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NO. _____

FILED
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

STEWART LYLE HINES, PETITIONER,

-VS.-

GWENDOLEN CLEOPHA NELSON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the sole beneficiary and sole trustee of a trust is the real party interest and can represent that trust pro se?
2. Whether the sole beneficiary and sole trustee have a statutory right to file a motion under the Federal Rules of Civil Procedure Rule 60(b) with the Circuit Court as a non-original party and statutory right to appeal the denial thereof.

LIST OF ALL PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Gwendolen Cleopha Nelson, Individually and as a former Trust Managing Agent.
2. Stewart Lyle Hines, as Sole Beneficiary and Sole Trustee on behalf of Forbes-Robertson Group, a Pure Trust Organization. [current petitioner]

RELATED CASES

Hill v. Nelson, 13CIV18-000015, First Circuit Court of the State of South Dakota (Judgment entered December 26, 2019)

Hill v. Nelson, No. 29470, South Dakota State Supreme Court (Judgment entered June 1, 2021, rehearing denied, July 9, 2021)

Hines v. Nelson, No.21-6094, 2021 US LEXIS 6094 (rehearing denied, *Hines v. Nelson*, 2022 US LEXIS 897)

Hill v. Nelson, No. 30174, South Dakota State Supreme Court (Dismissal entered January 6, 2023, rehearing denied February 24, 2023)

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the South Dakota State Supreme Court to review the merits appears at Appendix A. to the petition and is published.

The opinion of the First Circuit Court of the State of South Dakota appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the South Dakota State Supreme Court decided my case was January 6, 2023. A copy of that decision appears at Appendix A.

A timely petition for a rehearing was thereafter denied and appears at Appendix C the jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

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STATEMENT OF THE CASE

In 1999, Stewart Hines, (herein 'Petitioner') granted his interest in real property to Forbes Robertson Trust (herein 'Forbes'). Joseph Hill (herein 'Plaintiff Hill') was appointed as Forbes Managing Fiduciary Party as Trustee. In 2003, Plaintiff Hill appointed Gwen Nelson (herein Respondent) as managing agent of Forbes. The Petitioner has always been Forbes sole beneficiary.

Respondent later independently declared herself trustee of Forbes, and as trustee, quit claimed 400,000.00 of Forbes real property over to herself, individually.

In 2018, Plaintiff Hill filed suit 13CIV18-000015 against the Respondent for her fraudulent transfers of \$400,000.00 of Forbes real property and without any notification or authorization from him. The Respondent answered and counterclaimed.

Plaintiff Hill filed a Motion for Declaratory Judgment. Respondent through her attorney, Kevin Loftus (herein Mr. Loftus), filed for default judgment. On May 7, 2018, the Circuit Court advised Plaintiff Hill, proceeding pro se, that the court would hold him to the same standard as an attorney. The circuit court denied the parties motions.

On September 25, 2019, the Petitioner filed a request with the circuit court to remove and replace Plaintiff Hill as Forbes' trustee.

On October 2, 2019, the circuit court set a date for a motions hearing. On October 8, 2019, Plaintiff Hill gave notice to Mr. Loftus that he had resigned from Forbes and appointed the Petitioner as successor trustee.

On November 12, 2019, Plaintiff Hill filed objections and for summary judgment. Plaintiff Hill's filings included his October 8, 2019 resignation and specifically requested that Petitioner be substituted in his place as 13CIV18-000015's plaintiff.

On November 13, 2019, the circuit court held a motions hearing. The Petitioner appeared as 13CIV18-000015's plaintiff and physically provided circuit court Plaintiff Hill's above stated October 8, 2019 resignation to support his standing.

At TR 7:7-12 the Petitioner stated,

"I would like to submit to the court something that just came to me, and I copied it this morning and brought it in. I didn't know if you would and it's Mr. Hill's resignation, dated the 8th of last month and again, I just received this appointing me as trustee. So, I would have standing in this situation."

At TR 7:13-24 the Circuit Court replied,

"Okay. And, you know, I would note, just based on that, the parties are the parties unless the Court changes that designation; and this would be, in the Court's opinion, of no effect in regard to this issue here. The issue I'm deciding now really isn't even a standing issue, I'm going to take that under advisement; and I'm taking your motions under advisement."

The Circuit Court decided plaintiff party's/ Petitioner's filings were moot, took the Respondent's motions under advisement and set another hearing date for January 8, 2020.

On December 19, 2019, the Petitioner, as plaintiff, filed a motion for summary judgment. The Petitioner additionally filed a motion under SDCL 15-6-25(c), and supporting affidavit for the circuit court to officially substitute him as 13CIV18-000015's plaintiff. The Circuit Court did not hear these filings.

On December 26, 2019, the Circuit Court issues it's Memorandum Decision to the parties. The Circuit Court dismissed 13CIV18-000015 on the merits under SDCL

15-6-41(6) determining that neither Plaintiff Hill or the Petitioner had standing to represent Forbes pro se and had engaged in the unauthorized practice of law.

On January 13, 2020, the Circuit Court issued its order dismissing the Plaintiff party's complaint. The merits of 13CIV18-000015 were not heard.

On July 11, 2020, Petitioner's attorney Joel Arends, made entry into the case on his behalf and filed motions for reconsideration of the Petitioner's unheard above-stated December 19, 2019 filings and for intervention under SDCL 15-6-24(a).

The Circuit Court held a hearing in 13CIV18-000015 on September 30, 2020. The Court stated at TR 3:9-11: "No persons are appearing on behalf of the plaintiff. Stewart Hines, individually, is appearing with is counsel Joel Arends."

The Circuit Court denied the Petitioner's Motion for Reconsideration and intervention as "frivolous." On October 26, 2020, the Circuit Court issued a judgment against the Petitioner for attorney's fees and costs.

On November 9, 2020, the Petitioner filed a Notice of Appeal with the South Dakota Supreme Court, Appeal No. 29470. On January 12, 2021, the Petitioner filed the Appellant's brief.

On February 19, 2021, the Respondent filed her Appellee's brief. On June 1, 2021, Justice Kern summarily affirmed Appeal No. 29470, *Hill v. Nelson*, 2021 Lexis 73 (S.D. 2021). The Petitioner filed a Motion for Reconsideration, which was denied on July 9, 2021.

The Petitioner filed a Writ of Certiorari with this Court, Case No 21-6094. The Court denied certiorari on December 6, 2021, *Hines v. Nelson, 2021 U.S. Lexis 6094* and denied rehearing on February 22, 2022, *Hines v. Nelson, 2022 U.S. Lexis 897*.

On September 15, 2022, the Petition filed a Rule 60, Motion for Fraud upon the Courts in 13CIV18-000015 alleging that the Respondent had committed a fraud upon both the Circuit Court in 13CIV18-000015 and subsequently in the South Dakota State Supreme Court in Appeal No. 29470.

In the beginning of October 2022, the Petitioner contact the Clay County Clerk of Courts to find out if the Circuit Court had set a date to consider the Petitioner's Rule 60 Motion for Fraud upon the Courts. The Clerk informed the Petitioner that the Circuit Court had orally informed her that his Motion had been denied without issuing an Order.

On October 17, 2022 the Petitioner filed a letter to the Circuit Court in 13CIV18-000015 which reiterated his standing as the actions Plaintiff, the legitimacy of his "Motion under SDCL 15-6-60(b), alleging 'Fraud upon the Court,'" and requested the Circuit Court "issue a denial order of my opinion so I may appeal." (See Appendix D)

On October 26, 2022, the Circuit Court issued its Order Denying Motions Without Hearing. The Circuit Court's Order found the Petitioner had "no authority to litigate a claim on behalf of the trust, the motions are thereby null and of no effect "and" subject to restraint for the unauthorized practice of law." (See Appendix B)

The Petitioner filed a Notice of Appeal with the South Dakota Supreme Court, Appeal No. 30174. On November 23, 2022, Justice Kern issued an Order to Show Cause stating " It appearing to the Court that the Appellant is not a participant or part in

this action, because this Court previously affirmed the denial of Appellant's Motion for Intervention and Reconsideration in this matter by Judgment of Affirmance in Appeal No. 29470 dated June 1, 2021 "that" the Appellant show that not appeal of right exists" (See Appendix E)

On February 24, 2023, the South Dakota Supreme Court issued its Order Denying the Petitioner's Motion to Reconsider in Appeal No. 30174. (See Appendix C).

REASONS FOR GRANTING THE PETITION

ISSUE 1.) WHETHER THE SOLE BENEFICIARY AND SOLE TRUSTEE OF A TRUST IS THE REAL PARTY IN INTEREST AND CAN REPRESENT THAT TRUST PRO SE.

a. Rule 10 Considerations by the Court for Discretionary Review.

Rule 10 considerations of this Court heavily apply to the elementary and basic 'original question' of procedural law.

A decision of this elementary question of procedural law involving pro se standing by this Court applies to ALL trust and estate litigation within ALL the state and federal courts of this nation.

ALL state and federal courts, and litigants of this nation, will instantly know if a party has pro se standing (or not) as a preliminary matter of procedural law.

In function, a decision of this Court will be preventative of extra costs, time and litigation of parties and prevent 'actual legal injuries' due to wrongfully issued judgments in the lower courts. And in addition, it will simultaneously increase judicial economy as the courts will immediately know the standing of the parties before it, thus saving the resources of the lower and appellate courts.

Multiple states and federal courts of appeals have ruled that sole trustee and sole beneficiary can represent that trust (or estate) pro se. In contravention of all other precedents of other state and federal courts. In this case, the South Dakota State Circuit and Supreme Court has repeatedly refused to recognize the Petitioner's pro se standing as a plaintiff or appellant.

Had precedent from this Court existed when 13CIV18-000015 was first filed in February of 2018, any / all pro se standing issues would have been curable for the parties and Circuit Court. The merits of 15CIV18-000015's \$400,000 in trust fraud would have been easily decided.

b. A Sole Beneficiary and Trustee can Represent a Trust PRO SE.

South Dakota state law does not provide, nor is there any precedent which determines whether a sole beneficiary and trustee of a trust can proceed pro se in litigation. The Circuit and Appellate Courts of the State of South Dakota have repeatedly refused to recognize the Petitioner's pro se standing in contravention of all other state and federal precedent.

In the Circuit Court's December 26, 2019 dismissal under SDCL 15-6-41 (b) in 13CIV18-000015 the Circuit Court found that under Ohio State precedent, the Petitioner did not have the authority to represent Forbes pro se. However, Ohio precedent also includes that a trustee who is the sole beneficiary of a trust has standing to proceed pro se. *See Tennpenny v United States, 490 F.Supp2d 852 (N.D. Ohio 2007)*

The Petitioner originally cited the precedent of *Tennpenny* and cases cited therein, to establish his standing in the state courts. (*cited in Rule 60(b) Motions, Appeal No. 29470, Appeal No. 30174*)

Multiple state court decisions support the Petitioner's position. *See Wilbur v. Tunnell*, 98 Mass, App. Ct. 19, 151 N.E.3d 908 (2020); *Est. of Gomez by and through Gomez v. Smith*. 243 W. Va. 491, 845 S.E.2d 266 (2020); *Tradewinds Hotel Inc. v.*

Cochran, 8 Haw. App. 256, 799 P2d 60 (1990) (cited in Rule 60 (b) Motions, Appeal No. 29470, Appeal No. 30174

The Second, Third, Fourth, Fifth, Sixth, and Seventh Federal Court of Appeals also support the Petitioner's position. See *Rodgers v. Lancaster Police & Fire Dept*, 819 F.3d 205, 211 (5th Cir. 2016) (recognizing: "Two circuits going further, affirmatively hold that an individual with capacity under state law to represent the estate may do so pro se if he estate's sole beneficiary and there are no creditors. See *Bass v. Leatherwood*, 788 F3d 228, 230-31 (6th Cir. 2015); *Guest v. Hansen*, 603 F.3d 15, 19-21 (2d Cir. 2010). Those decisions are persuasive")

In *Bourne v. Gardner*, 468 F.Supp 3d 246 (D. Mass. 2020), the court applied the Second, Fifth and Sixth Federal Court of appeals and Massachusetts State precedent and found that as the trust's sole beneficiary, the "dangers that accompany lay lawyering' in this case are outweighed by Bourne's right to self-representation, the Court will allow Bourne to represent himself PRO SE." *Id.* at 428.

Further, the Fourth Circuit Court of Appeals agreed with the Third Circuit Court of Appeals, holding in *Wojcicki v. SCANA/SCE&G*, 947 F.3d 240, 245 (4th Cir. 2020), stating: "Similarly, courts have allowed non-attorney administrators to represent an estate where the administrator is the sole beneficiary but will bar an administrator from going forward pro se if another beneficiary's interest is implicated." Lastly, the Seventh Circuit Court of Appeals has held the same: "If the administrator is not the sole beneficiary of the estate, then he or she may not represent the estate in court." *Malone v. Nielson*, 474 F.3d 934, 937 (7th Cir. 2007) (per curiam).

“It is only legal fiction that assigns the sole beneficiary’s claim to a paper entity-the estate- rather than the beneficiary himself.” *Guest v. Hansen*, 603 F.3d 15, 19-21 (2d Cir. 2010)

c. Petitioner had Standing in the Circuit and Appellate Courts of South Dakota

In 13CIV18-000015 the Petitioner’s September 15, 2022, Rule 60 Motion for Fraud Upon the Courts on page 2 states as follows:

“The Plaintiff, Forbes’ sole beneficiary and trustee, had standing in 13CIV18-000015 two- and one-half months prior to the trial court’s December 26, 2019, Dismissal. As of October 8, 2019, SDCL 15-6-7(a), SDCL 15-6-19, and SDCL 15-6-25(d)(1) applied to the Defendant and he could litigate pro se. Other pre and post dismissal requests by the Defendant to be substituted or for intervention in 13CIV18-000015 orally in court, or by motion under SDCL 15-6-25(c) and SDCL 15-6-24, went unaddressed, unheard, or were denied by the trial court.”

On October 8, 2019, Forbes’ former trustee and plaintiff in 13CIV18-000015 (‘Plaintiff Hill’) resigned and appointed the Petitioner as his successor, SDCL 55-1A-39. This ‘disclaimer of powers’ within Forbes was effective immediately under the stated statute and the Petitioner became Forbes only member, sole beneficiary, and sole trustee.

“It was long been settled that when a trustee, in breach in his fiduciary duty to the beneficiaries, transfers property to a third person, the third person takes property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary’s breach of duty. The trustee of the beneficiaries may then maintain an action for the restitution of the property.” *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250, 1200 S.Ct. 2180, 2189, 147 L.Ed. 2d 187 (2000).

ISSUE 2.) WHETHER THE SOLE BENEFICIARY AND SOLE TRUSTEE HAD A STATUTORY RIGHT TO FILE A RULE 60(b) MOTION FOR FRAUD UPON THE COURT WITH THE CIRCUIT COURT AS A NON-ORIGINAL PARTY AND STATUTORY RIGHT TO APPEAL THE DENIAL THEREOF.

a. Petitioner had a Statutory Right to File his Rule 60 Motion.

Taking notice of the argument herein ISSUE 1.) above, as of October 8, 2019, Petitioner was the sole beneficiary and sole trustee of Forbes, the real party in interest under *SDCL 15-6-17(a)* and could litigate pro se. And as of October 8, 2019, per *SDCL 55-1A-39* and *SDCL 15-6-25(d)(1)* the Petitioner was factually and legally a substituted party in any/all direct and appellate litigation involving Forbes.

Of paramount importance to this case/ petition is the ALL of the motion, orders, and judgments in the Circuit and Appellate Courts in 13CIV18-000015 and *Appeal No. 29470*, preceding the Petitioner's Rule 60(b) Motion for Fraud Upon the Courts, were final (regardless of errors). The Petitioner well understood this, however, in Justice Kern's November 23, 2022, Order to Show Cause for Appeal No. 30172 (*Appendix E.*) the Justice relied on her former summary affirmance in Appeal No. 29470 as a bar for the Petitioner to appeal.

On pages 3-4 of the Petitioner's Rule 60(b) Motion for Fraud on the Courts filed with the Circuit Court, and EVERY subsequent filing with the Circuit and Appellate Court in Appeal No.30182 the Petitioner cited *United States v. Buck* F.3d 1336, 1341-42 (10th Cir. 2002)

See *United States v. Buck*, 281 F.3d 1336, 1341-42 (10th Cir. 2002)

"[A] court can set aside its judgment if procured by fraud upon the court relief is not dependent on the filing of a motion by a party to the original judgment; the court may assert this power *sua sponte*. *Id.*

"There is no time limit for such proceedings, not does the doctrine of laches apply. See *Bulloch v. U.S.* 763 F.2d 1115, 1121 (10th Cir. 1985) (en banc); 11 Wright & Miller § 2870, at 412; Moore's § 60.21[4][g]." *Id.*

"The substance of the plea should control, not the label..."there are no formal requirements for asserting fraud on the court," Moore's § 60.21[4] [f]... In short we do not reject Appellant's fraud-upon-the court claim on procedural grounds." *Id.*

"Section 15-6-60 does not limit the power of the court to entertain an independent action to [relieve a party] from a judgment, order or proceeding...or to set aside a judgment for fraud upon the court." *Corcoran v. McCarthy*, 2010 S.D. 7 1114, 778 N.W.2d 141, 147.

See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982).

"Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed [rights]." quoting *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113(1971).

The merits of the facts and law within the Petitioner's Rule 60(b) Fraud upon the Courts motion for relief are not before the Court, just the Petitioner's ability to be able to file it with the Circuit Courts and right to appeal denial thereof to the South Dakota State Supreme Court under. *SDCL 15-26A-3* and *SDCL 15-26A-4*.

Briefly, the facts and law with the Petitioner's stated Rule 60(b) motion raised two interdependent issues: (1) that the (unheard) merits of trust fraud were obvious, and that due to the Circuit Court's dismissal under *SDCL 15-6-41(b)* continued exclusion of the Petitioner, a miscarriage of justice occurred; and (2) the Respondent and Mr. Loftus' fraud upon the court due to extrinsic activities involving former Plaintiff Hill an taking multiple judicially estopped positions; in 13CIV18-000015 and Appel No. 29470 prevented the Petitioner from becoming a party in the underlying action and having the merits of the case heard.

b. Violation of the Petitioner's Civil Rights.

If the Petitioner is unsuccessful in having his petition decided/heard by this Court his next action will be to file a civil rights action against the State of South Dakota for denial of access to courts and due process.

See *Christopher v. Harbury*, 536, U.S. 403, 414-15, 122 S.Ct. 2179-87, 153 L.Ed2d 413 (2002).

"Whether an access claim turns on a litigating opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for separate and a distinct right to seek judicial relief from some wrong. However, unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which the plaintiff cannot have suffered injury by being shut out of court."

Here, the total exclusion of the Petitioner is in the complete absence of procedural law related to the applicable facts. Judicial discretion alone had been abusively utilized to suppress the merits of \$400,000.00 in trust fraud and excludes the Petitioner without remedy. The Circuit Courts and Appellate Courts continued exclusion and various monetary and legal sanctions against the Petitioner since October 8, 2019, has violated his statutory rights and his rights to access the courts, due process, and equal protection of law under the First, Fifth and Fourteenth Amendments of the United States Constitution. See *U.S. Const. amend. I*; *U.S. Const. amend. V*; *U.S. Const. amend. XIV*, §1.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

18 MAY 2023
Date: 