IN THE

Supreme Court of Virginia

RECORD NO. 180358

VIRGINIA LYNN MERCER, ADMINISTRATOR
of the ESTATE of CLIFTON WOOD,

Appellant,

v.

M. LORI-BELLE MacKINNON, *et al*.,

Appellees.

REPLY BRIEF OF APPELLANT

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VIRGINIA:

IN THE VIRGINIA SUPREME COURT

MERCER, Virginia Lynn,
Administrator of the Estate of Clifton Wood

Petitioner/Appellant,

v. Record No. 180358

MacKINNON, M. Lori-Belle,

Appellee,

and

COX & PALMER,

Appellee.

APPELLANT'S REPLY BRIEF

COMES NOW the appellant, by and through the undersigned counsel, and issues this Reply Brief pursuant to Rule 5:29 of the Rules of the Supreme Court, and for her memorandum of law, states as follows:

Appellant asserts that her Opening Brief adequately asserts her claims and the legal basis for her prayer that this Court reverse and remand the Final Order(s) of the Circuit Court for Loudoun County in this case and therefore, rests on the same, and requests only oral argument thereon to further her arguments. There is, however, one matter raised by Appellee MacKinnon in her Appellee's Brief that Appellee believes requires a response:

I. ISSUES REPLIED TO

A. No Res Judicata or Judicial Estoppel Should Attach to the Prince William County Circuit Court Order Dismissing that Guardianship Case as "moot" for the purposes of determining whether the Appellant can Proceed in this Case.

Appellee MacKinnon did not explicitly raise a defense of res judicata or judicial estoppel in her brief, however, her assertion that the Appellant's endorsement of an order by the Prince William Circuit Court dismissing the cross petitions for the appointment of a Guardian and Conservator as moot should prevent her from further litigating the claim that Appellee MacKinnon mishandled or converted the respondent's funds amounts to such an argument.

Appellee MacKinnon points out that Appellant had filed a Motion for an Accounting in the Prince William County Circuit Court proceeding seeking a full accounting of Appellee MacKinnon's use of the funds entrusted to her by the Prince William County Circuit Court pursuant to an Interim Order. The respondent in that case, Eleanor Wood, passed away before that motion could be heard, thereby divesting the Prince William County Circuit Court of jurisdiction over the matter, and the same was dismissed as moot. Appellee MacKinnon appears to assert that the Appellant had an opportunity to litigate the matter and should therefore be barred from litigating it now. There are several problems with such an argument.

B. The doctrine of res judicata does not apply.

Whether an action is precluded by res judicata is a question of law that this Court reviews *de novo*. *Kellogg v. Green*, 295 Va. 39, 809 S.E.2d 631 (2018) *Citing*: *Caperton v. A.T. Massey Coal Co.*, 285 Va. 537, 548, 740 S.E.2d 1, 7 (2013). In order for a party to prevail on a defense of res judicata, the party must show that the matter was previously decided on the merits by a final judgement. *Kellogg v. Green*, *Id*. at: 45,634. See also: *Norris v. Mitchell*, 255 Va. 235, 239, 495 S.E.2d 809, 812 (1998). "A final judgment is essential to the imposition of res judicata."

There is no allegation by the Appellee that the matter was decided on its merits. The only "final order" in this case is one finding that the matter was moot as to the determination of who should be appointed as the conservator for a respondent who had passed away while the case was pending. Without any adjudication on the merits, Appellant's claims are not precluded under Rule 1:6 of the Rules of the Supreme Court of Virginia.

Finally, the parties to this litigation are not the same as the parties to the prior litigation. While it is true that part of Clifton Wood's estate's claim is derivative of Eleanor Wood's claims, as Clifton Wood was the sole intestate heir to Eleanor Wood, Clifton Wood has raised additional claims pertaining solely to his own estate and his separate funds which his estate alleges were misappropriated by

Appellee MacKinnon along with those of Eleanor Wood.

C. The doctrine of judicial estoppel does not apply.

The doctrine of judicial estoppel prevents a party from litigating a matter that could have been litigated in a prior action, but failed to do so. It is important to note that this Court has previously opined that the purpose of the doctrine is protect the integrity of the Courts and to prevent litigants from gaming the system. "Judicial estoppel is intended first and foremost to protect the integrity of the judicial process and to guard it from improper use." *Eilber v. Floor Care Specialists, Inc.*, *et al*. 294 Va. 438, 807 S.E.2d 219 (2017), *Citing*: *Parson v. Carroll*, 272 Va. at 564, 636 S.E.2d at 454 (2006).

This case is simply not one in which the litigant attempts to raise a claim that it did not raise in a prior litigation, either out of negligence or strategy. The claim was raised by a different party, under different circumstances under different legal procedures, but the matter was rendered moot by the death of that party prior to its adjudication. As the matter has never been considered on its merits, it cannot be precluded and the Appellant cannot be said to be estopped from raising it now. The claim survives because the estate of the deceased party has the right to raise claims that the party herself could have raised, pursuant to Code of Virginia, § 8.01-25 and § 64.2-520.

CONCLUSION

Appellee's assertion that the matter of her use or misuse of Eleanor Wood's funds was raised in a prior litigation that was dismissed as moot upon the death of Eleanor Wood is irrelevant and should be disregarded by this Court. Appellee does not and cannot raise a defense of res judicata or judicial estoppel because the matter was never decided on its merits. The claims raised in this case involve causes of actions by both Eleanor Wood's and Clifton Wood's estates that have never been adjudicated and therefore the said claims survive the deaths of both parties and may now be pursued by the personal representative.

WHEREFORE the Appellant prays that this Court grant her appeal and remand this case back to the Loudoun County Circuit Court for trial on the merits.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of August, 2018, I complied with Rule 5:26(e) and also served a true and accurate copy of the foregoing on the following persons via email to:

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