

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Alex Kinlaw, Jr. Circuit Court Judge

Common Pleas Case No.: 2019-CP-23-02032

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Appellate Case No.: 2022-000731

John R. Mensch and Shauna M. Waddell  
Individually and as Personal Representative  
of the Estate of Florence Petrak Mensch  
and John R. Mensch

*Respondents*

vs.

Sterling Raymond Mensch, III, Individually  
as Personal Representative of the Estate of  
Florence Petrak Mensch and in the former  
Capacity as Agent under a Power of  
Attorney for Florence Petrak Mensch

*Appellant.*

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**Memorandum in Opposition to Appellant's Motion for Leave to File a Rule 60(b) Motion in  
Probate Court**

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BROWN, MASSEY, EVANS,  
McLEOD & HAYNSWORTH, LLC

s/Tyler E. McLeod

Tyler E. McLeod

S.C. Bar No. 101309

Knox Haynsworth, III

S.C. Bar No. 010275

106 Williams St.

Greenville, SC 29601

Telephone: (864) 271-7424

[tmcleod@bmemhlaw.com](mailto:tmcleod@bmemhlaw.com)

[knoxhaynsworth@bmemhlaw.com](mailto:knoxhaynsworth@bmemhlaw.com)

Attorneys for Respondents

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## **ARGUMENT**

### **I. Appellant may not challenge subject matter jurisdiction.**

The dispute regarding Sterling Mensch's breach of his duties towards Florence Mensch and her successors in interest began when he was acting as her power of attorney. Following her death, litigation ensued between the parties. In the action Sterling Mensch litigated vigorously in the probate court of Greenville County the issues raised by the pleadings in the underlying action. After an adverse verdict against him, Mr. Mensch filed an appeal with the circuit court for Greenville County specifically asserting the jurisdiction of the circuit court. Thereafter, apparently for strategic reasons, Mr. Mensch took the position that the circuit court had no appellate jurisdiction because there was no "final order" from the probate court. Nowhere at the trial court level did Mr. Mensch ever challenge the jurisdiction of the probate court. While it is true that subject matter jurisdiction may be raised at any time, even on appeal, it is also true that a party may not invoke the provisions of Rule 60(b) where it is clear the issue could have been litigated at trial.

"[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939). An argument that is not raised to an intermediate appellate court is not preserved for review by this Court. *United Dom. Realty Trust v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992). Even though subject matter jurisdiction may be raised at anytime, there is no error preservation exception allowing a party to bypass calling an erroneous ruling to the attention of the tribunal making it before appealing that ruling to a higher court. *Compare Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322, 199 S.E. 296 (1938) (once the issue of

subject matter jurisdiction has been decided adversely to a party, he must preserve his exception or be barred from raising the issue later); *cf. DeTreville v. Groover*, 219 S.C. 313, 65 S.E.2d 232 (1951) (party abandoned subject matter jurisdiction issue by failing to argue it in brief). The State failed to ask the circuit judge to reconsider her subject matter jurisdiction ruling before appealing the order to this Court. Accordingly, it has failed to preserve any issue related to that ruling for our review. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) (holding Rule 59(e) applies to circuit court sitting in appellate capacity to review criminal convictions); *State v. Bailey*, 368 S.C. 39, 626 S.E.2d 898 (Ct.App.2006), *cert. denied*, March 8, 2007 (circuit court's appellate error must be called to its attention by petition for rehearing in order to be preserved for further appellate review).

Appellant continues to try and seek the same relief while ignoring on-point adverse rulings against him. By his Order dated May 17, 2022 the Honorable Alex Kinlaw, Jr. found that Judge Faulkner's Order for damages was a final Order and therefore denied appellant's request that the case be remanded to the probate court. Judge Kinlaw also dismissed respondent's appeal of the probate court orders, including Judge Faulkner's final order dated January 22, 2022. No motion to reconsider was filed with the circuit court.

From a procedural perspective up to this point the appellant Sterling Mensch has noticed an appeal from probate court to circuit court but then argued that no appellate jurisdiction exists because the probate court did not issue a "final order". (Notwithstanding the fact it was appellant who appealed this "non-final" order from probate court to circuit court.) Significantly, in the underlying action in probate court after the adverse ruling appellant did not raise subject matter jurisdiction with the probate court.

## **II. The probate court had jurisdiction over the entire action.**

Appellant contends, strangely, that his misdeeds undertaken pursuant to his Power of Attorney before the death of his mother are somehow out of reach of the probate court. Notwithstanding his agreement as to jurisdiction over both the subject matter and parties, Sterling Mensch now contends that the probate court could not issue its order because it had no jurisdiction over actions which were taken prior to Ms. Mensch's death. In some sense, respondents feel they are required to make the same arguments over and over again as to the egregious conduct of Sterling Mensch.

It has already been submitted and established that the probate court had jurisdiction over the matters before it. Obviously, probate courts are not limited in jurisdiction to merely matters that take place after death. Rather, probate courts are given jurisdiction, both individually and concurrently, for many matters that take place prior to death. By way of example and exceptionally relevant to the arguments asserted in this case, is the case of *Vaughn v. Bernhardt*, 339 S.C. 125, 528 S. E. 2d 82 (S.C. App. 2000) in which the South Carolina Court of Appeals affirmed the circuit court which had affirmed the probate court in determining that funds in a joint account belonged to the estate of Mary Henrietta Bernhardt. Just like the probate court in this case, the court of appeals in *Vaughn* determined the probate court had jurisdiction. Among the reasons for finding jurisdiction was the fact that the legislation amending Section 34-11-10 made it subject to the provisions of Section 62-6-101, et seq. of the Probate Code. As with the Power of Attorney in this case, it is clear that the probate court has jurisdiction to deal with fraud, misrepresentations and similar conduct occurring not only pursuant to a power of attorney, but also such actions undertaken

following death or resulting damages occurring after death. Pursuant to § 62-8-117 of the South Carolina Power of Attorney Act, the probate court certainly has jurisdiction to restore the value of the Estate to what it would have been had the violations of the power of attorney not occurred, which is exactly what Judge Faulkner did in her final Order. As such, even if procedurally appellant was entitled to file his leave (to file a Rule 60(b) Motion), such leave should be summarily denied.

### **III. Judicial Estoppel**

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "Judicial estoppel comes into play when the court is forced to take a position based on a factual assertion." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003); see also *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 554 n.6, 556 S.E.2d 718, 723 n.6 (Ct. App. 2001)

When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. . . . [T]he truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence. *Hayne Fed. Credit Union*, 327 S.C. at 252, 489 S.E.2d at 477 (footnote omitted).

In this case litigation initially began between the parties in Probate Court. In that litigation no issue was raised disputing jurisdiction of the probate court. In fact, jurisdiction was admitted and the litigation itself related to matters which took place prior to as well as after the death of

Florence Mensch. Sterling Mensch specifically admitted subject matter jurisdiction of the probate court in lines 9 and 10 of his answer to the first Amended Petition. (First Amended Petition and Answer attached collectively as Exhibit 1) After affirmatively agreeing that the probate court had jurisdiction, then taking the position the probate court had no jurisdiction over matters previously litigated, Mr. Mensch yet again changes his mind. It borders on frivolity to allege that the probate court did not have jurisdiction over this matter because it involved actions Sterling Mensch took prior to the death of Florence Mensch. Such a position flies in the face of logic, reason, and the law. In addition to the prior examples of probate court jurisdiction of pre-death actions, if the probate court did not have jurisdiction to address pre-death actions and misdeeds, there would be no ability for a final accounting to be prepared and addressed by the probate court as to described in S.C. Code Ann. §62-3-805. Furthermore, the probate court clearly has jurisdiction pursuant to § 62-8-117 of the South Carolina Power of Attorney Act, which states, “An agent that violates this article is liable to the principal or to the principal’s successors in interest for the amount required to: (1) restore the value of the principal’s property to what it would have been had the violation not occurred. . .” The purpose of the four-day trial on damages and the resulting final Order of Judge Faulkner was to restore the value of the Estate to what it would have been had Sterling Mensch not so egregiously violated his duties as agent under power of attorney for Florence Mensch. Appellant is simply trying to delay supplemental proceedings to execute such Order for as long as possible.

#### **IV. Conclusion**

In sum, appellant’s position is frivolous and should be summarily rejected.

BROWN, MASSEY, EVANS,  
McLEOD & HAYNSWORTH, LLC

s/Tyler E. McLeod \_\_\_\_\_

Tyler E. McLeod  
S.C. Bar No. 101309  
Knox Haynsworth, III  
S.C. Bar No. 010275  
106 Williams St.  
Greenville, SC 29601  
Telephone: (864) 271-7424  
[tmcleod@bmemhlaw.com](mailto:tmcleod@bmemhlaw.com)  
[knoxhaynsworth@bmemhlaw.com](mailto:knoxhaynsworth@bmemhlaw.com)  
Attorneys for Respondents

July 1, 2022

**Jul 01 2022****SC Court of Appeals****PROOF OF SERVICE**  

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I, the undersigned, served a copy of this Return to Appellant's Motion for Leave to File a Rule 60(b) Motion in Probate Court and Memorandum in Opposition to Appellant's Motion for Leave to File a Rule 60(b) Motion in Probate Court with Exhibit 1 on the following counsel of record this 1<sup>st</sup> day of July, 2022, by email and U.S. Mail to the following address of record:

Devon M. Puriefoy, Esquire  
John-Paul Baum, Esquire  
3 Boyce Avenue  
Greenville, South Carolina 29601  
[devon@truluckthomason.com](mailto:devon@truluckthomason.com)  
[johnpaul@truluckthomason.com](mailto:johnpaul@truluckthomason.com)

**BROWN, MASSEY, EVANS,  
McLEOD & HAYNSWORTH, LLC**

s/ Tyler E. McLeod  
Tyler E. McLeod  
Knox Haynsworth, III  
106 Williams St.  
Greenville, SC 29601  
Telephone: (864) 271-7424  
[tmcleod@bmemhlaw.com](mailto:tmcleod@bmemhlaw.com)  
[knoxhaynsworth@bmemhlaw.com](mailto:knoxhaynsworth@bmemhlaw.com)  
Attorneys for Respondents