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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, Master in Equity and Special Circuit Judge

Case No. 2010-CP-07-3033

In the matter of Estate of Margaret Dever Hover Gurnham A/K/A Margaret D. Hover:

Beach First National Bank, ... Respondent,

v.

Estate of Margaret Gurnham a/k/a Margaret Hover and/or Brian Hover, its Personal Administrator, ... Appellants.

FINAL BRIEF OF RESPONDENT

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AMENDED FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Where a deficiency judgment is sought in a mortgage foreclosure action in the court of common pleas, does a decedent's estate forfeit the defense that the claim is time-barred where the estate fails to assert the time bar as an affirmative defense?

COUNTERSTATEMENT OF THE CASE

Beach First National Bank, the respondent herein, filed this action in Beaufort County Probate Court on August 21, 2008 against Brian Hover, the appellant herein, as personal representative of the estate of Margaret Gurnham (f/k/a Hover), seeking allowance of a claim against the estate. The claim was based upon a deficiency judgment in the amount of $259,620.63 subsequently entered on December 11, 2008 against the personal representative. This judgment was entered in a mortgage foreclosure action in Beaufort County Court of Common Pleas.

The appellant answered denying the petition and alleging that the claim was time-barred. Both parties immediately moved for summary judgment.

By Order dated and entered on March 1, 2010, the Honorable Kenneth Fulp, Probate Judge for Beaufort County, granted the respondent's motion for summary judgment. Appellant's timely motion to alter or amend was denied by Order dated and entered on May 3, 2010.

Appellant timely appealed to the Court of Common Pleas for Beaufort County.

By Order dated December 21, 2011 and entered on December 22, 2011 by the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County and Special Circuit Judge, the judgment of the Probate Court was affirmed. Appellant's timely motion to alter or amend was denied by Order dated and entered on May 17, 2012.

Notice of appeal was timely served.

STATEMENT OF FACTS

On May 22, 2005, Margaret D. Gurnham executed a promissory note in favor of the respondent bank. The note was secured by a second mortgage on property of the Margaret D. Hover Irrevocable Qualified Residence Trust on Hilton Head Island. Mrs. Gurnham died on December 8, 2005. Notice to creditors was published in March 2006. Mrs. Gurnham's son, the appellant herein, continued to make payments on the note

through March 2008, then defaulted. On August 19, 2008, the bank filed a claim against the estate in the amount then due on the note.

The holder of the first mortgage commenced a foreclosure action in the Court of Common Pleas of Beaufort County on July 15, 2008. The respondent herein, as a defendant in that action, cross-claimed against the appellant as personal representative for foreclosure of its second mortgage and a deficiency judgment if necessary. The appellant defaulted. After the entry of a deficiency judgment against the appellant as personal representative, the respondent filed a supplemental statement of claim against the estate on December 30, 2008, reflecting the amount of the deficiency judgment. In its supplemental claim petition, the bank alleged that the appellant had assured the bank that the note would be paid but then failed to list the note in the Estate's inventory filed after the claims period had expired. [Supp. Petition dated 8/21/09, ¶ 8, R. 20–21.] The bank asserted that the personal representative had forfeited any statute of limitations as a defense to the claim. [Supp. Pet., Third Count, R. 24.] The Bank further alleged estoppel, fraud, constructive fraud, negligent misrepresentation, and breach of contract. [Supp. Pet., ¶¶ 32–41, R. 24–26.] The appellant disallowed the respondent's supplemental claim on July 29, 2009. [R. 18.]

The course of proceedings upon the respondent's petition for allowance of its claim is accurately recited in the final paragraph of appellant's Statement of Facts (Brief at 2–3).

ARGUMENT

Where a deficiency judgment is sought in a mortgage foreclosure action in the court of common pleas, a decedent's estate forfeits the defense that the claim is time-barred where the estate fails to assert the time bar as an affirmative defense.

Within the confines of estate administration inside the probate court, the personal representative may have no duty to respond to a claim filed outside the time limits of a nonclaim statute. The rule is different, however, when the creditor invokes the jurisdiction

of the court of common pleas. There, the nonclaim statute must be pled as an affirmative defense, in the same manner as a statute of limitations. *See* Rule 8(c), SCRCP. A deficiency judgment in such an action is an allowance of the claim.

Our Supreme Court answered the question presented in this appeal in the case of *Moultis v. Degen,* 279 S.C. 1, 301 S.E.2d 554 (1983):

> [W]e recognize that the claims barring statute is an affirmative defense to be pled by way of answer . . . .

Id. at 5 n.3, 301 S.E.2d at 557 n.3. At issue in the *Moultis* case was the predecessor to present section 62–3–803, but the earlier statute was a nonclaim statute as well, so that the principle is the same. *Id.* at 5, 301 S.E.2d at 557. *Accord: Palmer v. Golden*, 145 Wash. App. 249, 187 P.3d 758 (2008).[1]

A. <u>The court of common pleas has subject matter jurisdiction of mortgage foreclosure actions. A deficiency judgment is one of the remedies available to the court in such an action.</u>

The Gurnham Estate intentionally defaulted in response to the Bank's claim for a deficiency judgment, confident that it could ignore the court of common pleas in reliance upon the Estate's subject matter jurisdiction defense. That reliance was misplaced. Where a particular defense must be pled and proved or else is forfeited, the court has subject matter jurisdiction of the claim at issue.

The Beaufort County Court of Common Pleas has subject matter jurisdiction of

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[1] Golden argues that the time bar in [Washington's probate nonclaim statute,] RCW 11.11.070(3) is not an affirmative defense but, rather, is a statute of repose that deprives the trial court of subject matter jurisdiction, which a party does not waive. But even if we accept that RCW 11.11.070(3) is a statute of repose, it does not affect the court's jurisdiction; rather, statutes of repose, like statutes of limitation, attach to and bar only the claim itself. *Rice v. United States,* 122 U.S. 611, 621–22, 7 S.Ct. 1377, 30 L.Ed.793 (1887). We hold that Golden waived the time bar defense in RCW 11.11.070(3) by failing to plead it in her answer or in a CR 12 motion.

Id. at 258–59, 187 P.3d at 763.

mortgage foreclosure actions.

> "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong."

The Linda McCompany, Inc. v. Shore, 390 S.C. 543, 703 S.E.2d 499, 506 (2010), *quoting: Dove v. Gold Kist, Inc.,* 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994). The fact that the defendant Estate had a defense based upon the passage of time did not deprive the court of subject matter jurisdiction.[2]

A party within the personal jurisdiction of the court of common pleas — as the Estate was — cannot simply ignore the summons of that court and reserve the right to contest the subject matter jurisdiction of common pleas in another forum.

> "A party that has had the opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment."

Colonial Pacific Leasing Corp. v. Taylor, 326 S.C. 529, 534, 484 S.E.2d 595, 598 (Ct. App. 1997), *quoting: Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). "Even subject matter jurisdiction . . . may not be attacked collaterally." *Kontrick v. Ryan,* 540 U.S. 443, 455 n.9, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), *citing:* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982).

This principle is illustrated in the case of *McCreery v. Covenant Presbyterian Church,* 303 S.C. 271, 400 S.E.2d 130 (1990), dealing with the subject matter jurisdiction of the Workers' Compensation Commission, where our Supreme Court reversed a Court of Appeals decision allowing collateral attack of a finding of subject matter jurisdiction.

> Moreover, contrary to the Court of Appeals' reasoning, the fact that subject matter jurisdiction was not actually litigated in this

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[2] *See: Federal Deposit Ins. Corp. v. Hillcrest Associates,* 233 Conn. 153, 172, 659 A.2d 138, 147 (1995) ("The foreclosure action, of which the deficiency judgment procedure is simply a part, resulting in a supplemental judgment in the same case, is already before the court. Thus, the court already has subject matter jurisdiction over the action before it.").

case supports disallowing a collateral attack.

Id. at 274, 400 S.E.2d at 131. *Accord: South Carolina Dept. of Motor Vehicles v. Holtzclaw,* 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009).

Federal jurisprudence upon the question of subject matter jurisdiction transposes compatibly into our South Carolina caselaw on the same question. The United States Supreme Court has often acknowledged the occasional confusion in its own decisions regarding the distinction between statutes which define subject matter jurisdiction and those which lay down what the Court has come to call "claim-processing rules." Even an emphatic, nonextendable time limit is ordinarily a claim-processing rule. The passage of that time limit does not affect the subject matter jurisdiction of the court which hears the claim.

> [There is a] critical difference between a rule governing subject matter jurisdiction and an inflexible claim-processing rule. Characteristically, a court's subject matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.

Kontrick v. Ryan, 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). *Accord: Eberhart v. United States,* 546 U.S. 12, 19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) ("These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them. Here, where the Government failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense."); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1098 (2006) ("'Jurisdiction,' this Court has observed, 'is a word of many, too many, meanings.' . . . But in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" *Scarborough v. Principi,* 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004)). *Accord: Gonzalez v. Thaler,* ___ U.S. ___, 132 S.Ct. 641, ___ L.Ed.2d ___ (2012); *Dolan v. United States,* 560 U.S. ___, 130 S.Ct. 2533, 177 L.Ed.2d 108 (2010); *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. ___, 130 S.Ct.

1237, 176 L.Ed.2d 18 (2010).[3]

Not only may subject matter jurisdiction not be challenged collaterally; it may no longer be questioned on appeal *in the same action* unless issue–preservation rules are observed. *State v. Oxner,* 391 S.C. 132, 705 S.E.2d 51 (2011).

The Estate's concern that property of the decedent would be rendered unmarketable if the Bank's claim is allowed under these circumstances is unfounded for several reasons. Section 62–3–812 provides that "[n]o execution may issue upon nor may levy be made against any property of the estate under any judgment against a decedent or a personal representative . . . ." The scope of this section is not at issue in this appeal, but it appears to provide protection to a personal representative and perhaps others. More importantly, in this case the Estate was open and being administered. If the Estate had been administered and closed, there would have been no personal representative to sue in the court of common pleas, and no entity in existence capable of allowing the judgment of that court as a claim against the Estate. Finally, the Estate could and should have properly defended itself in the court of common pleas rather than forfeit the defense which it now belatedly presents. Under the narrow circumstances of this case, the allowance of the common pleas judgment as a claim against the Estate opens no Pandora's box, as the Estate contends.

B. Decisions from other jurisdictions relied upon by the Estate are not in point.

The Estate contends that South Carolina's "claims-barring process is based on — and virtually verbatim with — the Uniform Probate Code . . . ." (Brief at 5.) This is not so in a critical particular.

Section 3–803(a) of the Uniform Probate Code reads in material part:

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[3] Confusion about subject matter jurisdiction is found in the caselaw of every jurisdiction, in all likelihood. *Cf. Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003), where our Supreme Court overruled earlier decisions holding that the door–closing statute, Section 15–5–150, is a jurisdictional limitation and held instead that it merely addresses the capacity of a party to sue.

> (a) All claims against a decedent's estate which arose before the death of the decedent . . . , *if not barred earlier by another statute, contract, tort, or other legal basis of limitations or non-claim statute*, are barred. . . unless presented within the earlier of the following . . . .

(Emphasis added.) The General Assembly rejected this wording. South Carolina's version of UPC § 3–803(a), codified here as section 62–3–803(a), reads as follows:

> (a) All claims against a decedent's estate which arose before the death of the decedent . . . , *if not barred earlier by other statutes of limitations,* are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates . . . .

(Emphasis added.) The phrase "***other*** statutes of limitations" means that section 62–3–803(a) itself is a statute of limitations. The General Assembly's deliberate, considered departure from the text of the uniform act can have no other meaning. It is true that our Supreme Court held that the predecessor to section 62–3–803(a) was a nonclaim statute, *Moultis v. Degen,* 279 S.C. 1, 301 S.E.2d 554 (1983), and this Court of Appeals has held that section 62–3–803(a) is a nonclaim statute. *In re Estate of Tollison,* 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct. App. 1995). The statute may serve as a nonclaim statute in matters of estate administration while serving as a statute of limitations for pleading purposes. *Moultis v. Degen,* 279 S.C. 1, 5 n.3, 301 S.E.2d 554, 557 n.3 (1983). This was the holding of the Florida Supreme Court interpreting similar statutes, discussed below.

The Estate cites a number of cases from other jurisdictions adopting various parts of the Uniform Probate Code. Those cases are all distinguishable, starting with the fact that in none of those jurisdictions did the legislature reject the wording of section 3–803(a) of the UPC and rewrite that statute as a statute of limitations, at least for pleading purposes.

> 1. *In Florida, as in South Carolina, an estate forfeits the benefit of the time bars found in the probate code when it fails to assert them as affirmative defenses in an action outside probate court.*

Appellant cites a case decided by Florida's intermediate appellate court for the proposition that claim time limits are jurisdictional. (Brief at 6, *citing Lutheran Brotherhood, etc. v. Estate of Petz,* 744 So.2d 596 (Fla. App. 1999).) One year after *Lutheran Brotherhood,* the Florida Supreme Court decided *May v. Illinois Nat'l Ins. Co.,* 771 So.2d 1143 (Fla. 2000). Interpreting two Florida statutes generally comparable to our section 62–3–803, the court held that Florida's section 733.702, Florida Statutes (1991), is a statute of limitations, not a "true jurisdictional statute of nonclaim . . . ." *Id.* at 1153. Even though the statute is a statute of limitations and not a "jurisdictional statute of nonclaim," it "operates to bar untimely claims . . . even if the time [bar] . . . is not asserted . . . *in the probate proceedings* . . . ." *Id.* (emphasis added). However, if the claimant chooses to proceed with an action "outside of the [probate] court proceedings," the time limit is waived "if not raised as an affirmative defense." *Id.* at 1153.

> This is so because the non-waiver provision contained in section 733.702(3) is, by its own terms, limited to the probate context. See § 733.702(3), Fla. Stat. (1991).

Id. at 1153–54. Interpreting another time bar found in the Florida system — section 733.710, barring any claim not presented within two years of death — the court found that this statute "is a jurisdictional statute of nonclaim that is not subject to waiver or extension *in the probate proceedings.*" *Id.* at 1155 (emphasis added). This statute, too, must be pled as an affirmative defense in an action outside probate court.

Thus, in Florida, the appellant would have forfeited the probate code's time bar provisions — both the statute of limitations provision and the nonclaim provision — in respondent's common pleas foreclosure action unless those provisions were affirmatively

pled. A Florida deficiency judgment would have been valid.[4]

2. *The Colorado, Minnesota, and Mississippi cases are not in point.*

The Estate cites four Colorado cases involving that State's version of section 3–803(a) of the UPC (Brief at 6 nn. 4 & 5), as well as one Minnesota case and one Mississippi case. (Brief at 9 nn. 8 & 10.)

In Colorado, the nonclaim statute of the probate code has indeed been held to be "jurisdictional." Nevertheless, all four cases relied upon by the Estate were direct appeals from a judgment either granting or denying the claim. None was a collateral attack which implicated Colorado's version of our section 62–3–806(d), which provides:

> (d) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

See: Estate of Nauert v. Morgan-Nauert, 274 P.3d 799 (N.M. Ct. App. 2012) ("Generally, a judgment obtained in another court against a personal representative is considered an allowed claim against an estate . . . . *See* [NMSA 1978,] § 45-3-806(D) . . . ."). Colorado's version of section 3–803(a) of the UPC was not altered to read "other statutes of limitation," as ours was. Our General Assembly's rejection of the uniform code's language makes our section 62–3–803(a) more akin to a statute of repose — at most — than a true, jurisdictional statute of nonclaim. In Colorado as in South Carolina, a statute of repose must be pled and proved. A statute of repose does not deprive the court of subject matter jurisdiction. *Dunton v. Whitewater West Recreation, Ltd.,* 942 P.3d 1348 (Colo. App. 1997). *Accord: Square D Co. v. State Farm Fire & Cas. Co.,* 610 So.2d 522 (Fla. App. 1992).

The Minnesota case relied upon by the Estate (Brief at 9 n.8) was a direct appeal from a deficiency judgment, not a collateral attack implicating Minnesota's analog to our

[4] What the Florida creditor could have done with its judgment is another question. Florida appears to have no analog to our section 62–3–806(c), providing that "[a] judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim."

section 62–3–806(d), quoted above. Like South Carolina, Minnesota does not permit collateral attack of a judgment for alleged lack of subject matter jurisdiction. *Bode v. Minnesota Dept. of Natural Resources,* 594 N.W.2d 257 (Minn. Ct. App. 1999).[5]

In the Mississippi case cited by the Estate, no deficiency judgment was sought or entered. The court's opinion in material part was dictum.

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[5]

> [Minnesota cases are] consistent with the general approach of the RESTATEMENT (SECOND) OF JUDGMENTS that restricts post-judgment attacks on subject-matter jurisdiction. RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1977). The Restatement's position is based on the importance of finality in judgments and a recognition that by adjudicating an action, a court has tacitly determined it has subject-matter jurisdiction. *See Stoll v. Gottlieb,* 305 U.S. 165, 171-72, 59 S.Ct. 134, 137, 83 L.Ed. 104 (1938) (in rendering a judgment, court "tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter"); RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. a (discussing finality). . . . When a judgment has been entered that is not a plain usurpation of authority or a violation of due process, a societal interest in finality is significant, and it is equally significant to create procedures that require arguments on jurisdictional issues to be raised in the original litigation. . . . "A rule that voids a solemn judgment whenever one of the parties chooses to attack it is a rule asking for trouble."

Id. at 262–63 (*quoting* Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle,* 53 VA. L. REV. 1003 (1967)).

CONCLUSION

The Estate intentionally defaulted in response to the Bank's claim for a deficiency judgment, confident that it could ignore the court of common pleas in reliance upon its subject matter jurisdiction defense. That reliance was unjustified. Just as a creditor must pay the price when it is lulled into missing the claims filing deadlines in probate court, so the Estate must assert its rights in the court of common pleas in a timely fashion or lose them. The rules in both courts must be respected.

The Bank's claim against the Estate is a just one for monies lent but not repaid. If the Estate wished to avail itself of a defense based upon procedural time limits, it was bound to follow the procedural rules which apply to such a defense, but failed to do so.

For these reasons the respondent asks the Court to affirm the judgment.

Respectfully submitted,

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February 25, 2013.

THE STATE OF SOUTH CAROLINA
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COURT OF COMMON PLEAS

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A/K/A Margaret D. Hover:

Beach First National Bank, ... Respondent,

v.

The Estate of Margaret Gurnham A/K/A Margaret D.
Hover and/or Brian Hover, its personal
representative, ... Appellants.

CERTIFICATE OF SERVICE

I certify that I served a copy of respondent's amended final brief by first class mail, postage prepaid, addressed to appellant's attorney at his address of record, namely:

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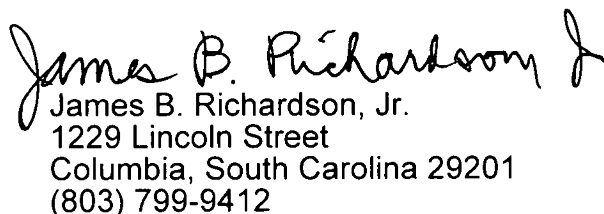

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Case No. 2001-CP–07–3033

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A/K/A Margaret D. Hover:

Beach First National Bank, ... Respondent,

v.

The Estate of Margaret Gurnham A/K/A Margaret D.
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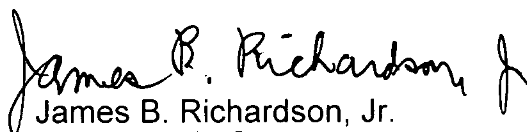
CERTIFICATE OF COUNSEL

I certify that respondent's amended final brief complies with Rule 211(b), SCACR.



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February 26, 2013

Honorable Jenny A. Kitchings
Clerk of the S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Beach First National Bank v. Estate of Margaret Gurnham
2012-207047

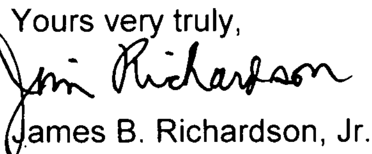
Dear Ms. Kitchings:

Your office pointed out an error in the caption used in the respondent's final brief and required its correction.

For that purpose I enclose for filing the amended final brief of respondent, correcting the caption. Kindly discard the final brief originally filed.

Thanking you, I remain

Yours very truly,



James B. Richardson, Jr.

cc: J. Brent Kiker, Esq.
Wm. Weston J. Newton, Esq.

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SC Court of Appeals