Case No. 12-20164

In the United States Court of Appeals
For the Fifth Circuit

CANDACE LOUISE CURTIS,

Plaintiff - Appellant

v.

ANITA KAY BRUNSTING; DOES 1-100; AMY RUTH BRUNSTING,

Defendants - Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

APPELLANT'S REPLY BRIEF

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Rules

Rule 12(b) 10, 11

PHONE CONFERENCE, NOT A 12(b) MOTION HEARING

Appellant Curtis objects to any and all references to the phone conference as evidentiary. There is no transcript or recording. The absence of a record deprives this court of review and denies Curtis due process.

NEW EVIDENCE AND THE RECORD ON APPEAL

In Defendants' statement of the case, Anita and Amy Brunsting object to the "Notice of Correlative Action and Newly Disclosed Evidence" section of Curtis's opening Brief, arguing that the court "will not ordinarily enlarge the record on appeal to include material not before the district court.", and that "To the extent that Curtis references documents she has received after judgment as "newly discovered evidence," "these are not before the Court and should not have any bearing on the issues presented."

> Newly discovered evidence after trial is ground for a new trial when "(1) the evidence has come to his or her knowledge since the trial, (2) the failure to discover the evidence sooner was not due to a lack of diligence, (3) the evidence is not cumulative, and (4) the evidence is so material it would probably produce a different result if a new trial were granted." *Waffle House, Inc. v. Williams, 313 S.W.3d 796, 813 (Tex. 2010).*

The evidence recently disclosed to Curtis by the Defendants meets all of the above criteria with abundance[1]. If the Schedules A-J disclosed in April 2012 had been before the District Court, the Court would have clearly

[1] Curtis opening Brief "NEWLY DISCLOSED EVIDENCE" p.2

seen that large sums of assets are unaccounted for and appear to have been self-dealt, comingled, or otherwise misappropriated. Moreover, the Court would have noted that these transactions occurred during the last 15 months of Nelva Brunsting's life. Although these Schedules were unsupported with actual account statements or other written documentation, there is no question that these transactions occurred without notice, to the exclusion of Curtis and brother Carl, were inter vivos transactions[2] and, therefore, fall outside the probate exception.

The averments in Curtis's original complaint and affidavit establish a presumption of everything implied by the newly disclosed evidence section, with the exception of the frequency of the occurrences and the dollar amounts[3].

> For purposes of a motion to dismiss for lack of subject matter jurisdiction as a matter of law, the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of the plaintiff. *Whisnant* ***v.*** *United States, 400 F.3d 1 177, 1 179 (9th Cir. 2005)*

Defendants object to new evidence and then argue that the Court should presume that a state probate action exists. The Record on Appeal does not support a claim to the existence of state probate proceedings, nor

[2] USCA5 54-55
[3] See Curtis federal complaint USCA5-16 item 39, see also Curtis demand Letters USCA5, 67 & 68, 71-74

have Defendants shown the relief requested by Curtis would interfere with the probate of a will, the administration of an estate, or any other purely probate function.

DEFENDANTS CONTINUE TO BE DISINGENUOUS WITH THE COURT

All of the evidence in this case is uniquely in the possession of the Defendants. Defendants are being sued for concealing information they have a duty to divulge. Defendants concealed the facts from the District Court and appear to have knowingly misstated the law. Without an evidentiary hearing and a properly briefed court as to law and fact, one cannot competently determine applicability of the probate exception.

Defense counsel knows, as the Defendants' schedules disclose, that the appropriations Defendants refer to as "gifts"[4] occurred during the lifetime of Nelva Brunsting. By arguing a probate exception does not apply to inter vivos property transfers[5], counsel attempts to taint the course of justice before this Court in an effort to produce an outcome other than that which would flow from the ordinary course of these proceedings.

Defense counsel, Bernard Mathews, appears to have perpetrated a fraud upon the District Court in Defendants' emergency motion, by citing to

[4] Appellee's Brief "Statement of the Facts", P.2
[5] Appellant's Brief P.24 item 19 & pg 25, item 22, Wisecarver

the Property Code[6] and calling it the Probate Code, then bootstrapping a route test theory to the Supreme Court Opinion in Marshall that specifically decries the route test[7]. If, under state law, the state courts of general jurisdiction[8] would have jurisdiction over the dispute, then federal court jurisdiction would exist even under the now defunct route test.

Curtis filed four civil tort causes of action on February 27, 2012. At that point in time there was no action of any kind in any other court[9] and no wills had been filed. Curtis's complaint was dismissed on March 8, 2012. Again, there was no action of any kind in any other court and no wills had been filed with the Harris County Clerk Recorder. The doctrine of custodia legis does not apply as a bar to federal jurisdiction in this case.

BURDEN OF PROOF

> A fiduciary "has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes." *Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied)*[10].
>
> Additionally, when a plaintiff alleges self-dealing by the fiduciary as part of a breach-of-fiduciary-duty claim[11], a presumption of unfairness automatically arises, which the fiduciary bears the burden to rebut. See *Houston v. Ludwick, No. 14-09-00600-CV, 2010 WL 4132215, at *7 (Tex. App.—*

[6] USCA5-434
[7] Appellants Opening Brief P. 13 under "The route test"
[8] Texas Property Code 115.001
[9] USCA5-6 item 3
[10] (citing Montgomery v. Kennedy, 669 S.W.2d 309, 312–14 (Tex. 1984); Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513–14 (Tex. 1942))
[11] USCA5 – 7, Curtis original Complaint Count I page 3, item 10,

Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.); Chappell, 37 S.W.3d at 22[12].

VENUE

The Harris County Probate Court is a forum nonconveniens as the records of the probate court are not fully available electronically.

Curtis is a diverse plaintiff and has the choice of venue. If Defendants choose to second-guess Curtis's choice of venue it should not be via an imaginary probate exception propounded upon fraudulent concealment of facts, the manufacture of facts, or false statements of the law.

REBUTTLE OF ARGUMENT THAT CASE WAS CORRECTLY DETERMINED

The District Court entered its order of dismissal based upon claims asserted by Defendants' emergency motion. The Court did not have the law or the facts properly before it, was not properly briefed, and there was no jurisdictional hearing.

Further, in dismissing Curtis's action, the Court cites to the Supreme Court in Marshall v Marshall 126 S. Ct. 1735, but it is unclear where the Court derived that information from the Supreme Court opinion in Marshall.

Defendants argue the nature of the relief sought is persuasive as to the applicability of the probate exception, but the theory is based upon a

[12] (citing Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257, 261 (Tex. 1974); Int'l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 576 (Tex. 1963))

manufactured fact and Defendants provide no legal authority for application of only half of an interference test theory.

The authority Defendants provide for their assertion is *Breaux et al., v. Dilsaver 254 F.3d 533 (5th Cir. 2001)* but, like in Dilsaver, none of the requests for relief in Curtis's four causes could possibly interfere with state probate proceedings, even if the Court could assume the existence of a probate action.

In counts one through four[13] the several causes of action are (1) Breach of Fiduciary (2) Extrinsic Fraud (3) Constructive Fraud (4) Intentional Infliction of Emotional Distress, and the relief sought is $75,000.00 for each cause of action, from each Defendant, with punitive damages and whatever declaratory or injunctive relief the court may deem appropriate.

In *Wisecarver v. Moore, 489 F.3d 747 (6th Cir.2007)* the court affirmed the dismissal of a cause of action not because Wisecarver sought a trust distribution remedy, but because granting the request in that case would have disrupted the already completed and closed probate proceedings. No such set of facts is contained in this Record. Request for a trust distribution remedy, as an isolated fact, does not imply interference with property in the

[13] USCA5, 15, items 32-38

custody of a state court and does not trigger the probate exception.

There is no probate and one should view the no contest requirements section of both wills[14] (Article VI) and ask the question, if there is a probate… then it was brought by whom?

DEFENDANTS MANUFACTURE FACTS

Defendants manufacture several facts not contained in the Record in an effort to support their various theories[15]. They make no valid reference to the Record to support their fact claims, including the claim that Curtis is seeking a trust distribution remedy[16]. Defendants argue extensively assuming this nonexistent fact in their efforts to seek refuge in the probate exception, and this is not the first time Curtis has been forced to deny seeking any such remedy.[17]

There is not a single instance where the Record shows Curtis asking for distribution from the trust and it matters not. Even if Curtis had made such a request, a trust distribution remedy as an isolated fact does not invoke the probate exception a priori.

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[14] See pg 9. Unsigned wills of Elmer & Nelva Brunsting USCA5, 281-293, 291 294-304, 302.
[15] Wills have since been probated (P.7 para 1 & P. 11 item B), trust serves as will substitute (p6 & 18), estate is in probate (p.12), Case now involves Survivors trusts (p. 17).
[16] Appellee's Brief Pg 5
[17] USCA5, 484 item 3

The application for injunction

Curtis's application for injunction was dismissed for want of service. That order is not challenged here, however, Defendants choose to argue that the mere application for injunction should be cause for dismissal of the entire action under the probate exception. Defendants fail to provide meaningful authority to support this theory.

Curtis's application for injunction[18] alleges irreparable harm to the trust estate if Defendants are not prevented from wasting the estate and seeks to compel an accounting to determine the reason Anita and Amy refuse to answer or account. There is no viable legal reason the trustees would refuse to answer or account or provide copies of trust documents. It follows that the trustees' reasons for failure to disclose or notice are not legitimate and the burden of proof is on the Defendants.

The proposed injunctive order and the interference test

Looking at the proposed injunctive order[19] we see again Curtis is asking the court to enjoin Defendants from wasting the trust estate until further order of the court and seeks judicial process to compel an accounting and the production of documents.

[18] USCA5-15 item 38
[19] USCA5, 413-

Curtis believes that had it been properly served upon Defendants, her application for injunction could have been granted by the U.S. District Court as easily as the Harris County District Court could issue such an order. Curtis believes that upon remand such an order could and perhaps should be issued.

DEFENDANTS CLAIM THAT CURTIS HAD ADMITTED THE PROBATE EXCEPTION APPLIED, AT LEAST IN PART

Federal court jurisdiction is founded upon the constitution[20] and statute[21] and can neither be created nor destroyed by agreement of the parties.

> The question of subject matter jurisdiction can never be waived. Nor can jurisdiction be conferred by conduct or consent of the parties. C. Wright, supra. See Eagerton v. Valuations, Inc., 698 F.2d 1115, 1118 (11th Cir.1983); A.L. Rowan & Son v. Department of Housing and Urban Development, 611 F.2d 997, 998-99 (5th Cir.1980). Such jurisdiction goes to the core of the court's power to act, not merely to the rights of the particular parties. If jurisdiction could be waived or created by the parties, litigants would be able to expand federal jurisdiction by action, agreement, or their failure to perceive a jurisdictional defect. Such a result would be in direct conflict with the concept of limited jurisdiction. Therefore, United States District Courts and Courts of Appeals have the responsibility to consider the question of subject matter jurisdiction sua sponte if it is not raised by the parties and to dismiss any action if such jurisdiction is lacking. Fed.R.Civ.P.

[20] *See* U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States."

[21] *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")

> 12(h)(3). Matter of Kutner, 656 F.2d 1107, 1110 (5th Cir.1981), cert. denied, 455 U.S. 945, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). *Giannakos v. M/v Bravo Trader 762 F.2d 1295*

Defendants are grasping at straws in an attempt to misconstrue the intended meaning of Curtis's statement, as if there was some definitive negative jurisdictional implication. There is no jurisdictional implication.

Curtis was merely suggesting that if their claim was true, Defendants should file their Rule 12(b) motion with the federal court and seek remedy in the state probate court that they claimed had jurisdiction. This is by no means an agreement as to applicability of the probate exception, it merely points out Defendants' self-serving contradiction.

A reading of Curtis's reply[22] demonstrates the following (articulated in item 1 and summarized in item 7):

If a court does not have subject matter jurisdiction, its only power is to dismiss the action. None-the-less Defendants file their emergency motion asking the court to issue an order removing a lis pendens allegedly filed with the Harris County Clerk Recorder, whilst simultaneously telling the Court it had no authority to do so.

Defendants filed no Rule 12(b) motion and there was no evidentiary hearing on the question of jurisdiction.

[22] USCA5-484 item 7

Defendants argue, "trusts, like wills, can implicate the probate exception"

Defendants continue to pose antiquated authority in support of arguments clearly eviscerated by the Supreme Court opinion in *Marshall v Marshall 547 U.S. 293; 126 S. Ct. 1735, 1743.*[23]

All of the probate exception cases prior to Marshall in the Supreme Court are suspect.

The Ninth Circuit's broad, sweeping application of the exception is a prime example of how this judicially created doctrine, born in the 1970's[24], has been blown out of proportion. The Supreme Court reversed the Ninth Circuit Court of Appeal's opinion in Marshall in a very dramatic way.

> We granted certiorari, *545 U.S. 1165, 126 S. Ct. 35, 162 L. Ed. 2d 933 (2005),* to resolve the apparent confusion among federal courts concerning the scope of the probate exception. Satisfied that the instant case does not fall within the ambit of the narrow exception recognized by our decisions, we reverse the Ninth Circuit's judgment.

All of the cases and theories consistent with the Ninth Circuit opinion in Marshall v. Marshall *(In re Marshall), 392 F.3d 1118 (9th Cir. 2004)* are invalid and portions of some surviving decisions are no longer viable, as they are based upon now defunct probate exception theories.

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[23] See comments on Markham P.1743

[24] The term "probate exception" appears to have been used for the first time in *Magaziner v. Montemuro,* 468 F.2d 782, 787 (3d Cir. 1972), a domestic relations case; it apparently was first used in a probate-related case in *Lee v. Hunt,* 431 F. Supp. 371, 377 W.D. La. 1977).

CUSTODIA LEGIS

The doctrine of custodia legis is a first come first served doctrine and unless actual interference with a pending or closed probate proceeding can be shown to exist, the property of the Brunsting Family Living Trust and all of the resulting trusts is in the possession of the United States District Court, not the state courts. Curtis seeks only those remedies available under the Texas Property Code.

CONCLUSION

Defendants seek refuge in contradictions and manufactured facts to avoid a show of proof at all costs. If Defendants are using trust monies to pay for their legal defense in this action they are misappropriating fiduciary assets, as the trust is neither liable for their breaches nor a named defendant in this action. They are being sued as Anita Brunsting and Amy Brunsting, not as co-trustees of the Brunsting Family Living Trust or any resulting trust thereof.

Respectfully submitted,

By: /s/ Candace L. Curtis
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service on Appellees will be accomplished by regular mail on August 1, 2012 to the following:

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/s/ Candace L. Curtis
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