IN THE
Supreme Court of Virginia

RECORD NO. 100305

DONALD L. GUNTER,

Appellant,

v.

ROBBIE S. MARTIN,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellant Gunter ("Gunter") misstates several matters in his "Statement of the Nature of the Case..." and "Statement of Facts."

This is what happened: George F. Martin ("Mr. Martin") died intestate on June 1, 2004 at 84 years of age, survived by his widow, Robbie S. Martin ("Mrs. Martin"), as his only heir. She qualified as the administrator of his estate on July 14, 2004 and filed a "list of heirs/real estate affidavit" showing herself as the sole heir. (App. 10,13)

On May 27, 2005 (not in March) Gunter filed a "Petition" in the Colonial Heights Circuit Court as Chancery case number 05-48 (the "first case") in which he asked the court to allow an amended list of heirs to be filed, indicating that he is the biological child of Mr. Martin and, as such, an *heir* (emphasis added) and beneficiary of Mr. Martin's estate; that the court determine the rights of the parties; and that he have such further relief as may be necessary and proper. The named defendant was "ROBBIE S. MARTIN, INDIVIDUALLY And in her capacity as Administrator Of the Estate of George F. Martin." (sic) (App. 80-81)

Mrs. Martin, individually and as administrator, filed a Motion to Dismiss (App. 85-87) on June 24, 2005, claiming that Gunter had not satisfied the requirements of Virginia Code §64.1-5.1(4) by filing, within one year after Mr. Martin's death, an affidavit alleging parenthood and an action seeking the adjudication of parenthood. (Contrary to Gunter's assertion in his Opening Brief (page 4), the Motion to Dismiss was in no way based on the fact that his Petition "was notarized, but did not contain an oath or affirmation... [alleging] parenthood.")

Gunter's Opening Brief, at page 5, mischaracterizes the conclusion of the first case. After written submissions and hearings on August 4, 2005 and February 6, 2006, the trial court entered an order (App. 158-159) which dismissed Gunter's Petition, holding that the requirements of Code §64.1-5.1 had not been met. Contrary to the Opening Brief (page 5), the court said nothing about Gunter's Petition "not invok[ing] or cit[ing] Va. Code §64.1-5.1."

Gunter gave notice and filed a Petition for Appeal in due course. This Court, in Record No. 060897, refused his appeal on July 24, 2006, finding that there was no reversible error in the trial

court's judgment. A Petition for Rehearing was likewise denied.

In his Opening Brief, Gunter says that "[i]n the fall of 2008, [he] learned of this court's opinion in *Jenkins* v. *Johnson*, 276 Va. 30, 661 S.E.2d 484 (2008)." (Page 2. Also see page 5.) He completely misstates the facts in *Jenkins*, which was a suit filed by an illegitimate daughter to partition real estate she inherited from her intestate father. Gunter says "the trial court dismissed the claim for the failure of the plaintiff to meet the requirements of Section 64.1-5.1 of the 1950 Code of Virginia...." Then, he says, "[t]his Court reversed that decision, holding that the affidavit requirements of Va. Code §64.1-5.1 only apply to personal property, not real estate." (Pages 2,6) First off, the trial court did not dismiss the claim. Secondly, the judge ruled that §64.1-5.1(4) did not apply to the case. Thirdly, this Court affirmed the circuit court's conclusion. And finally, *Jenkins* did not say that Code §64.1-5.1 only applies to personal property. Rather, the conclusion was "that the requirements of Code §64.1-5.1(4) do not apply when real estate passes by intestate succession under Code §64.1-1." 276 Va. at 36.

On June 30, 2009 Gunter filed the instant suit in the Circuit

Court of the City of Colonial Heights as case number CL09-162. As he says in his footnote 1, he termed his initial pleading a "Complaint to Quiet Title & for Allotment or Sale of Real Property in Lieu of Partition." Mrs. Martin was sued individually, and the Complaint related to two parcels of real estate in the City that Mr. Martin had owned. (App. 1-8)

(As an aside, counsel for Mrs. Martin want it to be known that they recognized that there is absolutely no basis here for a suit to quiet title. Further, there is no separate cause of action in Virginia for the "Allotment or Sale of Real Property in Lieu of Partition." No point was made of this, however, since it seemed likely that the trial court would treat the Complaint as one for partition without going to the trouble of amendment.)

In response to this second suit, Mrs. Martin filed a Plea of Res Judicata (App. 18-21), based upon the outcome of the first case. In the Plea she also said that even if res judicata did not bar Gunter's suit, he was collaterally estopped from attempting to relitigate the paternity issue.

After the parties presented written and oral argument,

the Honorable Herbert C. Gill, Jr. issued an opinion letter dated November 9, 2009 which upheld Mrs. Martin's position. (App. 73-76) On November 18, 2009 the judge entered an order formally sustaining the Plea of Res Judicata and dismissing Gunter's Complaint. (App. 77-79) This appeal ensued.

It is not clear what Gunter intended his first assignment of error to be. On page 1 of his Opening Brief, he assigns error to the trial court's "finding that the '*identity of the quality of the persons* for or against whom the claim is made' prong of the res judicata test was met...." (Emphasis added.) On page 7 he argues that the court erred when it found "that the '*identity of parties'* prong ... was met ...." (Emphasis added.) Among the objections Gunter listed on the final order was one objecting to the finding that the "identity of parties" prong was met. (App. 78) He made no mention of the "quality" prong. In his Brief he says that "Appellant Gunter did concede in his reply pleading that the identity of the parties is the same, but specifically disputed that the quality of the persons was identical." (Page 8)

STANDARD OF REVIEW

Given the nature of the case, questions related to the trial court's judgment are subject to *de novo* review. *Walker* v. *American Ass'n of Prof. Eye Care Spec.*, 268 Va. 117 (2004).

ARGUMENT

Summary of Argument

"The judicially created doctrine of *res judicata* rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent harassment of parties." *Bill Greever Corporation, et al* v. *Tazewell National Bank,* 256 Va. 250, 254 (1998). "The doctrine is founded upon two maxims of the law, one of which is that 'a man should not be twiced vexed for the same cause;' the other that 'it is for the public good that there be an end of litigation.' " (Citation omitted.) *C. Patterson* v. *L. Saunders, et al.*, 194 Va. 607, 612 (1953).

"Under the common law doctrine of *res judicata*, a final judgment on the merits of a claim precludes the parties from further litigation based on that claim." *State Water Control Board* v. *Smithfield Foods*, 261 Va. 209, 214 (2001).

The trial court considered the conflicting arguments of counsel and held that the decision in the first case was a judgment on the merits. Gunter did not assign error as to that conclusion, which was clearly correct. For a decision to be "on the merits" for *res judicata* purposes, it is not necessary that the court hear evidence and make a specific finding on a given issue. For example, where the court sustains a demurrer for the plaintiff's failure to state a case, that demurrer goes to the merits of the case and constitutes *res judicata* as to a subsequent proceeding where the same parties and same issues are involved. *Gimbert* v. *N.S.R.R. Co.*, 152 Va. 684 (1929). Mrs. Martin's Motion to Dismiss in the first case was like a demurrer, and in fact a demurrer could have been used in its stead.

Also, in the second case the court cannot inquire as to the correctness of the decision in the first case. If error were committed in the prior case, it would not matter. The first holding would have to have been changed by appeal. *Brunner* v. *Cook*, 134 Va. 266 (1922). *Accord, C. Patterson*, *supra.* The same is true with collateral estoppel. *City Capital Resources, Inc.* v. *White,* 29 F. Supp.2d 334 (S. D. W. Va. 1998).

"The bar of *res judicata* precludes relitigation of the same cause of action, *or any part thereof*, which could have been litigated between the same parties and privies." (Emphasis added) *Smith* v. *Ware,* 244 Va. 374, 376 (1992). Before *res judicata* can be asserted against a subsequent case, four elements must be present:

" '(1) identity of the remedies sought; (2) identity of the cause of action [or any part thereof]; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made.' " *Id.*, quoting *Wright* v. *Castles*, 232 Va. 218, 222 (1986).

> When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties.

Lofton Ridge, LLC v. *Norfolk Southern Rwy. Co.*, 268 Va. 377, 381 (2004).

When Gunter filed the first case, he made an election as to how he would proceed in his quest to establish his kinship to Mr. Martin and deal with property interests thereby created. Alternatives were available, and he chose from among them the approach he wanted to take. He could have opted, for example, to record an affidavit and file, within one year of Mr. Martin's death, an action which sought to do nothing more than adjudicate parenthood. He chose not to do so. He could also have included a count asking for partition of the personal property and/or real estate. He chose not to do so. When he realized that he had failed to file the required affidavit, he could have asked the trial court to proceed with a determination of paternity but omit commands to the administrator. He chose not to do so. He could have asked for leave to amend his pleading so as to add a count for partition at that time. He chose not to do so. He could have nonsuited before the case was submitted to the court for decision. He chose not to do so.

Mrs. Martin was forced to defend the first case to the end, and she should not now be twice vexed. If she had lost the first case, and if the judge had ruled that paternity had been established in

Gunter's favor, could she contend that Gunter should have to prove paternity again in the instant suit?

1. THE IDENTITY AND QUALITY OF THE PARTIES IN THIS CASE ARE INCLUDED IN THOSE IN THE FIRST CASE. (Assignment of Error I, Argument I)

The contradictions in Gunter's positions notwithstanding, this Brief will speak briefly to both identities, even though the appellee believes she is not compelled to respond to either. (See "Statement of the Case," *supra* at page 5.)

In both cases, Gunter and Mrs. Martin were the only two people involved. The difference between the two suits is that Mrs. Martin was sued in the first case individually and as administrator of her husband's estate, while in the instant cause she is named solely in her individual capacity. In other words, she appears as an individual defendant in both suits, and Gunter as an individual is the sole plaintiff in both suits. The tests as to both the identity and the quality of the parties are satisfied, as the extra person in the first case (the administrator) is of no moment. The trial judge recognized this. (App. 74)

If Mrs. Martin had been sued in the first case only as the administrator, Gunter's position would appear to be easier to argue, but even then his success would be doubtful:

> [*Res judicata*] "proceeds upon the principle that one person shall not the second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue, which has been necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit."

(Citation omitted.) *Ward* v. *Charlton*, 177 Va. 101, 115 (1941). In point of fact, Mrs. Martin was the sole beneficiary on the defendant's side to be benefitted or harmed by the victory or defeat of herself as administrator in the first case.

As to either the identity or the quality of the parties, *extra* people do not matter; what is important here is that the plaintiff and defendant are parties as individuals in the instant case and were opponents in the first case in the same capacities. See *City of Virginia Beach* v. *Harris*, 259 Va. 220 (2000), which involved suits in federal and state courts. There, the plaintiff sued the City and various individuals in federal court and then sued in state court. In the latter suit, not all of the individual defendants who were sued in the federal

case were made parties. This Court held that the federal district court's judgment as to the individual defendants who were sued in the Eastern District of Virginia barred relitigation against those of them who were then sued in state court.

2. THE IDENTITY OF THE REMEDY SOUGHT IS THE SAME. (Assignment of Error II)

Smith v. *Ware*, *supra*, describes the first of the four required *res judicata* elements as "identity of the remedies sought." *Mowry* v. *City of Virginia Beach*, 198 Va. 205, 211 (1956), calls it "identity in the thing sued for."

Gunter cites *Smith* v. *Ware* as if it supports his position. It does not. An action for unlawful entry and detainer and a bill of complaint for commutation of dower are totally distinct proceedings, with very different elements and results. At the time, they could not have been brought together in any event, because one was an action at law and the other was a chancery cause.

The remedies in the Gunter cases are the same for *res judicata* purposes. In both cases, the plaintiff filed a legal proceeding to have the court declare his ownership interest in assets which Mr. Martin had owned. However, no such interests could be determined

unless the trial court first found that Gunter was Mr. Martin's son. In the first case the court was asked specifically to determine paternity, and in the second case the request was implicit, as the finding of paternity was an essential prerequisite to establishing ownership. Code section 64.1-5.1 describes a method for determining paternity with regard to probate assets, with the remedy being the court's declaration of parenthood. In non-probate situations, a decision could be made, for example, by a declaratory judgment action or as a part of a case dealing with a division of assets (as here).

In both Gunter cases, a decision as to the manner in which Gunter would receive his interest in assets would be secondary to the real remedy – the declaration that he was Mr. Martin's son. The rest is rather perfunctory. Gunter concedes that in either case the paternity question would have to be decided on the basis of precisely the same information, namely that which satisfies Code §64.1-5.2 (Opening Brief, page 16)

Lest there be any doubt, Gunter confirms what we think:

> ...[T]he first case asked the [Trial] Court to determine Appellant Gunter's rights in Mr. Martin's estate, both real and personal

> property, as Mr. Martin's biological son. The second case asked the Court to determine Appellant Gunter's rights in Mr. Martin's real property, as Mr. Martin's biological son.

(Opening Brief, pages 11-12) He goes on to say that the distinction between the cases is that title to real estate vests in heirs at the moment of the decedent's death, rather than going to his estate, as would happen with personalty. If that makes a difference for *res judicata* purposes, does it mean that Mrs. Martin still may face a personal-property partition suit by Gunter relative to Mr. Martin's Wachovia stock that does not go through his estate because it was endorsed as transferrable on death to "my distributees at law"? What about a suit to partition land Mr. Martin owned in Albemarle? Can he wait 20 years?

3. THE IDENTITY OF THE CAUSE OF ACTION (OR PART THEREOF) IS THE SAME. (Assignment of Error III)

"Cause of action" can mean different things in different contexts, and a particular set of facts may give rise to several causes of action. "A valid, personal judgment on the merits in favor of defendant bars litigation of the *same cause of action*, <u>or</u> <u>any</u> <u>part</u> <u>thereof</u>, which could have been litigated...." *Bates* v. *Devers*, 241 Va.

667, 670 (1974). (Underline added.) For purposes of *res judicata*, a cause of action "may be broadly characterized as an assertion of particular legal rights which have arisen out of a *definable factual transaction*. *** A cause of action may present several factual and legal issues." *Id.* at 672. (Emphasis added.) Plaintiff cites *Davis* v. *Marshall Homes, Inc.*, 265 Va. 159 (2003), for the proposition that the test to determine the identity of the cause of action is "whether the same evidence is necessary to prove each claim." (Page 15)

In the instant case, it is clear that the rights which Gunter asserts do arise out of a "definable factual transaction." That would be the alleged fathering of Gunter by Mr. Martin. This relationship would then be applied to determine Gunter's interest in Mr. Martin's property.

That said, the situation here also accommodates the "same evidence" scrutiny of *Davis*. Any rights which Gunter could possibly have must all flow from establishing that Mr. Martin was his father. He has conceded that, in any case, the evidence used to accomplish that objective must meet the requirements of Virginia Code §64.1-5.2. (Opening Brief, page 16)

No matter what theory of law or legal tact Gunter employed to proceed against properties formerly owned by Mr. Martin, a part of any claim would be constant and common: He would have to prove (or must already have proven in a prior case), by evidence per Code §64.1-5.2, that he is the biological child of Mr. Martin. Failing that, he could not win a single ownership claim of any kind.

It might be noted that in Gunter's attempt to distinguish causes of action, he tries to show the differences in the totality of all the items of evidence he believes to be necessary in each case. His effort, however, falls short. For example, on page 16 of the Opening Brief he addresses what he believes was required to be shown by the plaintiff in the first case. He lists four items of proof. He overlooks, for example, the necessity of proving that he was filing, within one year of Mr. Martin's death, an action seeking the determination of parenthood; that Mr. Martin left no proper will devising the assets to other persons; and that there were no other owners of the assets, including those who might have survivorship interests.

As for the second suit, Gunter overlooks (on pages 16-17) the need to show, for example, the value of the properties; that he was

not the son of Mr. and Mrs. Martin; that Mr. Martin had no other children; that the properties could not be partitioned in kind; that there was no proper will devising the property to others; that there was no owner who was willing to accept allotment of the whole of the property and pay to other owners the amounts to which their interests would entitle them; and that the interest of the owners would be promoted by a sale of properties and a division of the net proceeds among those entitled thereto.

However, such differences are actually of no moment. Proof of parenthood is a part of each suit, and it requires evidence per Code §64.1-5.2. That is absolutely mandatory, and it applies no matter the name one might give to the suit, what its ultimate objective may be, or how much other evidence might be needed. Establishment of paternity is an essential part of any legal action Gunter might choose to employ, and he is afforded one opportunity to prove it.

Gunter speaks of Judge Gill's reference to Rule 1:6 in his opinion letter and of the irrelevance of the Rule to this case. (Opening Brief, pages 14-15). Even if the judge's decision on "cause of action" had in fact been based solely on that Rule (which it was

not), that would not be grounds for reversal. If a trial court comes to the correct conclusion but for the wrong reason, the judgment is still to be affirmed. *Richmond* v. *Grande Lodge,* 162 Va. 471, 475 (1934).

4. THE DECISION IN *JENKINS* V. *JOHNSON*, 276 Va. 30 (2008), DID NOT CONSTITUTE A SUBSTANTIAL OR MATERIAL CHANGE IN CIRCUMSTANCES OR FACTS WHICH MIGHT ALTER THE RIGHTS OF THE LITIGANTS. (Assignment of Error IV)

Mowry v. *City of Virginia Beach, supra*, cited by Gunter at page 19, says that "res judicata does not prevent a re-examination of the same question between the same parties when ... facts have arisen which may alter the rights of the litigants." There must be "substantial or material changes in conditions." *Id.* at 211-212.

Gunter claims *Jenkins* created a new right or law. However, it did not. Rather, its accomplishment was to point out that the requirements of filing an affidavit and parenthood action within one year per Code §64.1-5.1 only applied in connection with settlement of a decedent's estate. It did not provide a time limit within which a putative co-owner of inherited real estate must file a partition suit or lose his potential interest. How could *Jenkins* create a new right or

law when this Court "[held] that the language of Code §64.1-5.1(4) is plain and unambiguous." *Id.* at 35. The opinion merely pointed out exactly what the statute said. Gunter talks about what he would have done "had *Jenkins* been on the books" (page 20) when he filed the first case, but the appellee has already observed that he eschewed those obvious alternatives available to him at that time. (*Supra* at page 9.)

CONCLUSION

Robbie S. Martin prays that the judgment of the trial court be affirmed.

Respectfully,

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CERTIFICATE

The undersigned counsel hereby certifies that there has been compliance with Rule 5:26 and that on the 30TH day of July, 2010, fifteen copies of this Brief of Appellee were hand-delivered for filing in the office of the clerk of the Supreme Court of Virginia; an electronic version was filed with said clerk contemporaneously by e-mailing to scvbriefs@courts.state.va.us; three copies were mailed to opposing counsel, David G. Hubbard, Esquire, Leiser, Leiser & Hennessy, 8229 Boone Blvd., Suite 310, Vienna, VA 22182; and an electronic version was served on said opposing counsel by e-mailing to dghubbard@leiserlaw.com.

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