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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr. Circuit Court Judge

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

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,

Respondent,

v.

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.

**Reply to Return to Motion for
Leave to File R. 60(b) Motion in the Probate Court**

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Appellant, 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”) respectfully offers this reply to the return of and a motion for leave and to file a R. 60(b) motion with the Probate Court.

Argument

I. No Dispute Exists as to the Efficiency of Allowing the Probate Court to Consider the Issue of Subject Matter Jurisdiction Now.

The issue presented in this Motion is a narrow, procedural one: Should the Probate Court consider the issue of subject matter jurisdiction via a motion filed under R. 60(b), SCRCF now, or wait two years or more for that motion to be filed after the instant appeal has concluded? The Return makes no attempt to confront that question, much less offer a compelling reason to justify the delay in resolving subject matter jurisdiction.

The Return does not dispute that the Probate Court could issue an opinion on jurisdiction and any appeal from that decision could be eventually consolidated with the instant appeal, all without prejudice to either party and without requiring two separate panels of this Court to become familiar with the underlying proceedings. Unfortunately, however, absent a motion filed in the Probate Court now, the subject matter jurisdiction of the Probate Court will likely be beyond the scope of the instant appeal. If the Circuit Court below was correct, no appellate jurisdiction exists at all due to the timing of the notice of appeal. If Appellant is correct, however, no appellate jurisdiction likewise exists because of a lack

of a final order, a prerequisite for appellate jurisdiction.¹ Particularly in the absence of any articulated prejudice in the Return, it is far better to resolve all jurisdictional issues in one set of briefs, as this Motion would allow if granted.

II. The Probate Court Likely Does Not Have Jurisdiction Over Some of the Claims that It Adjudicated.

The Return does not dispute that the survival statute applies to the causes of action encompassing most of the damages awarded in the Probate Court. Nor does the Return dispute that S.C. Code § 62-1-302(b) specifically strips the Probate Court of jurisdiction to adjudicate survival-statute claims on their merits. A very substantial question of jurisdiction, therefore, exists. Indeed, the Return could cite to no case specifically approving of subject matter jurisdiction in a case like this one. It tries citing *Vaughn v. Bernhardt*, 339 S.C. 125, 528 S. E. 2d 82 (S.C. App. 2000), but that case misses the mark. The case does not discuss subject matter jurisdiction much less resolve it. Courts do not consider implicit jurisdictional rulings. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511, 126 S. Ct. 1235, 1242, 163 L. Ed. 2d 1097 (2006) (“We have described such unrefined dispositions as ‘drive-by jurisdictional rulings’ that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit”). Further,

¹ Contrary to the Returns’ suggestion, there was no “strategy” in pointing to the potential lack of a final order, as is required to confer appellate jurisdiction. *See* [Opp. at 1]. If Appellant is correct that the unresolved tax proceedings preclude finality, either the Circuit Court or this Court would have *sua sponte* been required to raise the issue. *In re Nov. 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009). The notice of appeal was filed out of an abundance of caution given the potential uncertainty as to when appellate review was available.

Respondents have been unable to find any authority that the Power of Attorney Act trumps the specific jurisdiction stripping contained in S.C. Code § 62-1-302(b).

Insofar as the Return claims that the jurisdictional issue was somehow waived, the Return fundamentally misunderstands the well-settled law about jurisdiction. Parties can never affirmatively waive jurisdiction, much less implicitly do so—after all, it goes to the “power” of the tribunal to act. *See In re Nov. 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009); *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237, 442 S.E.2d 598, 600 (1994). Further, the Return forgets that Appellant’s post-trial motion would have allowed the Probate Court to hear the jurisdictional problems with parts of the damages award (i.e., those damaged relating to pre-death actions), but Appellant was denied a hearing. And the Return overlooks, too, that Appellant raised the jurisdictional problem in its merits brief to the Circuit Court, but the Circuit Court believed that *it* lacked appellate jurisdiction to review the Probate Court’s order.

Conclusion

Accordingly, Appellant Mensch respectfully requests that the Court grant him leave to file a motion under R. 60(b), SCRCR, in the Probate Court during the pendency of this appeal so that the Probate Court can consider whether it exceed its subject matter jurisdiction

Dated this 6th day of July, 2022

TRULUCK THOMASON, LLC

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CERTIFICATE OF SERVICE

I, the undersigned, served a copy of this Reply to Return to Motion for Leave on the following counsel of record this 6th day of July 2022, by email and U.S. mail to the following addresses of record:

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