L. 12-18), (R.p. 219). Kaufman's testimony on March 31,2014, and before Judge Curry on January 31, 2006 is not supported by the facts existing at the time of his ex parte petition for an emergency order. The de novo review will show that Mrs. Knight was not represented during the period of Mr. Knight's removal (R.p. 188-189), and because she was never informed of the arrangements to give restitution to Respondent

Knight-Tonney, she was induced into cooperating with the arrangements. The Respondent offered no evidence of abuse or neglect. Knight-Tonney offered no evidence that Mr. Knight's removal from his home was necessary for his care. Respondent Knight-Tonney offered no evidence to establish that Mr. Knight's removal from his home delivered him from death. Howard, Matter of., 315 S.C. 356, 434 S.E.2d 254 (1993). Further, the de novo review would show that after her husband's removal, Mrs. Knight was left with no substantial income, because she was completely dependent on her husband and she had to contest the contempt of Respondent Knight-Tonney in order to maintain basic necessities (R.p. 195) ( R.p. 81, L. 19-22) (Trp. 103, L. 4-6). Mr. and Mrs. Norman R. Knight, Jr. had been married for nearly sixty (60) years and Mr. Knight always was the breadwinner ( R.p. 178). This relationship was no secret to the Respondent Knight-Tonney, but she totally disregarded her parents' relationship.

## VIII. LOWER COURTS ERRED IN HOLDING THAT RESPONDENT KNIGHT-TONNEY'S CLAIM FOR REPAYMENT WAS FILED TIMELY

Ms. Knight-Tonney filed in the wrong county according to the order that moved the case to Dorchester County, ( R.p. iii - 8.36). Ms. Knight-Tonney filed her claim in Charleston County on January 20, 2009, and then the claim was not filed or received in Dorchester County until January 22, 2009, at the earliest. (R. p. 251). See, S.C. Code Sec. Ann. 62-3-801(a), - 803(a)(2). As a creditor, January 20, 2009 was the final day for filing claims against the estate. Knight-Tonney's claim is untimely. Phillips v. Quick. 399 S.C. 226,731 S.E.2d 327 (Ct. App. 2012).

## IX. LOWER COURTS ERRED IN HOLDING THAT RESPONDENT KNIGHT- TONNEY HAD SATISFIED THE LEGAL REQUIREMENTS FOR CASE - IN- CHIEF

Respondent failed to establish the required foundation for properly presenting her Case-in-chief, i.e. eligibility for the relief she sought. The "case-in-chief' is the evidence presented at Trial by the party with the burden of proof. See Beck v. Clarkson, 300 S.C. 293, 387 S.E.2d 681 (1989). The "burden of proof' is a party's duty to prove a disputed assertion, allegation or claim. See, Bryan A. Gamer, Black's Law

Dictionary at 190 (10th ed. 2014). To fulfill this duty at trial all elements of the claim must be established at trial. Howard, Matter of, 315 S.C. 356,434 S.E.2d 254 (1993) note 7 citing In re Estate of Kruger, 235 Neb. 518 455 N.W.2d 809 (1990) (in probate court, burden of proof is upon claimant against decedent's estate.) The validity of a claim upon an estate begins with the statutory requirement that the claim is (a) filed within a certain period of time, (b) delivered to specified entities and individuals, (c) presented in a particular format, (d) occurred at a point in time, (e) identified as necessary, reasonable, and beneficial, (1) and contained a particular value. These factors must be presented at trial. Defendant Tonney only presented evidence on items (d) through (f). S.C. Code Sec. 62-3-801,et seq. (1988). The Petitioners' intent when citing S.C. Code Ann. 62-3-801. et. seq. (1980) was to refer only to Part 8, Creditors' Claims. The citation meets the standard recited in In Re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001). When including the other authority cited in the argument, Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993) note 7 citing In re Estate of Kruger, 235 Neb. 518 455 N.W. 2d 809 (1990) and Stump v. Stump, 91 Md. 699,47 A. 1034 (

1900). Stump v. Stump, id., mentioned here because it is contained in the note. We do not believe Respondent Tonney was persuasive on any element mentioned and our reference to any item identified is to recognize the mere attempt.

## X. LOWER COURTS ERRED BY REIMBURSING RESPONDENT KNIGHT- TONNEY FOR ATTORNEY FEES IN PARENTS' FAMILY COURT MATTER AND ALLOWING FULL INTEREST ON JUDGMENT

If Respondent Knight-Tonney was a party in a family court proceeding and died at the stage of litigation as Mr. Knight died, Knight-Tonney would be the deceased spouse in a family court matter that was dismissed with nothing owed to her. Louthian & Merritt, P.A. v, Davis. 272 S.C. 330, 251 S.E.2d 757 (1979). Respondent Knight-Tonney does not qualify to receive repayment of Attorney's fees involving Family Court litigation. The Family Court did not order attorney's fees to Respondent Knight -Tonney. Family Court attorney's fees in this situation are provided according to S.C. Code Ann. 20-3-145 (1979). Matter of Jennings 321.S.C.440, 468 S.E.2d 869, rehearing

denied (1996) and Huffy. Jennings ,319 S.C. 142, 459 S.E.2d 886, rehearing denied, appeal dismissed (S.C. App. 1995) demonstrate the requirements for recovery of attorney's fees, i.e. Respondent Knight- Tonney is not an attorney. Attorney's fees are a peculiar item according to law. Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 ( Ct. App. 1990). It is well established that attorney's fees are not recoverable unless authorized by contract or statute. Jackson v. Speed, 326 S.E. 289, 307,486 S.C.2d 750. 759 (1997). Knight-Tonney cannot meet these tests for receiving attorney's fees. There is no contract or statute that provides her eligibility for attorney's fees. Finally, judgment interest must be adjusted according to period when the judgment becomes final. Howard, Matter of, 315 S.C. 356, 434 S.E.2d 254 (1993).

## XI. BEATRICE WHITTEN SHOULD BE REMOVED AS SPECIAL ADMINISTRATOR

The Record on Appeal contains the cross-examination of Beatrice Whitten (R.p 234-236). During the testimony she testifies that the Annuity documents raised no concern for Mr. Knight's only heir. (R.p. 234). She testified to e-mailing opposing counsel and not

including all counsel. (R.p 234, 236). The record shows that she disregarded a direct order of the Probate Judge ( R.p 293). In Petitioners' Motion for New Trial and to Alter or Amend the Judgement filed on July 28, 2014, Petitioners expanded on the concern with how Respondent Whitten transferred ownership of a vehicle left to Mrs. Knight but somehow was delivered to his estranged grandson (R.p. 97-99). Respondent Whitten did not have an explanation for this deviation from Mr. Knight's WILL. The Record substantiates that Whitten should not be the administrator for the Knight Estate S.C. Code Ann. 62-3-703(a) (2005).

## CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

September 22, 2019

North Charleston, S.C.

s// Jackson Seth Whipper, Esquire
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Attorney for the Petitioners

# APPENDIX

Page

SC S.Ct ORDER WRIT (denied) from ..... App 1

SC COURT of APPEAL: (rehearing) ..... App 2

SC COURT of APPEAL AFFIRMED.. App 3 (pg 1 – 14)

H.3803. SUMMONS IN PROBATE COURT
Summons Subcommittee Report..... App 4 (pg 1 – 18)

DISENFRANCHISEMENT . . . . . App 5 (pg 1 – 5)

The Constitution of the United States;
The Fourteenth Amendment ..... App 6

S.C. CODE SEC 14-23-1040
*See* S.C. CODE SEC 14-23-1080
*See* S.C. CODE SEC 14-23-1150
..... App 7

END

THE SUPREME COURT SOUTH CAROLINA

In Re: Estate of Norman Robert Knight, Jr.,(deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert "Bobby" Knight, III, Petitioners,

v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents.

Appellate Case No. 2019-000054
Lower Court Case No. 2014-CP-10-05355

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT
BY : S// D. Shearhouse
CLERK

Columbia, South Carolina

June 28, 2019

cc:
Jackson Seth Whipper, Esquire
Charles Mac Gibson, Jr., Esquire
Beatrice E. Whitten, Esquire
The Honorable Julie J. Armstrong
The Honorable Jenny Abbott Kitchings

THE SOUTH CAROLINA COURT OF APPEALS

In Re: Estate of Norman Robert Knight, Jr.,(deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert "Bobby" Knight, III, Appellants,

v.

Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents.

Appellate Case No. 2016-000748

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Columbia, South Carolina

S// Paul E Short, J.
Paula H Thomas, J.
D. Galin(illegible?), J.

FILED
December 18, 2018

Cc: Jackson Seth Whipper, Esquire
Beatrice E. Whitten, Esquire
Charles Mac Gibson, Jr., Esquire
Julie J. Armstrong

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In Re: Estate of Norman Robert Knight, Jr., (deceased), Estate of Mildred C. Knight, (deceased), and Norman Robert "Bobby" Knight, III, Appellants,
v.
Beatrice E. Whitten, as a special administrator, and Chloe Knight-Tonney, Claimant, Respondents.

Appellate Case No. 2016-000748

Unpublished Opinion No. 2018-UP-365 Submitted June 1, 2018 - Filed September 12, 2018

AFFIRMED

Jackson Seth Whipper, of Whipper Law Firm, of North Charleston, for Appellants.
Charles Mac Gibson, Jr., of Mount Pleasant, for Respondent Chloe Knight-Tonney.
Beatrice E. Whitten, of Mount Pleasant, pro se.

PER CURIAM: In this appeal of an order granting Chloe Knight-Tonney's (Chloe's) claim against Norman Robert Knight, Jr.'s (Father's) Estate, Norman Robert Knight III (Bobby), Mildred C. Knight's (Mother's) Estate, and Father's Estate

(collectively, Appellants) raise numerous issues, including whether the special administrator should have been removed for cause, whether Chloe was entitled to reimbursement for expenses paid for Father's care, and whether the probate court had proper jurisdiction over the matter. We affirm.

1. We find the lower courts erred by finding Chloe did not have to file a summons. Chloe filed her claim and petition for allowance of a claim in 2009, prior to the amendment of section 62-3-806(b) requiring the filing of a summons with a petition. However, at the time Chloe filed her petition, section 14-23-280 of the South Carolina Code and the South Carolina Rules of Civil Procedure (SCRCP) required her to file and serve a summons. See S.C. Code Ann. § 14-23-280 (2016) ("Proceedings in the court of probate may be commenced by petition or complaint to the judge of probate for the county to which the jurisdiction of the subject matter belongs, briefly setting forth the facts or grounds of the application. A summons shall be issued to the defendants in such proceedings." (emphasis added)); Rule 81, SCRCP (providing the South Carolina Rules of Civil Procedure apply in probate court "to the extent they are not inconsistent with the statutes and rules governing [the probate court]"); Rule 3(a), SCRCP ("A civil action is commenced when the summons and complaint are filed with the clerk of court. . . .").

Appellants assert the lower courts lacked jurisdiction over them because Chloe failed to file or serve a summons. See BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) ("A court generally obtains personal jurisdiction by the service of a summons."); Roche v. Young Bros, of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995) ("Rule 4, SCRCPf, the rule governing service of process,] serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action."). However, we find Appellants waived any objection to the failure to file or serve a summons and to the lack of personal jurisdiction by (1) failing to raise the failure to file or serve the summons in their first motion to dismiss, (2) failing to raise the lack of personal jurisdiction in a motion to dismiss or in a responsive pleading, and (3) appearing and arguing the merits of the action multiple times before the probate court and the circuit court. See Rule 12(h)(1), SCRCP ("A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion [made pursuant to Rule 12] or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule

15(a) to be made as a matter of course."); Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007) ("Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance."); see also Cheraw Motor Sales Co. v. Rainwater, 125 S.C. 509, 513, 119 S.E. 237, 239 (1923) ("The next assignment of error is the refusal to dismiss the proceedings because there was no summons and complaint served. The defendant filed his answer and tried his case on the affidavit in attachment, and thereby waived his right to his motion."). Accordingly, we affirm as to this issue.

2. We find the Office of Court Administration (the Court Administration), on behalf of the Chief Justice, appropriately assigned Judge Mary Blunt and then Judge Kenneth E. Fulp to preside over this probate case because the other judges presiding over the case were recused or disqualified. See S.C. Const, art. V, § 4 ("The Chief Justice . . . shall have the power to assign any judge to sit in any court within the unified judicial system."); S.C. Code Ann. § 14-23-1010 (2016) ("The probate court of each county is part of the unified judicial system of this State."); S.C. Code Ann. § 14-23-1080 (2016) (providing where a probate judge must be recused from a case, "the Chief Justice of the supreme

court shall appoint a special judge to sit in the matter"). We also find venue was proper because (1) based on a 2012 memorandum from the Court Administration, Judge Fulp, as a special probate judge, could properly hold hearings in either Beaufort, his own county, or Charleston, the county where the case originated; (2) Appellants withdrew their objection to venue during a December 17, 2013 hearing; and (3) Appellants' alleged objections to venue while Judge Blunt presided over the case are not included in the record. See Harkins v. Greenville County, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (stating the appellants have the burden of providing this court with an adequate record); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (providing an issue conceded in the trial court cannot be argued on appeal). Accordingly, we affirm as to this issue.

3. We find the probate court did not abuse its discretion by quashing Appellants' subpoena for the deposit and withdrawal records from 2004 to 2009 of the "Queenie" account because Chloe withdrew her claim for the $1,622.22 paid to the Bishop Gadsden nursing facility for Father's care that came from the account, rendering discovery of who deposited and withdrew money from the account irrelevant. See Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d

495, 498 (2009) ("A trial [court's] rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion."); id. ("Rule 26(b)(1), SCRCP, provides, unless otherwise limited by order of the court, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .'" (alteration in original) (emphasis added) (quoting Rule 26(b)(1), SCRCP)). Additionally, we find the issue of whether Chloe should have moved for a protective order of the information from the "Queenie" account is unpreserved for appellate review because Appellants did not raise this issue until on appeal to this court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

We find the probate court erred by finding the redaction in the letter from Thad Vincent, Father's attorney in the family court case and Chloe's attorney in the probate case, to Chloe and Walter Kaufmann, Father's guardian, was protected by attorney-client privilege because (1) the letter pertained to Father's attorney's fees in the family court case, not to any confidential information given to Vincent by Chloe; (2) Vincent provided no legal advice to Chloe in the letter; and (3) Vincent did not represent

Chloe in the family court case. See Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App. 1984) ("When the attorney communicates to the client, the privilege applies only if communication is based on confidential information provided by the client."); id. ("The attorney-client privilege, though, does not protect communications with non-clients.");. ("A person attains the status of a 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice."). Nonetheless, the redacted material in the letter regarding who Vincent believed to be at fault for the "craziness involved" in the family court matter was not relevant to Chloe's claim for Father's attorney's fees; thus, we find Chloe did not have to provide the unaltered letter in discovery. See Hollman, 384 S.C. at 577, 683 S.E.2d at 498 ("Rule 26(b)(1), SCRCP, provides, unless otherwise limited by order of the court, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action .... (alteration in original) (emphasis added) (quoting Rule 26(b)(1), SCRCP)). Accordingly, we affirm as to this issue.

4. Because Chloe's claim sounds in law, as the relief requested is for money due and the nature of her claim is akin to repayment of a personal loan to Father during his lifetime, we find the doctrine of unclean

hands cannot apply to bar Chloe's claim. Aaron v. Mahl, 381 S.C. 585, 594, 674 S.E.2d 482, 487 (2009) ("The doctrine of unclean hands 'precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'" (quoting Ingram v. Kasey's Assocs., 340 S.C. 98, 111 n.2, 531 S.E.2d 287, 294 n.2, (2000))); id. ("The equitable doctrine of unclean hands, however, has no application to an action at law."); see also Matter of Howard, 315 S.C. 356, 359, 362, 434 S.E.2d 254, 256, 258 (1993) (finding petition for allowance of claims for deceased's unpaid balance on loans from several family members was an action at law).

5. We find the probate court did not err by failing to recognize the automatic stay for appeals found in section 62-1-308(c) of the South Carolina Code (Supp. 2005)1 because (1) Chloe did not file her creditor's claim until almost three years after the circuit court affirmed the probate court order appointing Kaufmann, and (2) the probate court orders appealed by Appellants did not address the administration of Father's estate because Father was still alive at the time of the orders and the appeal. See § 62-1-308(c) ("When an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court,

court of appeals, or supreme court is had."); Ulmer v. Ulmer, 369 S.C. 486, 492, 632 S.E.2d 858, 861 (2006) ("Section 62-1-308(c) does not apply to all orders of the probate court concerning the parties. The only proceedings required to cease are those proceedings addressed in the orders from which an appeal was taken."). Accordingly, we affirm as to this issue.

6. We find the lower court did not err by failing to apply the doctrine of fraud in the inducement to enter a contract as a bar to Chloe's claim because Mother did not prove Kaufmann's and Family Services Inc.'s, Father's conservator's, failure to inform Mother that Chloe would be covering the costs of some of Father's expenditures was a false representation intended to be acted upon by Mother. See M. B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980) ("In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury."); id. ("Failure to prove any one of the foregoing elements is fatal to recovery."). Accordingly, we affirm as to this issue.

FN1 Although not relevant in this appeal, we note section 62-1-308(c) has been amended since the time relevant to this case. See § 62-1-308(c) (Supp. 2017).

7. We find the lower courts did not err by allowing Chloe's claim against the greater weight of the evidence because (1) the proper standard of review of a probate court proceeding pertaining to an action at law is any evidence, and (2) evidence in the record supported the probate court's findings that Chloe's claims against Father's estate fell within the definition of claim found in section 62-1-201(4) of the South Carolina Code (Supp. 2017). See § 62-1-201(4) ("'Claims,' in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator . . . ."); Matter of Howard, 315 S.C. at 361, 434 S.E.2d at 257 ("If the proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them."). Therefore, they were allowable in the amount of $23,914.73 plus 8.75% annual interest.

Here, the record shows Chloe provided evidence in the form of her testimony, receipts, bills, and letters from Father's attorneys, as well as the testimony of

Kaufmann and Family Services, Inc. that the expenditures she made were for Father's benefit, were not intended to be a gift, and were made with Kaufmann and Family Services, Inc.'s approval. Further, the record reveals the order removing Mother as Father's guardian and conservator was appealed and affirmed, and Father—an incapacitated elderly man suffering from Alzheimer's disease—was removed from his home in compliance with an emergency order issued by the probate court after his independent, court-appointed guardian was denied visitation. The record further reveals at the time of his removal and after, Father did not have access to his possessions or funds because they were in Mother's control or were "tied-up" in litigation commenced by Mother against Father. Accordingly, evidence in the record supports the $23,914.73 plus 8.75% annual interest awarded to Chloe from Father's estate as reimbursement for her claim, and we affirm as to this issue.

8. We find Chloe timely filed her claim because she filed within eight months of the first published notice for creditors to present their claims and within a year of Father's death. See S.C. Code Ann. § 62-3-803(a) (2009) ("All claims against a decedent's estate which arose before the death of the decedent . . . are barred . . . unless presented within the earlier of the following dates: (1) one year after the decedent's death; or (2)

within the time frame provided by . . . Section 62-3-801(a) [of the South Carolina Code (2009)] for all creditors barred by publication."); § 62-3-801(a) (providing a creditor must file a claim within eight months of the date the estate's personal representative first published notice in the newspaper for creditors to present their claims). Accordingly, we affirm as to this issue.

9. We find Appellants abandoned their argument that the lower courts erred by holding Chloe satisfied the legal requirements for a case-in-chief because in making this argument, Appellants presented no facts or specific law, citing only "S.C. Code Ann. § 62-3-801, et seq. (1980)," which arguably could be construed as a citation to the entire probate code. See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory), modified on other grounds by Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017).

10. We find the lower courts did not err by reimbursing Chloe for attorney's fees resulting from the family court matter and granting her full interest on the judgment. We note Appellants' argument that the holdings in Matter of Jennings and Huff v. Jennings FN2 FN3 show Chloe's claim for attorney's fees is not valid because there was no order by the family court awarding fees. However, Chloe is not a

lawyer attempting to collect unpaid fees, nor is she attempting to place a lien on property under section 20-3-145; accordingly, the holdings in Huff and Matter of Jennings are inapposite to whether Chloe is entitled to repayment for the money she expended on Father's representation in family court. Further, we find the probate court did not err in awarding Chloe repayment for the money she expended on Father's legal services in the family court because there was evidence in the record supporting its conclusion that the attorney's fees were allowable claims against Father's estate. See Matter of Howard, 315 S.C. at 361, 434 S.E.2d at 257 (proscribing any evidence standard of review for a probate court action at law). Accordingly, we affirm as to this issue.

> FN2 321 S.C. 440, 449 n.5, 468 S.E.2d 869, 875 n.5 (1996) (finding an attorney improperly filed a lien on property belonging to her client pursuant to section 20-3-145 of the South Carolina Code (2014), which allows an award of attorney's fees to "constitute a lien on any property owned by the person ordered to pay the attorney fee" because section 20-3-145 is not applicable where the court did not award attorney's fees (quoting § 20-3-145)).
>
> FN3 3 19 S.C. 142, 145-47, 459 S.E.2d 886, 889-90 (Ct. App. 1995) (finding an attorney's practice of filing liens on property belonging to her clients when they failed to pay their bills was not statutorily authorized because section 20-3-145 allowed a lien for attorneys' fees only when an order by the family court awarded the fees).

11. We affirm the denial of Bobby's petition to remove Beatrice Whitten as special administrator because he

did not provide an adequate record to complete appropriate judicial review of this issue. See Harkins, 340 S.C. at 616, 533 S.E.2d at 891 (providing the appellants have the burden of providing an adequate record on appeal).

AFFIRMED. FN4

SHORT, THOMAS, and HILL, JJ., concur.

FN4 We decide this case without oral argument pursuant to Rule 215, SCACR.

SOUTH CAROLINA BAR

JANUARY 21, 2010 ♦ Myrtle Beach, South Carolina

# H.3803 - SUMMONS IN PROBATE COURT

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In the fall of 2006 the Probate, Estate Planning and Trust Section Council [PET Council] approved and established a subcommittee, known as the Summons/SCRCP Subcommittee [Summons Subcommittee], which met and held regular meetings beginning in November 2006. Kathryn Cook DeAngelo served as Chairperson of the Summons Subcommittee and the members since November 2006 were: Judge Waldo Maring (Georgetown), Judge Joshua Queen (Cherokee), Carolyn Rogers, Andrew Chandler, Lester Schwartz, and Kathryn DeAngelo. Catherine Kennedy joined the Summons Subcommittee in December 2007 as an active participant. In the spring of 2008, a Summons Subcommittee Report, which included recommendations and proposed legislative amendments to the Probate Code, was reviewed and

approved by the PET Council. In January2010, the PET Council presented a Summons Subcommittee Report to the S.C. Bar House of Delegates, which was approved. Thereafter, the S.C. Bar approved the proposed legislation, and Rep. Bannister sponsored the bill as H.3803, a copy attached hereto. On April 30, 2009, H.3803 received a favorable report from the House Judiciary General Laws Committee. By way of a more detailed history and explanation about the creation and development of H.3803, the following is the Report from the PET Council that was submitted to the S.C. Bar House of Delegates in January 2009:

## SUMMONS SUBCOMMITTEE REPORT

The South Carolina Probate Code became effective in 1987. The South Carolina Rules of Civil Procedure [SCRCP] became effective in 1990. Some may ask, "What do the rules of civil procedure have to do with the probate code?" Well, the answer is, "Quite a bit." However, to many lawyers, as well as probate judges, it's not crystal clear or certain whether or how our separate rules of civil procedure apply in or to probate court proceedings. As a result, a great deal of confusion and conflict have been created for our bench and bar due to the lack of a uniform, consistent set of procedural rules for legal proceedings in our probate courts. One can survey probate courts county by county and find a patchwork of many procedural differences among the different probate courts, which causes upset and stress for the probate bench and bar, as well as

for the clients that the lawyer may represent in probate court proceedings. The PET Council acknowledged this confusion and decided that it needed to be addressed and thus established the Summons Subcommittee to review, study and evaluate the rules of procedure in our probate courts and also study the application and interplay of the summons and the SCRCP in our probate courts. The Summons Subcommittee met and held regular meetings from November 2006 until the early part of 2008. From the outset, all members of the Summons Subcommittee recognized the problem, i.e., confusion, inconsistency, and conflicts created for our bench and bar due to the lack of a uniform, consistent set of procedural rules for proceedings and actions in our probate courts. The focus of our study efforts has been to research this issue, determine how we believe it may best be addressed and resolved legislatively, and report our findings and conclusions to the PET Council for its further consideration. Our Summons Subcommittee was fortunate to have Judge Maring and Judge Queen among its active members because these probate judges candidly shared with us the history and evolution of their, as well as many probate judges', thinking on this issue. Judge Queen and Judge Maring informed us that without summons and proper service, they experience many problems at hearings, such as parties appearing unprepared or illeprepared, surprised, confused, unclear about the issues, uncertain about what is going on at the hearings, and potentially subject to "trial by ambush." These serious flaws and

problems are what the SCRCP were intended to address, so that parties are afforded procedural due process safeguards, "trial by ambush" is avoided, and a coherent set of rules govern legal proceedings, including discovery. The judges also candidly informed us to expect resistance from many probate judges. The beginning point of our study focused on a single issue, which consumed a great deal of time, discussion, and evaluation, namely, the substantive distinction and difference between the notice requirements of S.C. Code §62e1e401 and the summons/petition requirements, which will be the primary focus of this presentation.

## NOTICE

When the Probate Code was initially enacted more than twenty (20) years ago, S.C. Code §62-1e401 contained certain notice requirements, which provided as follows:

> SECTION 62-1-401. Notice; method and time of giving.
>
> (a) If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:
>
> (1) by mailing a copy thereof at least twenty days before the time set for the hearing by certified, registered, or ordinary first class

> mail addressed to the person Being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;
>
> (2) by delivering a copy thereof to the person being notified personally at least twenty days before the time set for the hearing; or
>
> (3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence by publishing a copy thereof in the same manner as required by law in the case of the publication of a summons for an absent defendant in the court of common pleas.
>
> (b) The court for good cause shown may provide for a different method or time of giving notice for any hearing.
>
> (c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding. [emphasis(added]

After reviewing the language of S.C. Code §62-1-401, it is clear that the plain language of that statute address the notice requirements for a hearing on a petition and does not address proper commencement of an action or proceeding by summons. If a statute's terms are clear, the court must apply the terms according to their literal meaning. Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an

attempt to expand or limit the scope of a statute. Id. On the other hand, other statutes and rules govern the proper commencement of a proceeding and, most importantly, afford due process by vesting subject matter and personal jurisdiction on the court.

The purpose of this notice requirement should be obvious. It is to prevent a party from being prejudicially surprised by a hearing. See State ex rel Ward v. Hill, 489 S.E.2d 24 (1997). But the foregoing code section and notice requirements therein were viewed by most judges and lawyers as a substitute or replacement for a summons. This meant that when a formal proceeding, such as a will contest, was commenced, the court required a notice of hearing but did not require a summons for the petition to contest the will. Judge Maring acknowledged that he, as well as many other probate judges, came to realize that notice of hearing is just that, giving notice of a hearing on a petition, and that it does(not( take the place of or substitute for summons and service of process in order to properly commence a civil action or proceeding. Since the notice requirements of S.C. Code §62-1-401 are for the purpose of notifying interested persons of a hearing, such notice is not a substitute for a summons. So then we studied and reviewed other statutes, case law, and the SCRCP to determine whether and how a summons and rules of procedure govern proceedings in the probate court.

## SUMMONS

The next question is, what rules apply or govern the commencement of a legal action or proceeding? Under Rule 3(a), SCRCP, a civil action is commenced

by the filing and service of a summons and complaint. Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct.App.1997). And why is it so important to file and serve a summons upon defendants? Although quite elementary to an audience of lawyers, the Constitution of this State, and the United States, requires due process of law. Article I, §3 of our State constitution provides as follows:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

The sanctity and importance of a cohesive, uniform set of procedural court rules, which begins with process, is to ensure that all parties who come before the court enjoy their constitutional right to due process, beginning with proper notice of a proceeding and a meaningful opportunity to be heard. Any lawyer or judge who considers the seriousness and gravity of a guardianship and conservatorship proceeding in probate court easily appreciates that the respondent or defendant in such a proceeding faces potential loss of his or her life, liberty, and/or property, thus requiring due process of law. Generally, where a statute specifically prescribes the method by which to notify a party against whom a proceeding is commenced, service of the summons and complaint must be accomplished in that manner. Fulton v.

Mickle, 518 S.E. 2d 518 (N.C. App. 1999) (emphasis added). "Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served." Id. The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him. Farr v. City of Rocky Mount, 10 N.C.App. 128, 177 S.E.2d 763 (1970), cert. denied, 277 N.C. 725, 178 S.E.2d 831 (1971). Rule 4 of the South Carolina Rules of Civil Procedure, which governs process (summons) and service of process, is similar to Rule 4 of the Federal Rules of Civil Procedure.

The purpose of the rule is to provide notice of the commencement of an action and "to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." Wiles v. Welparnel Construction Co., 295 N.C. 81, 84, 243 S.E.2d 756, 758 [311 N.C. 542] (1978) (quoting Wright & Miller, Federal Practice and Procedure: Civil § 1063 p. 204 (1969)). Unless notice is given to the defendant of proceedings against him and he is thereby given the opportunity to appear and be heard or he appears voluntarily, the court has no jurisdiction to proceed to judgment even though it may have subject matter jurisdiction.[1]

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[1] Beaufort County v. Mayo, 207 N.C. 211, 176 S.E. 753 (1934); also (see, Mabee v. Onslow County Sheriff's Department, 174 N.C. App. 2210, 620 S.E.2d 307 (N.C.App.)

And it has also been recognized that although defective service of process may sufficiently give the defending party actual notice of the proceedings, 'such actual notice does not give the court jurisdiction over the party.' [citation omitted] Fulton v. Mickle, 518 S.E. 2d 518 (N.C. App. 1999).

The importance of the constitutional notice requirement afforded by summons and due process is illustrated by the case of McLain v. Ingram, 314 SC 359, 444 S.E.2d 512 (1994) (per( curiam). In McLain, the plaintiff served the summons and complaint a day before such documents were filed with the court. The lower court dismissed the action finding that it was not properly commenced. The Supreme Court noted that prior to adoption of the South Carolina Rules of Civil Procedure, a civil action was commenced by service of the summons, which was changed by Rule 5(d), SCRCP, which now provides:

> **Rule 5. Service and Filing of Pleadings and Other Papers**
>
> (d) Filing. . . .The summons and complaint shall be filed before service. . . .

In McClain the Supreme Court recognized that the adoption of the South Carolina Rules of Civil Procedure in 1985 heralded in a new era in South Carolina's civil practice, modernizing and streamlining our system, including the procedure for commencing a civil action. The Court held: "The

language of Rule 5(d) is clear: The summons and complaint must be filed prior to their service. Here, service preceded filing and thus this action was not properly commenced before expiration of the statute of limitations. We recognize the harsh result reached in this case, and take this opportunity to remind practitioners that the interrelationships between various court rules are not always readily apparent." McLain, at 360 [emphasis.added].

After understanding the legal importance of the summons and the civil procedure rules to properly commence a legal proceeding, one may then ask, how do the SCRCP apply to or govern proceedings in the probate court? First, we begin with a somewhat obscure code section -- S.C. Code §14-23-280 -- that contains a procedural rule applicable to the probate courts. This foregoing code section requires a summons for proper commencement of a probate proceeding and provides as follows:

> **SECTION14-23-280.** Commencement of proceedings; procedure.

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(2005) (The Court has unequivocally stated that when a statute prescribes the manner for proper notification, the summons must be issued and served in that manner.); Thomas and Howard Co., Inc. v. Trimark Catastrophe Services, Inc., 151 N.C. App. 88, 564 S.E.2d 569 (N.C.App. 2002)("Generally, where a statute specifically prescribes the method by which to notify a party against whom a proceeding is commenced, service of the summons and complaint

must be accomplished in that manner." [citation omitted]); Long v. Cabarrus County Board of Education, 52 N.C. App. 625, 279 S.E.2d 95 (N.C.App. 1981) ( "Where a statute provides for service of summons by designated methods, the specified requirements must be complied with or there is no valid service. [citation omitted].

Proceedings in the court of probate may be commenced by petition or complaint to the judge of probate for the county to which the jurisdiction of the subject matter belongs, briefly setting forth the facts or grounds of the application. A summons shall be issued to the defendants in such( proceedings. The manner of service, time for answering and other proceedings relating to the trial, except trial by jury, shall conform as nearly as may be to the practice in the courts of common pleas as provided in this Code. [emphasis added]

Also S.C. Code §62-1-304, which is a bit convoluted, also governs procedure and practice in the probate court and provides as follows:

> SECTION 62-1-304. Practice in court. Unless specifically provided to the contrary in this Code or unless inconsistent with its provisions, *the rules of civil procedure adopted for the probate court, and, in their absence, those adopted for the circuit court, govern formal proceedings under this Code.* [emphasis added]

This code section says if there are rules of civil procedure for the probate court, then those rules

govern "formal proceedings." And how are formal proceedings defined:

> **SECTION 62-1-201.General definitions. . . .**
>
> (15) "Formal proceedings" means those conducted before a judge with notice to interested persons.

S.C. Code §62-1-304 further provides that in the absence of such rules, then the circuit court rules SCRCP apply to formal proceedings in the probate court. So is there a separate comprehensive, cohesive set of "rules of civil procedure adopted for the probate court"? This was essentially answered in the case of Weeks v. Drawdy, 495 S.E. 2d 454 (Ct. App. 1997). In Weeks our appellate court recognized that the rules of probate court governing procedure address only a limited number of issues and that in the absence of a specific probate court rule, the rules of civil procedure applicable in the court of common pleas shall be applied in the probate court unless to do so would be inconsistent with the provisions of the Code. Weeks v. Drawdy, 495 S.E. 2d 454 (Ct. App. 1997). An exhaustive review of the probate code reveals that there are only a few procedural rules in the Probate Code (sale of lands), perhaps administrative in nature and somewhat limited in scope. However, our Probate Code does not contain a comprehensive set of civil procedure rules such as those contained in the SCRCP. Therefore, the abyss created by the absence of rules of civil procedure in the probate code must be filled by the rules of civil procedure adopted

for the circuit court (SCRCP) to govern formal proceedings in the probate court.

This latter conclusion is further reinforced by Rules 1 and 81, SCRCP, which provide as follows:

RULE 1

SCOPE OF RULES

These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

RULE 81

APPLICABILITY

These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable. They shall apply insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts. In any case where no provision is made by statute or these Rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State. [emphasis(added]

Note:

This Rule 81 covers the same subject as the Federal Rule but is drafted to conform to the State court system, and to,make the procedure in all civil courts as uniform as possible. [emphasis added]

The case of In Re: Estate of Timmerman, 331, S.C. 455, 502 S.E. 2d 920, 922 (Ct. App. 1998) is instructive in the application of Rule 81, SCRCP, in the probate court. In In Re: Estate of Timmerman, appellant surviving spouse/wife noticed appeal from an adverse order of the circuit court reversing the probate court's determination that appellant surviving spouse/wife was entitled to elective share. The Court of Appeals reversed this ruling of the circuit court premised on respondent beneficiary's failure to file in the probate court a timely motion to alter or amend the probate court's order pursuant to Rule 59(e), SCRCP. The Court of Appeals, relying on Rule 81, SCRCP, held that since a Rule 59(e) motion is not inconsistent with the Probate Code, it is therefore applicable in probate court proceedings. Numerous other appellate cases have recognized that the SCRCP apply to actions and proceedings in the probate court. See generally, (Weeks v. Drawdy, 495 S.E.2d 454 (Ct. App. 1997); Truluck v. Snyder, 606 S.E.2d 792 (Ct. App. 2004); LaFaye v. Timmerman, 502 S.E.2d 920 (Ct. App. 1998).

Applying rules of statutory construction and reading the foregoing rules and statutes together, it becomes apparent that S.C. Code §14e23e280, as well as §62-1-304 and **Rules 1 and 81, require that a summons shall be issued and that the SCRCP shall govern**

**formal proceedings in probate court,** including the "manner of service, time for answering and other proceedings relating to the trial," which is especially critical since the probate code does not contain a cohesive, uniform set of procedural rules to govern proceedings in the probate court.

## CONCLUSION

After a careful review, discussion and analysis of the foregoing code sections, rules, and case law, our Summons Subcommittee concluded:

- That the SCRCP govern the procedure in "formal proceedings" initiated by petition in probate court
- That although there are a few limited procedural rules in the Probate Code, our Probate Code does not contain a comprehensive set of civil procedure rules such as those contained in the SCRCP
- That our Probate Code needs to make clear that the SCRCP apply to formal proceedings in probate court in order to help avoid the many problems the Courts and lawyers encounter, to promote consistency for our probate bench and bar, and to streamline our probate court system

We also recognized the burden that the application of the SCRCP could place on pro( se( litigants but did

not believe there should be a different set of rules applied pro( se, keeping in mind the importance of the rules affording due process.

After coming to the foregoing conclusions, the question then became how we should proceed in our work to revise and amend the Probate Code in order to clarify that the SCRCP govern procedure in "formal proceedings" without embarking on a fullescale overhaul of the Probate Code. We thought that this could perhaps best, and most easily, be accomplished by amending S.C. Code §62-1-304, especially since Judge Maring aptly observed that §§14-23-280, 62-1-304 and Rules 1 and 81, SCRCP, already speak to the application of the SCRCP to "formal proceedings." Then we decided it would be best to incorporate procedural requirements throughout relevant portions of the Probate Code (Articles 1, 2, 3, and 5) to ensure that there is more uniformity and better clarify the application of the SCRCP. We also recognized that the procedure involved for certain petitions, such as the Petition for Settlement, should not be governed by the SCRCP and should be excluded from such rules. As to these latter petitions, we decided they should be denominated as an "application" and thus be considered informal and not governed by the SCRCP. The Summons Subcommittee has worked for more than a year on proposed legislative amendments and revisions to Articles 1, 2, 3, and 5, hoping to begin(the process of accomplishing the foregoing goals. Based upon the foregoing, we attach and submit to the House of Delegates our final drafts

of proposed legislative amendments to Articles 1, 2, 3, and 5 of the Probate Code for its review, consideration, and approval. In October 2008, the South Carolina Association of Probate Judges [SCAPJ] approved, with a few exceptions, the proposed legislative amendments to Articles 1, 2, 3, and 5. The Summons Subcommittee studied the exceptions and adopted certain of the exceptions. Also, the Summons Subcommittee submitted the foregoing Articles to the Elder Law Committee of the Bar, and such Committee approved of same.

Respectfully submitted by Summons/SCRCP Subcommittee on behalf of the PET Section Council

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Kathryn Cook DeAngelo, Esq., Chairperson and members, Judge Waldo Maring, Judge Joshua Queen, Andrew Chandler, Esq., Carolyn Rogers, Esq., Catherine Kennedy, Esq., & Lester Schwartz, Esq.

Attachments: Proposed legislative amendments to Articles 1, 2, 3, and 5, Title 62

DISENFRANCHISEMENT – (defined)

Disenfranchisement [ˌdisənˈfran(t)SHīzmənt] NOUN

. . . the state of being deprived of a right or privilege, especially the right to vote.
*{emphasis added} expanded here:*

Disenfranchisements of Petitioner's voting included the altering of the results of General Elections, which should never been altered and circumvented unjustly by a State Court's misused policy to only appoint only elected special probate judges.

The Petitioners are being deprived of the results of their County certified Vote. The results of the General Elections and expected statutory rights and privileges of the election results without them having a Qualified Elector appointed as Special Probate Judges. The Statute allows the Supreme Court Chief Justice to appoint, however the SC Court Administration appoints only Probate Judges elected in others Counties. There is nothing in the Laws allowing Probate Judges elected in other Counties to sit as a Special Probate Judge for these Petitioners. IN FACT, The General Assembly and the State gave

two (2) Laws {1040 & 1150} that prevent the appointment(s) of Judge Fulp of Beaufort County and

Judge Blunt of Dorchester County from their special probate judge appointments about the matters of these Petitioners. The State's Laws specifically limits both venue and jurisdiction of every special probate judge within the specific boundaries of each of the States 46 Counties by [i]ts enacting Title 14 Chapter 23 Probate Courts; Sections 1040; 1080 and 1150. Additionally, and alternatively, there are many many reasonably qualified professionals who have a capacity and could serve this duty being special probate judge. Many are **Qualified Electors** in each of the 46 Counties that comply with these Codes criteria. There is not even a requirement to be a lawyer to be elected and/or to serve the Office of Probate Judge. Venue and jurisdiction cannot be given where the Law prohibits and the Chief Justice by appointments has been limited by exacting language of Laws.

The Petitioner's **Substantial Rights** about results of an Election have been DEPRIVED & DENIED.

*See also,* App 3 at this APPENDIX for H.3803 report, and S.C. Attorney General Opinion Aug 30, 2010.

Ironically, H.3803 was composed by the Probate Judge Advisory Committee from County elected Probate Judges. They are serving the South Carolina Supreme Court Administration. Their report made only to clarify the requirement already in the Law of a Summons at all Probate Court formal proceedings.

S.C. Chief Justice Ness signed an Order on December 15, 1986 explaining that "*many probate judges and some associate probate judges travel to mental health or alcohol/drug treatment facilities for the purpose of holding Judicial Commitment hearings.*" He further explains the "*some probate judges are unable to travel to these facilities for such hearings and require the appointment of some other probate judge or associate judge.*" Therefore, "it is ordered that all probate judges and associate judges are hereby given jurisdiction to hold judicial commitment hearings in mental health or alcohol/drug treatment facilities. It is further ordered

that any probate judge or associate judge may be appointed special probate judge for a particular commitment hearing." Order of the Supreme Court of South Carolina on appointment of special probate judge for commitment hearing (December 15, 1986) (on file with SC Attorney General Opinions August 30, 2010)"

Furthermore, Petitioner, Norman Robert Knight, Jr (deceased) was never in Beaufort or Dorchester Counties as he had died March 11, 2008 and for any jurisdiction to be given for Counties Elected Probate Judge other than Charleston County were he lived and died, and to have made any rulings about him in death and of his Estate do not meet the scope and limits of C.J. Ness.

According to the Chief Justice Ness' ruling for incapacitated individuals housed outside their County of Residence then and only then would a special probate judge be allowed to travel into that County for that specific purpose of the constituent, or the probate judge from that County would have that.

jurisdiction by Law S.C. 14-23-1150 upon a Petition and Summons

The newest S.C. Supreme Court policy on only appointing special probate judges from a pool of other Counties' Elected Probate Judges, especially about estates inside another single County does not meet the strict language of the Laws nor the intent of Chief Justice Ness to guarantee services to a living constituent housed outside of his own jurisdiction or to get services for a constituent in need of a Judicial Commitment Hearing by his elected probate judge. The appointments policy of special probate judges from Beaufort and Dorchester Counties did not serve the Petitioner(s) at all. Clearly the Petitioners were deprived of their Substantive Rights about the services of their own S.C. Title 14. Probate Court.

The Constitution of the United States of America:

The Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Carolina Title 14

## Chapter 23 PROBATE COURTS

Sections 1040; 1080 and 1150

SECTION 14-23-1040. Only qualified county electors eligible to office of judge or associate judge. . . . No person is eligible to hold the office of judge of probate who . . . has not become a qualified elector of the county in which he is to be a judge,

SECTION 14-23-1080. Judges shall not sit in certain cases . . . In every such case the Chief Justice of the Supreme Court shall appoint a special judge to sit in the matter.

SECTION 14-23-1150. Jurisdiction of judges . . . Every judge of probate, in his county, shall have jurisdiction: