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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS
H. STEVEN DEBERRY, IV, CIRCUIT COURT JUDGE
CASE NO.: 2020-CP-22-00991**

APPELLATE CASE NO.: 2022-000058

Michael Mares and Emergency Power, LLC..... Appellants,

v.

Bradley Douglas Marx (deceased) and Catherine Marx, Individually, and in her capacity as
Personal Representative of the Estate of Bradley Douglas Marx.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court correctly dismiss the claims of Appellants Michael Mares and Emergency Power, LLC against Respondents Catherine Marx, individually and as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified in the Complaint as Bradley Douglas Marx (deceased)) where the claims were not filed timely or in accordance with the South Carolina Probate Code?
- II. Did the trial court correctly grant dismissal where the claims of Appellants were barred by the non-claim statute and Appellants failed to present even a scintilla of evidence to support the application of an exception to the non-claim statute after a full and fair opportunity for discovery on the issue?
- III. Did the trial court correctly find the non-claim statute was unaffected by the South Carolina Supreme Court Orders related to the COVID-19 pandemic where the Orders unambiguously provided no relief to Appellants in the absence of legislative action?

STATEMENT OF THE CASE

Appellant Michael Mares and Bradley Douglas Marx, deceased, formed a limited liability company, Appellant Emergency Power, LLC (the “Company”), in or about September of 1996 in the State of Michigan. Both were members of the Company, each owning a 50% membership in the Company. In 2018, Bradley Douglas Marx (“Decedent”) moved to Georgetown County, South Carolina and purchased a home with his wife, Respondent Catherine Marx. Decedent died on November 24, 2019, and Respondent Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020, by the Georgetown County Probate Court.

Subsequently, Appellants filed a Notice of Claim on September 1, 2020, within the Estate of Bradley Douglas Marx. In the Notice of Claim, Appellants asserted claims against the Estate, alleging the Estate was liable for Decedent’s alleged embezzlement from the Company beginning on or about April 16, 2013, purportedly continuing until the time of his death in November of 2019. [Statement of Creditor’s Claim]. Upon receipt and consideration of Appellants’ Notice of Claim, counsel for the Estate filed a Notice of Disallowance of Claim with the Probate Court on October 16, 2020, and mailed the Notice to counsel for Appellants on October 22, 2020, as evidenced by the Proof of Delivery filed with the Probate Court. [Notice of Disallowance of Claim and Proof of Delivery]. The Notice of Disallowance contained a warning, as required by statute, that Appellants’ claims would be forever barred unless a legal proceeding was commenced within thirty (30) days after the mailing of the Notice of Disallowance. [Notice of Allowance/Disallowance of Claim]. Appellants failed to file a Summons and Petition for allowance of claim within thirty (30) days of October 22, 2020, in the Probate Court. To date, Appellants have not filed a Summons and Petition for allowance of their claims in the Probate Court.

Appellants instead filed a Summons and Complaint with the Georgetown County Court of Common Pleas on December 7, 2020, asserting causes of action against Respondents for Conversion, Unjust Enrichment, and Constructive Trust. Specifically, Appellants allege Decedent used the Company's credit card to make personal purchases, transferred Company funds to his personal banking account, withdrew Company funds to purchase a personal vehicle not used for Company purposes, and paid himself unapproved bonuses using Company funds. The Complaint filed by Appellants mirrors the Notice of Claim presented in the Probate Court; while the allegations have been repackaged suitable for filing in the circuit court, the allegations and underlying claims are identical.

In response to the Complaint, Respondents filed a Motion to Dismiss ("Motion") on January 11, 2021, primarily based upon the applicable time limitations of the non-claim statute at issue, as well as Appellants' failure to comply with the South Carolina Probate Code. A hearing on the Motion was held before the Honorable Judge Steven H. John, Resident Circuit Court Judge for the Fifteenth Judicial Circuit, on February 4, 2021, via electronic communications where both parties were represented by counsel. At the conclusion of the hearing, the trial court took the matter under advisement after Appellants' counsel presented additional argument regarding the potential for liability insurance coverage, which if applicable, could have affected the trial court's decision. Respondents submitted a supplemental brief to the trial court on the issue. [Supplemental Memorandum of Law in Support of Motion, dated February 8, 2021].

Thereafter, on February 8, 2021, the trial court sent correspondence to counsel for both parties, continuing the Motion hearing for ninety (90) days, during which time the parties were to conduct discovery on the existence of any applicable liability insurance coverage for the claims asserted by Appellants against Respondents. [Correspondence dated February 8, 2021]. Upon the

expiration of the court-ordered discovery period, the trial court advised counsel for the parties the Motion would be placed back upon the general motion roster for re-hearing on the issues of liability insurance coverage, as well as the application of the South Carolina Supreme Court Order issued April 3, 2020, related to the extension of time and forgiveness of procedural defaults because of the COVID-19 pandemic. At the request of Respondents' counsel, once discovery was completed on the issue of liability insurance coverage (which exceeded the time period provided by the trial court and lasted for over nine months), the Motion was scheduled for re-hearing by the lower court on November 12, 2021, before the Honorable H. Steven DeBerry, IV, in Georgetown County, where all parties were represented by counsel.

Prior to the re-hearing of the Motion, Respondent Catherine Marx filed with the trial court an affidavit, produced to Appellants during the course of discovery, in which she swore and affirmed, under penalty of perjury, she had no knowledge of the existence of a liability insurance policy providing coverage to any Respondent for the claims and conduct asserted in the Complaint. [Affidavit of Catherine Marx]. During discovery, Appellants produced four liability insurance policies, and Respondents produced a policy of insurance providing liability coverage involving the use of a motor vehicle. However, no party could identify a policy of liability insurance which would provide coverage to any Respondent for the conduct and claims alleged by Appellants in the Complaint.

After taking the Motion under consideration, on December 2, 2021, the trial court issued its Order granting Respondents' Motion. [Order dated December 2, 2021]. Appellants filed a Motion for Reconsideration on December 10, 2022, which was denied by Order of the Court on January 7, 2022. [Order dated January 7, 2022]. Thereafter, Appellants commenced this appeal.

STANDARD OF REVIEW

Dismissal Pursuant to Rule 12(b)(6), SCRPC

In reviewing a decision to dismiss a complaint pursuant to Rule 12(b)(6), SCRPC, “an appellate court applies the same standard of review as the trial court.” Hager v. McCabe, Trotter & Beverly, P.C., 435 S.C. 740, 746, 869 S.E.2d 886 (Ct. App. 2022). A trial court may properly grant a motion to dismiss for failure to state facts sufficient to constitute a cause of action when facts alleged in the complaint, along with all reasonable inferences deducible therefrom, do not entitle the plaintiff to recovery on any theory of the case. Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) (*citing* Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

When an action is barred by the expiration of the applicable statute of limitations, a defendant may move pursuant to Rule 12(b)(6) for dismissal of an action. Spell v. S.C. Dept. of Hwys. & Pub. Trans., 292 S.C. 228, 355 S.E.2d 860 (1987). When deciding a motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Court should consider only the allegations set forth on the face of the complaint. Stiles, at 300, 457 S.E.2d at 602 (1995). As such, the Court’s consideration of the Motion to Dismiss must be confined to the four corners of the Complaint. Id.

However, in this case, Respondents moved the lower court to dismiss the Complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, asserting the claims are time-barred by the non-claim statute and the applicable time limitations contained within the statute. While a Rule 12(b)(6) motions are normally determined by reference solely to the allegations of the

Complaint, where, as here, the moving party premises the motion to dismiss upon the timeliness of the commencement of an action, in the interest of justice and judicial economy, the trial court is free to withhold a determination until such time as the non-moving party has a full and fair opportunity to conduct discovery so as to enable the party to address the timeliness of filing. In such cases, the Court may consider evidence or facts which tend to disprove the grounds for the motion, even if not contained in the Complaint. See e.g., Coker v. Nationwide Mutual Insurance Co., 243 S.C. 170, 175-176, 133 S.E.2d 122, 125 (1963). Additionally, allowing the parties a full and fair opportunity to conduct discovery on the issue of timeliness provides the non-moving party with additional time in which to amend their pleadings to overcome new issues raised in the motion to dismiss. Id. In the present case, no amendment was filed, and no additional evidence or facts were presented to the lower court by Appellants to overcome the issues of timeliness raised in Respondents' Motion to Dismiss.

Summary Judgment

To the extent this Court determines the lower court converted the Motion to Dismiss to one for summary judgment on the issue of liability insurance coverage after the initial hearing and subsequent order permitting discovery on the issue of the existence of liability insurance coverage, this Court similarly applies the same standards that govern the trial court under Rule 56, SCRPC. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003).

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. George v. Fabri, 345 S.C. 440, 548

S.E.2d 868 (2001). At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleading. Bravis v. Dunbar, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Rather, the nonmoving party must set forth or point to specific facts showing that there is a genuine issue for trial. Id. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. Id.; Barr v. City of Rock Hill, 330 S.C. 640, 642, 500 S.E.2d 157, 158 (Ct. App. 1998); Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 526, 469 S.E.2d 630, 632 (Ct. App. 1996). Likewise, it is not sufficient to create an inference which is not reasonable or an issue of fact that is not genuine. "The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Priest v. Brown, 302 S.C. 405, 408-409, 396 S.E.2d 638, 639-640 (Ct. App. 1990) (citing Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984)).

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THE CLAIMS OF APPELLANTS WERE NOT FILED TIMELY OR IN ACCORDANCE WITH THE SOUTH CAROLINA PROBATE CODE.

A. The Claims Asserted by Appellants in their Complaint Were Not Filed Within One Year of the Death of the Decedent or Within Eight Months After Publication.

As alleged in the Complaint filed by Appellants, the Decedent died on November 24, 2019, and Respondent Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020. Appellants filed the underlying action on December 7, 2020, more than one year

after the death of the Decedent in violation of the time deadlines contained in the South Carolina Probate Code. In relevant part, the South Carolina Probate Code provides the following:

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; ***are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following:***

- (1) ***one year after the decedent's death; . . .***
- (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication ***[within eight months after the date of the first publication].***

S.C. Code Ann. § 62-3-803(a)(1) and (a)(2) (emphasis supplied).

The Probate Code defines ‘claims’ as “liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent.” S.C. Code Ann. § 62-1-201(4). Appellants' Complaint includes allegations of conversion, unjust enrichment, and constructive trust against the Decedent, Catherine Marx in her capacity as the Personal Representative of the Estate of Bradley Marx, and against Catherine Marx individually. Thus, the causes of action asserted in the Complaint are undoubtedly ‘claims’ as defined by the Probate Code. As such, Appellants were required to file their claims on or before November 24, 2020, when the creditors’ claims period expired, but they failed to do so.

Notably, the time limitation set forth in the Probate Code applies not only to claims against the Estate of Bradley Douglas Marx but also to the claims asserted against Defendant Catherine Marx, individually (as an alleged “nonprobate transferee” of Bradley Douglas Marx) and as Personal Representative of the Estate of Bradley Douglas Marx. S.C. Code Ann. § 62-3-803. As

such, because the Complaint was filed in this action more than one year after the death of Bradley Douglas Marx, the Complaint is untimely, and the Court finds dismissal is appropriate as a matter of law.

B. The Claims Asserted by Appellants in their Complaint Were Not Filed Within Thirty Days of the Mailing of the Notice of Disallowance of Claim.

As noted above, when an allegation is made against the estate of a decedent, whether arising in contract, in tort, or otherwise, it is considered a “claim” under the South Carolina Probate Code. S.C. Code Ann. § 62-1-201(4). The South Carolina Probate Code provides a specific mechanism for presenting claims against a decedent’s estate. S.C. Code Ann. § 62-3-804. Under this provision, claimants, such as Plaintiffs, “may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, and must file a written statement of the claim, in the form prescribed by rule, with the probate court in which the decedent's estate is under administration.” S.C. Code Ann. § 62-3-804(1)(a). Thereafter, the Personal Representative “must serve upon the claimant a notice stating the claim has been allowed or disallowed in whole or in part.” S.C. Code Ann. § 62-3-806(a). Service of the notice may be made by “United States mail, personal service, or otherwise as permitted by rule and a copy of the notice shall be filed with the probate court along with proof of delivery setting forth the date of mailing or other service on the claimant.” Id.

In the case of a disallowance of claim, the notice “must contain a warning that the claim will be barred to the extent disallowed unless the claimant commences a proceeding for allowance of the claim in accordance with Section 62-3-804(2) within thirty days of the mailing or other service of the notice of disallowance or partial disallowance.” Id. The statute further provides in the event a claimant fails to initiate a proceeding for allowance of the claim within thirty days after the notice of disallowance is mailed, the claim is barred. Id.

Appellants filed properly a Notice of Claim on September 1, 2020, with the Georgetown County Probate Court. In response, the Personal Representative filed a Notice of Disallowance of Claim, which was mailed to counsel for Appellants on October 22, 2020. Appellants failed to file a Summons and Petition for Allowance of Claim within thirty days of October 22, 2020 and, accordingly, Appellants' claims were forever barred pursuant to S.C. Code Ann. § 62-3-804(5) which reads: "...no proceeding for enforcement or allowance of a claim or collection of a debt may be commenced more than thirty days after the personal representative has mailed a notice of disallowance or partial disallowance of the claim in accordance with the provisions of Section 62-3-806 [direction regarding allowance or disallowance of claims]."

Unbothered, Appellants filed the present action on December 7, 2020, more than one year after the death of Bradley Douglas Marx and more than thirty days after October 22, 2020, in violation of the deadlines contained in the South Carolina Probate Code and in violation of *res judicata*, as the Complaint filed by Appellants mirrors exactly the disallowed claim presented in the Probate Court.

C. The Claims Asserted by Appellants in their Complaint as to Respondent Catherine Marx, Individually, Were Properly Dismissed by the Trial Court.

Appellants, in their Initial Brief, focus their argument of reversible error on the trial court's dismissal of all claims on the premise that "[c]laims against the Respondent Catherine Marx in her individual capacity would not be barred by the provisions of the Probate Code that the Court has relied upon in dismissing the Appellant's claims." [App. Initial Brief]. However, just as Appellants' claims against Respondent Catherine Marx, as Personal Representative of the Estate, were properly dismissed pursuant to S.C. Code Ann. § 62-3-803(a) (claims made against a decedent's estate that are barred by the applicable statute of limitations are also barred against the

personal representative), Appellants' claims against Respondent Catherine Marx, individually, were similarly, properly barred.

Respondent Catherine Marx, as wife of the Decedent, is not only his sole intestate heir, but a devisee under the Decedent's Last Will and Testament filed under Case Number 2020-ES-22-0019, and a non-probate transferee of the Decedent. S.C. Code Ann. §§ 62-3-803(a) also states that claims made against a decedent's estate that are barred by the applicable statute of limitations are also "barred against...the decedent's heirs and devisees, and nonprobate transferees of the decedent... ." Therefore, Appellants claims against Respondent Catherine Marx as heir, devisee, and non-probate transferee were properly barred, and the trial court did not err in dismissing the matter. Further, since the trial court's Order provided the dismissal was without prejudice as to Respondent Catherine Marx and could be refiled if additional evidence was found and pled against her and filed within the applicable time period, Appellants could have filed an amended action against her, but they have failed to do so. The Complaint filed did not properly assert facts against Respondent Catherine Marx sufficient to constitute a cause of action against her individually, and the trial court properly dismissed the action in its entirety since the allegations contained in the Complaint were against the Decedent.

D. The Trial Court Applied the Appropriate Statutes in Determining the Timeliness of Appellants' Complaint.

Under the South Carolina Probate Code, the probate courts of our state have exclusive original jurisdiction over various matters including all subject matters related to "estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons... ." S.C. Code Ann. § 62-1-302(a)(1). This jurisdiction includes the ability to hear and rule on claims filed against an estate. The Probate

Code defines ‘claims’ as “liabilities of the decedent...whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent...” and encompass claims made the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent.” S.C. Code Ann. § 62-1-201(4); See S.C. Code Ann. § 62-3-803(a).

Appellants argue they discovered the alleged embezzlement of Respondents in May of 2020 – well before the end of the creditor claim period on November 24, 2020. In its’ Order, the trial court properly found that the causes of action asserted in Appellants’ Complaint are “undoubtedly ‘claims’ as defined by the Probate Code.” [Order Granting Respondents’ Motion to Dismiss]. Therefore, it follows that claims as liabilities of the decedent are subject to the Probate Code’s statute of limitations; a cause of action arising from an alleged liability of a decedent is considered a claim against the deceased’s estate, causing the claim to fall under the exclusive original jurisdiction of the probate court and activating the applicability of the probate code’s statute of limitations.

However, the South Carolina Probate Code does provide a process for petitioners to litigate their claims in South Carolina Circuit Courts by way of concurrent jurisdiction:

(3) In lieu of the procedure provided in subsections (1) and (2) [related to bringing an action in the probate court], and subject to subsection (6) [no proceeding may be commenced in any venue until a PR has been appointed], a claimant may commence a legal proceeding against the personal representative, *by the filing of a summons and petition for allowance of claim or complaint in any court where the personal representative may be subjected to jurisdiction*, seeking payment of his claim by the estate, and serving the same upon the personal representative. *The commencement of the legal proceeding under this subsection must occur within the time limit for presenting the claim as set forth in Section 62-3-803.* If the legal proceeding is not commenced in the probate court, the claimant must file a written statement of the claim with the probate court in which the decedent’s estate is under administration

providing substantially the same information as the statement in subsection (1), along with a statement that a legal proceeding to enforce the claim has commenced, and identifying the court where the proceeding is pending.

S.C. Code Ann. § 62-3-804 (emphasis added).

Even so, as Appellants' claims stem from liabilities of the Decedent, they are still subject to the Probate Code's statute of limitations as "*[t]he commencement of the legal proceeding under this subsection must occur within the time limit for presenting the claim as set forth in Section 62-3-803.*" S.C. Code Ann. § 62-3-804 (emphasis added). Certainly, the Probate Code does not require litigants to engage in "procedural hoop-jumping," but S.C. Code Ann. § 62-3-804 makes it clear that claims arising from liabilities of the Decedent remain subject to the Probate Code's statute of limitations, even when a claimant's legal proceeding is filed in another court of competent jurisdiction; filing a claim against a Decedent in the Court of Common Pleas does not suddenly allow the claim leniency in regard to the applicable probate statute of limitations. Therefore, Appellants' claims, even filed in the Court of Common Pleas, are subject to the South Carolina Probate Code's statute of limitations. To date, no notice has been filed in Probate Court of by Appellant as set forth in South Carolina Code Section 62-3-804(3). The Circuit Court properly relied solely on the S.C. Probate Code in determining the appropriate statute of limitations, and dismissal was proper.

II. THE TRIAL COURT CORRECTLY FOUND THE CLAIMS OF APPELLANTS WERE BARRED BY THE NON-CLAIM STATUTE, AND NO EVIDENCE WAS PRESENTED TO SUPPORT THE APPLICATION OF AN EXCEPTION TO NON-CLAIM STATUTE BY APPELLANTS AFTER A FULL AND FAIR OPPORTUNITY FOR DISCOVERY ON THE ISSUE.

Our courts have repeatedly held that "statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system." Pelzer v. State, 378 S.C. 516, 520, 662

S.E.2d 618, 620 (Ct. App. 2008) (citing Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996)). Recognizing the significance of such statutes, the Court held:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Id. (holding the statute of limitations barred a *pro se* PCR petition filed two days after the statute of limitations expired even though it was mailed prior to the expiration of the statute).

The statute at issue here (S.C. Code Ann. § 62-3-803) is a nonclaim statute, which differs from a traditional statute of limitations as this Court has explained:

A nonclaim statute . . . grants to every person having a claim of any kind or character against a decedent's estate, the right to file the same in the court having jurisdiction thereof and have the same adjudicated, provided such claim is filed within the time specified in the statute. ***Unless such claim is filed within the time so allowed by the statute, it is forever barred. The time element is a built-in condition of the said statute and is of the essence of the right of action. Unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.***

While such statutes limit the time in which a claim may be filed or an action brought, they have nothing in common with and are not to be confused with general statutes of limitation. The former creates a right of action if commenced within the time prescribed by the statute, whereas the latter creates a defense to an action brought after the expiration of the time allowed by law for the bringing of such an action.

Phillips v. Quick, 399 S.C. 226, 229-231, 731 S.E.2d 327, 329 (Ct. App. 2012) (quoting Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA, 684 N.E.2d 1137, 1138-39 (Ind. 1997)) (emphasis supplied).

Further, “[w]hile equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.” *Id.* (quoting Estate of Decker, 684 N.E.2d at 1139); see also, 51 Am. Jur. 2d *Limitation of Actions* § 3 (2011) (“The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.”). As such, when evaluating the timeliness of Appellants’ Complaint, the discovery rule is inapplicable, and the trial court would have committed reversible error if the court had applied the discovery rule when considering Respondents’ Motion. Phillips, 399 S.C. at 231-232, 731 S.E.2d at 329-330.

Appellants rely on the following provision of the nonclaim statute contained in the Probate Code in support of their contention that the general one-year deadline for commencing an action should not apply to the claims contained in their Complaint:

Nothing in this statute shall be construed as placing a limitation on a time for: ... ***to the limits of the insurance protection only, commencing a proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.***

S.C. Code Ann. § 62-3-803(d)(2) (emphasis supplied) (hereinafter the “liability insurance limits coverage exception”).

South Carolina case law related to the liability insurance limits coverage exception is reserved primarily to cases involving automobile and malpractice insurance. See e.g., Ex Parte Estate of Evans, 299 S.C. 366, 384 S.E.2d 748 (1989) (permitting the plaintiff to reopen the estate of a deceased doctor after one year to assert a medical malpractice claim against the decedent and his malpractice insurance carrier). Appellants provided the trial court with no legal authority to

support the application of the liability insurance limits coverage exception in cases involving alleged intentional, *ultra vires* misconduct on the part of a member of a limited liability company. The reported cases demonstrate the liability insurance limits coverage exception to the non-claim statute applies in cases where the Complaint itself reveals the potential for liability insurance coverage. Appellants' Complaint in the underlying case contains no such allegations, and even after a full and fair opportunity for discovery on the issue of potential liability insurance coverage, there was no amendment of the Complaint.

There is no allegation in Appellants' Complaint to support a finding: (1) there is a policy of insurance; (2) the Decedent was insured under any policy of insurance; (3) there is any provision in any policy of insurance that would afford liability coverage for the conduct alleged in the Complaint; or (4) the limits of the insurance protection. Appellant Mares alleged he and the Decedent were the sole members of the Company, and if such a policy existed, Appellants would likely be aware of the same at the time of filing. Further, the absence of such an allegation in the Complaint leads to the reasonable inference that no such liability policy exists. Regardless of whether the Company or any Respondent carried liability insurance affording coverage, the trial court was confined to the allegations on the face of the Complaint, which fails to set forth any facts supporting the application of a statutory deadline other than the one-year time limitation contained in the non-claim statute, S.C. Code Ann. § 62-3-803(a)(1).

Even assuming a liability policy exists, nothing in Appellants' Complaint sets forth conduct or actions which would lead the trial court to infer such claims would be covered by liability insurance. Appellants alleged the actions and conduct of the Decedent were taken in his individual capacity and not as an officer or director of the Company. It is the nature of the Decedent's alleged *ultra vires* actions and conduct that forms the basis of Appellants' Complaint. Repeatedly,

Appellants alleged the Decedent acted intentionally and deliberately in converting company funds and assets for his personal use.

Appellants provided the trial court with no case law in which intentional torts were held to be covered by a liability insurance policy when the allegations related to purported *ultra vires* actions of a defendant in his or her individual capacity. To the contrary, the overwhelming case law supports the proposition that intentional torts are not typically covered by insurance. See Prior v. S.C. Medical Malpractice Liab. Ins. Joint Underwriting Ass'n, 305 S.C. 247, 407 S.E. 2d 655 (Ct. App. 1991); Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989).

Furthermore, there are no allegations in the Complaint Respondent Catherine Marx was an officer or director of Emergency Power, LLC or that she had any access whatsoever to Company funds, records or accounts. As such, the trial court could not infer reasonably any liability insurance policy for the Company or otherwise would provide coverage for Respondent Catherine Marx based upon the conduct alleged in the Complaint. Even more, the existence of a liability policy providing coverage for Respondent Catherine Marx was not pled and is not contained in the allegations of the Complaint. Appellants alleged causes of action for Conversion, Unjust Enrichment and Constructive Trust, and Appellants did not provide the trial court with any legal authority to support a finding these types of intentional and equitable claims would be subject to liability insurance coverage. Finally, the liability insurance limits coverage exception applies to “the limits of the insurance protection only.” S.C. Code Ann. § 62-3-803(d)(2). There is no allegation contained in the Complaint as to what the limits of any liability insurance policy are, and Appellants’ demand for relief is not confined to the limits of any available coverage. Therefore, there was no basis upon which the trial court could have found for the application of

the liability insurance limits coverage exception to the general one-year time limitation contained in S.C. Code Ann. § 62-3-803(a)(1).

During the initial hearing on the Motion to Dismiss, counsel for Appellants conceded the underlying action was not commenced in compliance with the procedures set forth in the Probate Code or within one year after the Decedent's date of death. [Transcript of Hearing]. Since the applicable statute is a nonclaim statute, there is no equitable or other relief available to Appellants in this matter based upon the failure to file timely and to follow the procedures outlined in the Probate Code. See Beach First Nat'l Bank v. Gurnham (In Re Estate of Gurnham), 407 S.C. 194, 754 S.E.2d 875 (2014) (holding that unless S.C. Code Ann. § 62-3-803 is complied with, the claim is barred); Anderson Area Med. Ctr. v. Tollison (In Re Estate of Tollison), 320 S.C. 132, 135, 463 S.E. 2d 611, 613 (Ct. App. 1995) (same); A. McCoy's, Inc. v. Garner, 281 S.C. 378, 380, 315 S.E.2d 812, 813 (Ct. App. 1984) (holding that [S.C. Code Ann. § 62-3-803] was a nonclaim statute which bars all claims which are not timely filed); Moultis v. Degen, 279 S.C. 1, 301 S.E.2d 554 (1983) (holding that [S.C. Code Ann. § 62-3-803] bars all untimely claims including actions against assets distributed to the beneficiaries of the estate).

The trial court, therefore, correctly found Appellants failed to meet the statutory filing requirements to survive Respondents' Motion to Dismiss. Appellants' reliance on S.C. Code Ann. § 62-3-803(d)(2) is misplaced, as there are no allegations contained in the Complaint to support a finding that there is a policy of insurance providing liability protection to Respondents, and Appellants failed to allege the limits of any such policy or limited their demand for relief to such limits.

As such, the trial court found correctly the general one-year statute applied to the claims of Appellants, and as alleged, the claims are time-barred as a matter of law. Thus, dismissal of the Complaint was appropriate and proper as a matter of law.

III. THE TRIAL COURT CORRECTLY FOUND THE NON-CLAIM STATUTE WAS UNAFFECTED BY THE ORDERS OF THE SOUTH CAROLINA SUPREME COURT RELATED TO THE COVID-19 PANDEMIC IN THE ABSENCE OF LEGISLATIVE ACTION.

Appellants argue they should have been afforded an additional thirty days to file their Summons and Complaint due to the South Carolina Supreme Court's IN RE: Operation of the Trial Courts During the Coronavirus Emergency, dated April 3, 2020, as Amended December 16, 2020, Appellate Case No. 2020-000447 ("COVID Orders"). Specifically, Appellants rely on the following language: "Due to the increased need for extensions at the start of this emergency... and the due dates for trial court filings due on or after April 3, 2020 were automatically extended for thirty (30) days." COVID Orders at § (9)(A). Presumably, Appellants refer to this language because they view their Summons and Complaint as a "trial court filing," created in response to the Personal Representative's Disallowance of Claim. However, Appellants do not mention their disallowed claim *once* in their Summons and Complaint; their pleadings can only be construed as a wholly separate attempt to litigate substantially similar claims against the Decedent and his estate, as opposed to filing pleadings seeking allowance of their disallowed claim, as the Probate Code demands. See S.C. Code Ann. § 62-3-806(a).

As a wholly separate attempt to litigate their claims, it is clear the trial court properly reviewed and applied the COVID Orders, which expressly declined to toll established statutes of limitations:

Statute of Limitations, Repose and Other Similar Statutes. This Court is aware this emergency has already affected the ability of

litigants to commence legal actions and this adverse impact will most likely increase significantly as this pandemic progresses. The Judicial Branch has raised this concern to the leadership of the General Assembly as this issue relates to the statute of limitations, statutes of repose and similar statutes such as S.C. Code Ann. § 15-36-100. *While this Court has recognized the existence of judicial authority to toll a statute of limitations in other situations, it would be inappropriate for this Court to consider at this time what relief, if any, may be afforded to a litigant who is unable to file a civil action or take other actions under these statutory provisions due to this emergency.*

COVID Order, at 9. Section (c)(12) (emphasis added).

Even if statutes of limitations were tolled due to the COVID-19 pandemic, the statute at issue here (S.C. Code Ann. § 62-3-803) is a nonclaim statute, which differs from a traditional statute of limitations as this court has previously expressed. See Phillips, 399 S.C. at 229-231, 731 S.E.2d at 329 (Ct. App. 2012). As such, the trial court concluded properly the non-claim statute at issue here is unaffected, and did not err in interpreting the COVID-19 Orders.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Court affirm the lower court's Order.

Respectfully submitted,

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Myrtle Beach, South Carolina
August 4, 2022

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable H. Steven DeBerry, IV, Circuit Court Judge
Case No.: 2020-CP-22-00991

Case No.: 2022-000058

Michael Mares and Emergency Power, LLC.....Appellants,

v.

Bradley Douglas Marx (deceased) and Catherine Marx, Individually and in her capacity as
Person Representative of the Estate of Bradley Douglas
Marx..... Respondent.

PROOF OF SERVICE

I do hereby certify that on the 4th day of August 2022, I served a copy of the Initial Brief
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