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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas  
Honorable Diane S. Goodstein, Circuit Judge

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Appellate Case No. 2021-001413

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Jacquelyn Gladden and Patricia Reed . . . . . Respondents

v.

Cyndy Reed Stewart. . . . . Appellant.

**FINAL RESPONDENTS BRIEF**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did the Circuit Court err in finding that it had subject matter jurisdiction over the actions undertaken by Appellant related to the real property conveyed during the life of the Decedent?**
  
- II. Was the entirety of the Older Sisters' Complaint rendered moot when Appellant agreed to convey the property back to the estate, notwithstanding no adjudication as to the separate issues of Forgery, Fraud, and Misrepresentation, and Breach of Fiduciary Duty, Breach of Trust, and Self-Dealing?**
  
- III. Was there sufficient evidence to support a finding of willful and wanton conduct, as well as proper justification for an award of attorney's fees and costs?**

## STATEMENT OF FACTS

The facts of this case extend back beyond the start of any litigation between the parties. Ms. Theodocia Reed (the “Decedent”) was diagnosed with both dementia and Parkinson’s sometime in the early 2000’s. There is a factual dispute of exactly when these diagnoses occurred, but it is agreed by Cyndy Reed Stewart (the “Appellant”), Jacquelyn Gladden and Patricia Reed (collectively the “Older Sisters”) that the Decedent was diagnosed with two progressive and eventually debilitating diseases. The prior orders of the Richland County Probate Court provide that the Decedent became incompetent after October 19, 2009, but before May 25, 2010, when all the Decedent’s children agreed she was then incompetent. *Cf. R. pp. 485-498*. The first Richland County Probate Court found both Appellant and the Older Sisters owed the Decedent funds, and all were in contempt for failing to return these funds by the May 25, 2010, hearing. It is also important to note that the Order from the October 19, 2009, hearing, dated December 29, 2009, precluded all the children from selling any property owned by Decedent, as well as requiring Appellant to provide full financial information to the Older Siblings. *R. p. 492*. At this time, the Decedent owned real property of a residence in Orangeburg County, a residence in Bamberg County, and farm/timberland in Bamberg County. This Order was never overruled or otherwise revoked, and all three (3) sisters were present at the hearing and knew about the prohibition.

Prior to these Petitions being considered in Richland County, a set of competing power of attorneys were executed June 9, 2008. After execution by Decedent, the drafting attorney sent all three sisters a letter on June 23, 2008, informing them on how to properly sign as power of attorneys. *R. p. 483*. This is inconsistent with the argument of Appellant that she knew how to sign as Power of Attorney but elected to rely on the Georgia notary. *R. pp. 432, lines 23-25; 433, lines 1-8; 447, lines 17-23; 460, lines 9-25; 461, lines 1-19*.

After this hearing and Order and pursuant to the Court's recommendation in its order, the Decedent executed three new powers of attorney in January 2010, giving each of the sisters a different power. Appellant was specifically given authority over the Decedent while she was in Florida and **specifically prohibited from disposing, transferring, or otherwise conveying any real property.** *R. p. 504.* Ms. Gladden was given a springing power that would become active at the Decedent's incapacity. *R. p. 531.* All three received these powers of attorneys and were aware of them. This was also to effectuate a visitation schedule wherein Decedent spent six (6) months in Florida and six (6) months in South Carolina. *R. p. 18.*

There was another portion to the Richland Probate Actions that Appellant raised at trial. Appellant complained of \$8,000.00 "wrongfully" used by the Older Sisters to pay for the legal fees the Older Sisters incurred in the Guardianship/Conservatorship action. *R. p. 495.* However, such advance of fees was on advice of counsel, additionally, nothing in the ruling indicates that it was taken "wrongfully." *Id.* Rather, the Order provides that all three (3) sisters should be responsible for their own attorney's fees and must therefore reimburse the money. The Older Sisters were required to reimburse \$7,252.50, and Appellant was required to reimburse \$406.25, as the Appellant also utilized Decedent's money in the 2009 litigation. *Id.* Further, the Order from the Rule to Show Cause indicates all three children were in contempt for failing to timely reimburse Decedent. *R. pp. 18-19.* Therefore, the Older Sisters contest the characterization in Appellant's brief that they "wrongfully" took Decedent's funds and that the failures to comply were merely on the Older Sisters, as all three (3) undertook similar actions relating to Decedent's funds and failed to timely comply with the Richland County Probate Court order.

After the December 2010 Order, no litigation occurred for several years. While the Decedent was in the care of the Appellant in June 2014, several years after the Decedent's

diagnosis of dementia and Parkinson's and four years after the Decedent was determined to meet the definition of an incapacitated person, the Appellant had the Decedent execute a Florida Power of Attorney that did not include the restrictions on disposition of real property. This power of attorney upset the entirety of the estate plan and powers of attorney the Decedent already had in place, revoking the Older Sisters' powers of attorney, and replacing Ms. Gladden entirely with the Appellant's husband. *R. p. 512*. It is important to note, that this Florida Power of Attorney was not recorded in South Carolina until August 4, 2015. *R. p. 509*.

Approximately a year later, the Decedent was in South Carolina for a family wedding. At this time, it was clear to the Older Sisters that both the dementia and the Parkinson's had significantly progressed. Shortly after the July 4, 2015, wedding, the Decedent was hospitalized (July 28, 2015). The Decedent was released to the comfort of one of the Older Sister's homes on August 7, 2015; however, Ms. Gladden was forced to perform CPR on the Decedent almost immediately. The Decedent was then placed in an inpatient hospice facility. *R. pp. 257-259*. The Decedent passed on August 15, 2015.

During this wedding visit and Decedent's short hospice period, the Appellant unilaterally conveyed the Decedent's Orangeburg real property by executing a deed in Richmond, Georgia. On or about July 4, 2015, according to her own testimony, Appellant drafted a Quitclaim Deed to transfer the Decedent's Orangeburg Property. *R. p. 429, line 12-15*. This was while the Decedent was at the wedding with the Older Sisters. *R. p. 257, lines 4-9*. The recording of this deed was on August 4, 2015. The Quitclaim Deed indicated in the header of page one (1) that it was prepared by Appellant as a power of attorney; however, it was signed by "Theodicia K. Reed, Grantor." *R. p. 516*. The witnesses of this Quitclaim Deed were two personal close friends of Appellant, and it

was notarized at a bank according to Appellant's testimony. *R. p. 463, lines 19-24.* The Quitclaim Deed was recorded August 12, 2015- three days before the Decedent passed away. *R. p. 516.*

At the time of the Orangeburg Quitclaim Deed being recorded by Appellant, the Older Sisters were unaware of this conveyance or the Florida Power of Attorney. To be able to manage the Decedent's affairs while she was in hospice, Ms. Gladden obtained the opinions of two independent doctors to activate her springing power of attorney. *R. p. 260, lines 15-20.* The Decedent was still in the hospital (August 4, 2015). *R. pp. 258-259, lines 1-21.*

After the death of their mother, there was conflict regarding appointment of a personal representative. Generally, the sisters disputed who should be personal representative notwithstanding that all three were appointed pursuant to the Last Will and Testament of Theodocia K. Reed. Ultimately, Appellant was made personal representative. Upon Appellant's filing of the Inventory and Appraisal, the Older Sisters became aware of the conveyance, during the life of the Decedent, of the Orangeburg property. *R. p. 523.* This suit followed.

#### **FACTS NOT BEFORE THE TRIAL COURT BUT RAISED IN APPELLANT'S BRIEF**

Appellant filed a formal Petition for Probate of Decedent's Estate in Bamberg. Due to one of the Older Sister's failings to obtain a certified letter, the Court found she was not appropriate for appointment as Personal Representative. Further, she did not appear or file a competing petition or return. Therefore, Appellant was appointed as Personal Representative individually. Although Appellant's Brief claims Ms. Gladden was determined to be "unsuitable," the Order merely indicates that Ms. Gladden failed to respond and participate in the action that Appellant filed, as well as failed to file her own independent action, rather than any actual wrongdoing. *R. p. 25.* Additionally, Ms. Gladden obtained independent counsel and Appellant's attorney at the time

failed to acknowledge or provide information to Ms. Gladden's counsel. *Motion to Reconsider*, signed 01/27/2017 under Case No. 2017-CP-05-0024.

### **PROCEDURAL HISTORY**

The procedural history of this civil litigation is equally important to the rulings of the Civil Court and, in fact, was a factor in this Court's final ruling. This action was filed on July 9, 2018. There was a significant delay between filing and service due to Appellant appearing to avoid service. Appellant's attorney for the Estate at the time, Aaron Ness, requested a copy of the Complaint and it was provided. After receiving a copy, Mr. Ness indicated that he did not have authority to accept service and Appellant would not respond to process servers at her property. Eventually, it was served, and Mr. Ness filed a Motion to Strike, Motion to Dismiss, and Answer and Counterclaim on September 6, 2018. A Consent Order was entered into between the parties resolving the Motion to Strike. The Consent Order resolving the Motion to Strike, filed October 31, 2018, provided that no *pendente lite* relief shall be granted, and no award for attorney fees shall be granted. However, the Consent Order specifically indicated that this was "without prejudice as to any causes of action or relief that may arise hereafter." *R. p. 28*. This Consent Order was entered into prior to any discovery or the dilatory actions of Appellant in hiring and firing four (4) separate counsels on the eve of the trial rosters of the Orangeburg Circuit Court case, or the facts of Appellant's actions being determined through discovery or testimony.

Appellant thereafter served Discovery on the Older Sisters on or about September 6, 2018. The Older Sisters' responses were served on or about October 11, 2018. Discovery requests were served on the Appellant on or about November 5, 2018. Mr. Ness filed a Motion to be Relieved as Counsel and Motion for Protective Order (against discovery) on December 10, 2018. Older Sisters consented to both and provided a letter in lieu of appearance at the Motions hearing as well

as filed a Return to Motion to be Relieved as Counsel and Motion for Protective Order on December 26, 2018.

A Notice of Motion and Motion to Deem Request for Admissions Admitted was filed January 7, 2019, by the Older Sisters. The Order Relieving Counsel for Attorney Ness was filed February 25, 2019. As a part of that Order, Appellant was given 60 days from the date of the order to find new counsel. This is relevant for future claims to attorney's fees.

Older Sisters' Return to Motion to Dismiss and Notice of Motion and Motion on the Pleadings/Summary Judgment was filed on February 13, 2019. Older Sisters then filed a Motion to Compel on May 6, 2019, with a Memorandum in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiff's Motion. A Notice of Motion and Motion to Reinstate Attorney's Fees Claim to the Complaint was filed June 20, 2019, by Older Sisters. A Roster Hearing was set for the week of July 8, 2019- more than 60 days after the Order Relieving Counsel. At the roster hearing, Appellant appeared alone and stated that she was represented, but that her attorney was not present. There was no Notice of Appearance, but she claimed to be represented by an unnamed attorney and attempts to obtain the attorney were not successful. The matter was continued again by a Form 4 Order of Continuance filed July 29, 2019.

Older Sisters attempted to comply with ADR requirements through mediation. However, Mr. Ness represented Appellant in her role as the Personal Representative and would not consent to *ex parte* communications during mediation. Further, Mr. Ness was not willing to become involved in the civil matter again after his being relieved. Eventually, a proposed Order for Exemption from ADR Requirements was filed on August 5, 2019.

Another Roster Hearing was noticed for the week of September 23, 2019. David Melnyk provided a Notice of Appearance on August 2, 2019. Once again, Appellant appeared at court

without counsel and requested another continuance because she was unrepresented, although no Order Relieving Mr. Melnyk had been filed. Once more, the Court continued the matter. Mr. Melnyk failed to take any steps to relieve himself of counsel until the trial in April 2021 and failed to appear at any of the roster meetings or trial. This was yet another trial preparation, gathering of witnesses and attempt to proceed to trial by the Older Sisters that was fruitless at a steep cost. A Notice of Motion and Motion for Sanctions was filed by Older Sisters on October 8, 2019.

A Roster meeting was set again for November 4, 2019. Appellant obtained another attorney, Everett Comer, who filed a Notice of Appearance at midnight on the eve of the Roster meeting. Appellant tried to obtain yet another continuance, but it was denied. As the Motions were being argued, Appellant through, her counsel, interrupted and offered to convey the disputed property back. Although the other causes of action were not addressed on the record, the Motions hearing ended, and the Court dismissed the matter as being resolved by an Order filed January 10, 2020. The Older Sisters filed a Notice of Motion and Motion to Reconsider, or in the alternative Seek Damages in Probate Court on January 16, 2020. The Order Granting Motion for Reconsideration was filed January 29, 2020, and reinstated the case for the unaddressed issues and remaining causes of action.

A Notice of Motion and Motion to be Relieved as Counsel was filed by Mr. Comer on January 3, 2020. Older Sisters did not contest such relief provided no further continuances for lack of counsel were sought. However, Mr. Comers' Motion was denied April 28, 2020. Thereafter, the reinstated actions were set for trial for the week of April 19, 2021. Robert Phillips filed a Notice of Appearance on April 15, 2021. Subsequently, Appellant filed a Motion to Compel Mediation, notwithstanding the prior Order of Exemption from ADR. Appellant also filed a Motion to Dismiss on April 18, 2021. In addition to the Appellant's motions being heard, the

causes of action before the Court were further reduced at the start of the April 19 Roster Hearing. Specifically, the following causes of action were voluntarily dropped by the Older Sister's as moot: Second Cause of Action (Lack of Capacity/Insanity/Infirmity of the Mind); the Fourth Cause of Action (Duress/Undue Influence); the Fifth Cause of Action (Lack of Consideration); the Sixth Cause of Action (Unconscionability); the Eighth Cause of Action (Unjust Enrichment); the Ninth Cause of Action (Lack of Good Faith and Fair Dealing); the Tenth Cause of Action (Quantum Meruit); and the Eleventh Cause of Action (Quiet Title/Reformation of Deed). *R. p. 190, lines 13-20.* Additionally, the Court excluded the Seventh Cause of Action (Intentional Interference with Expected Inheritance) as specifically an issue under the Probate Courts Jurisdiction. *R. pp. 233, lines 16-25; 234, lines 1-2.* The actions prior to the start of trial were limited to those that took place during the life of the Decedent, which the trial court ruled included forgery, fraud, negligent misrepresentation, breach of fiduciary duty, breach of trust, and self-dealing. *R. pp. 191, lines. 21-25; 192, lines 1-19.*

The trial then began; however, after approximately 20 minutes of questioning, the Court determined that resolution of the Motion to Compel Discovery and determination of the conflict of the multiple counsels of record for Appellant needed resolution. Appellant argued that the filed Motion for Protection in December 2018, stayed and protected Appellant from having to respond to discovery, thereby allowing her to proffer documents that had never been provided to the Older Sisters. The Court found that to be "gamesmanship" on the part of the Appellant and was concerned that the Appellant was "using the system." *R. pp. 227, lines 24-25; 228, lines 1-8.* Ultimately, the trial was suspended, and counsel was to meet and confer concerning discovery, with Appellant warned that if she failed to provide documents in response to discovery requests, then she would not be permitted to utilize the documents in her defense. The Older Sisters and

their counsel were then asked to leave the Courtroom to protect the privileged communications between Appellant and her three attorneys of record. Mr. Comer and Mr. Melnyk were subsequently relieved as counsel on April 22, 2021.

Thereafter, the trial was heard, resulting in the ruling that Appellant now appeals, and specifically finding that Appellant willfully and wantonly forged the Deed; breached her duty as Power of Attorney (the Order indicates Personal Representative, however, no arguments concerning Appellants duties as personal representative were advanced and this is believed to be scrivener's error because the Court specifically limited the case to issues arising during Decedent's life); and the Order provides that such transfer was an attempt to defraud the Older Sisters. The Final Order and Judgment was filed September 7, 2021. A Motion to Reconsider was filed by Appellant on September 17, 2021. A Notice of Motion and Motion to Dismiss Motion to Reconsider for Failure to Comply with Rule 59 Service Requirements was filed by Older Sisters on October 4, 2021. Appellant then filed a Memorandum in Opposition to Plaintiff's Motion to Dismiss on October 7, 2021. Older Sisters filed a Return to Motion to Reconsider on October 12, 2021, and an Order denying the Motion to Reconsider was filed November 8, 2021. This appeal followed.

**PROCEDURAL HISTORY NOT RELEVANT TO THE TRIAL ON APPEAL BUT  
RAISED IN APPELLANT'S BRIEF**

The Older Sisters, having not received any accountings, divisions, or anything from the estate opened by Appellant over six (6) years ago, filed a Petition to Remove Personal Representative on July 6, 2020. This action is separate from the Civil action, as it is specifically looking at the action, or lack thereof, from Appellant regarding the Estate. While some delay during the appointment of the Personal Representative and subsequent appeal is expected, the case had been pending since 2015, and was still open at the time of filing in July 6, 2020. No

accountings of the farms or properties that were still running in the estate had been provided to the Older Sisters, nor were there any distributions made.

When drafting the Petition for Removal, the Older Sisters provided that, although ordered to do so, Appellant had failed to reconvey the Orangeburg property back to the Estate. Eventually, the Older Sisters' counsel provided a proposed Deed to resolve at least the title to this property. The Older Sisters also averred Appellant's failure to complete the Estate since 2015, as well as failure to provide accountings or notices to the Older Sister. The Older Sisters also cited the interference with inheritance in this Petition, as well as alleged breaches and failures since the Decedent died. Some of the causes of action in the Civil suit overlapped the Probate Form's reasons for removal, which is why the Civil Suit was attached to the Petition for Removal. Further, there have been additional grounds that the Older Sisters cite as having developed since the filing of the Petition for Removal that are not part of the Record on Appeal. The Older Sisters fully disclosed to the Probate Court the parallel action in Civil Court. The motivation for removal was not only for what was discovered during the Civil Action and occurring after the Decedent's death, but also the lack of movement on the Estate since her appointment in 2016 and depreciation of the assets. With the appeals of probate matters being resolved in late 2017, Appellant had time to resolve the Estate and failed to take any action whatsoever to do so, leading to the Petition for Removal. *R. p. 191, lines 12-14.*

### **STANDARD OF REVIEW**

Given the issues in this appeal, there are two (2) standards of review: As applied to the first issue- subject matter jurisdiction- appellate review is de novo. *First Citizens Bank and Trust Company, Inc. v. Taylor*, 431 S.C. 149, 162; 847 S.E. 2d 249, 256 (Ct. App. 2020), *qting Deborah Dereede Living Tr. dated Dec. 18, 2013, v. Karp*, 427 S.C. 336, 346; 831 S.E.2d 435, 441 (Ct. App.

2019). Review of subject matter jurisdiction can be properly raised on appeal, even if not raised during trial. *Ex Parte Cannon*, 385 S.C. 643, 654; 685 S.E.2d 814, 820 (Ct. App. 2009). However, as applied to testimony and evidence, the trial court is in the best position to review and determine the relevance, applicability, veracity, and other issues that aid the court in making a decision. A trial court's finding of facts relating to Appellant's claim of lack of evidence for finding willful and wanton behavior should not be overturned on appeal unless it is determined that there was not enough evidence to reasonably support the finding. *Towne Ass. Ltd. v. City of Greenville*, 266 S.C. 81, 87; 221 S.E.2d 773, 776 (1976), abrogated by on other grounds by *In re Estate of Kay*, 423 S.C. 476; 816 S.E.2d 542 (2018). See also *Canady v. Charleston County School District*, 265 S.C. 21, 24-25; 216 S.E.2d 755, 756-757(1975). Additionally, when reviewing the evidence, the appellate court, "must look at the evidence in the light most favorable to respondents and eliminate from consideration all evidence to the contrary." *Solley v. NFCU*, 397 S.C. 192, 202; 723 S.E.2d 597,602 (Ct. App. 2012).

## ARGUMENTS

### **I. THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION OVER APPELLANT'S ACTIONS RELATED TO THE REAL PROPERTY CONVEYED DURING THE LIFE OF THE DECEDENT.**

Jurisdiction is the authority of a court over a matter or person. It comes in two flavors: personal jurisdiction and subject matter jurisdiction. At issue in the case at bar is subject jurisdiction and which court, Probate or Circuit, had the authority to hear the issues complained of by the Older Sisters. The Circuit Court is a court created and governed by the South Carolina Constitution. *S.C. Const. art. V. §11*. By the language of the SC Constitution, it is a general court with original jurisdiction over both civil and criminal matters. *Id.* Its authority "ends" when a court create by statute begins. Probate courts are statutory courts, and they have authority as

outline in *S.C. Code Ann. §62-1-302*.<sup>1</sup> Given that the Circuit court is a general trial court, and the Probate court has outlined authority, there is some concurrent jurisdiction between the two. *S.C. Code Ann. 62-1-302 (a)(1), (b), (d), and (e)*. If a court is chosen in any of the matters that concurrent jurisdiction exists, the matter must be fully resolved in the chosen court. *Tucker v. Tucker*, 264 S.C 172, 178; 213 S.E.2d 588, 590 (1975). “The authorities in this State are uniform to the effect that where a judge has jurisdiction to hear a matter and the matter having been heard before him, he entertains jurisdiction until his decision is rendered.” *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384; 1 S.E.2d 797, 808-809 (1939).

Probate court has the authority to rule on matters that are testamentary in nature. *Beckwith v. McAlister*, 165 S.C. 1; 162 S.E. 623, 627-628 (1932) *quoting*. *In Re Covin’s Estate*, 20 S.C. 471 (1884). “The jurisdiction of the probate court extends to subject matter related to the estates of decedents.” *Matter of Howard*, 315 S.C. 356, 364; 434 S.E.2d 254, 259 (1993). In line with the statutory language providing Probate courts with their power, case law clearly shows that there is a line drawn when it comes to real property issues, like quiet title and partition. *Byrd v. McDonald*, 417 S.C. 474, 479-480; 790 S.E.2d 200, 203(Ct. App. 2016). Additionally, nothing within the statutory outline of powers authority of the Probate court to hear matters concerning powers of attorney and breach of duties associated with a power of attorney. *S.C. Code Ann. 62-1-302*. Nor does the statute give the Probate court authority to hear cases involving forgery, fraud, and misrepresentation, excepting as applied to wills and will contests. *Id.* Finally, as applied to matters of real estate conveyed by a living person and a suit against a living person for

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<sup>1</sup> Probate has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents, including contest of wills, construction of wills, determination of property in which the estate of a decedent or protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court,” emphasis added

such conveyance, the probate court does not have jurisdiction. *Brown v. Butler*, 347 S.C. 259, 262-263; 554 S.E.2d 431, 432-433 (Ct. App. 2001).

The case law cited and relied on by Appellant is clearly distinguishable from the case at bar. Even the cases relied on in this brief, with one notable exception, outlining the jurisdiction of the courts are distinguishable- almost all deal with causes of action arising after the death of a person. In *Tucker*, an executor was bringing an action to remove another executor. *Tucker at 175, 588*. In *Beckwith*, the sole executor was defending against foreclosures and other matters that arose after the death of a person. *Beckwith at 626*. Additionally, *Beckwith's* ruling is interesting as the probate court was found to have exceeded its jurisdiction in its ruling on certain real property/mortgage related matters that were raised as a part of the probating of the estate. *Id. at 628*. In the *Matter of Howard*, again the action being reviewed were by a personal representative after the death of a person. *Howard at 358-359, 256*. All of these are distinguishable from the case at bar, where the allegations involved the actions of a Power of Attorney during the life of the Decedent. Even *Judy v. Judy*, relied on by the Appellant is distinguishable. The estate heir filed a waste suit that arose after the death of the decedent. *Judy v. Judy, 393 S.C. 160, 164; 712 S.E.2d 408, 410 (2011)*. *Judy* is even further distinguishable as it was looking at the liabilities of the decedent, not the liabilities of a Power of Attorney. *Id.*

The only case that comes close to matching the facts on appeal is *Brown*. There, appellant was seeking to set aside a Master-In-Equities ruling that set aside a deed conveyed by a decedent during his life. *Brown at 261, 431-432*. After the death of the decedent, the respondents brought an action referred to the Master-In-Equity to set aside a deed wrongfully conveying property, and they succeeded. *Id. at 262, 432*. On appeal, the appellant attempted the same arguments that the Appellant at bar now makes- that the probate court has jurisdiction because the property is

tangentially related to the estate. This argument failed. *Id.* Appellant relied on §62-1-302(a), and the Appellate Court stated in its opinion,

*“The action here, however, is not against [decedent]. It is against [appellant]. It is neither an action to contest or construe a will, to determine heirs and successors of a decedent, nor to determine the estate of a protected person. Rather, the action is one to set aside a deed, and it is brought against one who is very much alive and litigating.”* *Id.*

Additionally, the Court pointed out that the conveyance was *inter vivos* and that the appellant held the property prior to the death of the decedent. *Id.* at 263, 433.

Appellant attempts to obfuscate the issues that were presented to the Circuit Court in this appeal. In her statement of facts, Appellant raises several alleged facts, such as the delay in the administration of the estate and the petition for removal, that were not before the Circuit Court and was specifically excluded in the pretrial motions by the Court, as those matters are rightfully within the jurisdiction of the Probate Court and remain pending in the Bamberg Probate Court. The matters that occurred during the life of the Decedent outside of the will execution, are not within the Probate courts authority. Appellant even cites the following “...liabilities of the estate ***which arise at or after the death*** of the decedent . . . .” are in the Probate Court’s jurisdiction, but seemingly ignores the language cited about matters arising after death. *Appellant’s Brief*, pg 12, citing *Judy* 712 S.E.2d 413, *emphasis added*.

At issue, specifically, was the conveyance of the property from Decedent **while alive** to Appellant. The Older Sisters are specifically complaining about actions Appellant undertook while **Decedent was alive**. Additionally, as in the *Brown* opinion, this action is against someone who is “very much alive and litigating.” *Brown* at 263, 432-433. Appellant tries to argue that because there are separate matters pending before the Probate court, this matter should also be before the Probate court, but that is not the case.

The Older Sisters filed a Complaint with a total of eleven causes of action, to wit: Forgery/Fraud and Misrepresentation; Lack of Capacity/Insanity/Infirmity of the Mind; Breach of Fiduciary Duty/Breach of Trust/Self-Dealing; Duress/Undue Influence; Lack of Consideration; Unconscionability; Intentional Interference with Expected Inheritance; Unjust Enrichment; Lack of Good Faith and Fair Dealing; Quantum Meruit; and Quiet Title/Reformation of Deed. While some causes of action relate to improper use a power of attorney during Decedent's life and the interference of inheritance that was not considered by this Court, these are contractual or property law claims that are not listed in the statutes outlining the authority of the Probate court. *See S.C. Code Ann. §62-1-302*. Appellant appears to argue that simply because the Older Sisters' deed contest could potentially affect the corpus of the estate, exclusive jurisdiction exists with Probate Court. But her logic is flawed. Appellant fails to recognize that at the time of filing the Complaint, Probate jurisdiction did not exist for deed reformation for a deed executed and recorded during Decedent's life and relying upon a Power of Attorney that, by its nature, terminated upon death. The Petition for Removal of Personal Representative was filed for separate reasons relating to Appellant's failures after the Decedent's death and her failure to protect assets and properly administer the estate as a Personal Representative court that must conclude the matter.

At filing, the Older Sisters, relying on the four corners of the disputed Quitclaim Deed, believed that the Decedent was manipulated into signing that deed during the last illness and while incompetent. In *arguendo*, if Appellant had tried the matter and succeeded, the property would have never been Estate corpus within the Probate Courts jurisdiction. Appellant also seems to ignore that her own Initial Inventory and Appraisal filed with the Probate Court did not include the subject Orangeburg property. *R. p. 522*. By Appellant's own court

submissions, the Probate Court simply had no jurisdiction over this Orangeburg property prior to Appellant eventually signing a proffered deed returning the property to the Estate. Additionally, Appellant's testimony was that the property was left off the of the Inventory. *R. p. 438, lines 10-22.*

The crux of Appellant's argument seems to rest on the fact that it was conveyed to the estate **after** the action was commenced and that this proceeding **may** affect the Probate Court. This argument fails to recognize that the concurrent jurisdiction had already been selected and it would be improper to move the case during the pendency of the litigation. *See First Carolinas Joint Stock Land Bank of Columbia v. Knotts, ibid.* Additionally, removal only works one way, from Probate to Circuit. There was no function of law that provides for removal from Circuit to Probate in the statutory scheme.

Appellant also does not appear to recognize that the actions of Appellant and issues before the Circuit court were not "testamentary in nature," as it relating to an *inter vivos* deed. *See Brown v. Butler, ibid.*

Additionally, Appellant fails to concede that that, if brought during the life of the Decedent, very little would have changed in this litigation. Appellant still violated a standing Court Order of the Richland County Probate Court; abused her fiduciary duties and authority as Power of Attorney; and engaged in fraudulent actions and conduct by having a judicially determined incompetent individual sign a subsequent Power of Attorney that removed the real estate conveyance limitation.

Additionally, none of the Appellant's arguments take into consideration the Circuit courts own awareness of its authority. During oral arguments of Defendant's Motion to Dismiss immediately preceding the trial, the Court listed the causes of action to identify any that were

improper for it to hear. The Older Sisters voluntarily dismissed several of the causes of action, and the Court further limited the case by dismissing Intentional Interference with Expected Inheritance as improperly before it and being within the purview of the Probate Court during the Estate proceedings. The Court stated, “[I]nsofar as what happened to that piece of property, vis-à-vis the estate, I’m not going to hear that. That’s for the probate court.” *R. p. 199, line 23.*

Further, the only party that continued to attempt to cross the line and involve matters that should only be heard by the Estate was the Appellant. Older Sisters’ counsel consistently objected to relevancy when such issues were raised. *E.g., R. pp. 346-350.*

The attorney’s fees argument advanced by the Older Sisters was for the frivolous and bad acts that Appellant engaged in during the litigation. As is evident in the Transcript, Appellant had the matter continued numerous times, hiring and firing attorneys for what Older Sisters believe were dilatory only. She also brought up arguments about her contributions to the property during the life of the Decedent, promising relevance, while not relating to the matters brought before the Court by the Older Sisters. *R. pp. 410, lines 22-25; 411, lines 8-19; 414, lines 18-25; 415, lines 1-22; 416, lines 1-15; 423, lines 14-24; 424-425, lines 1-11.* Additionally, Appellant provided testimony about her contributions to the property in dispute, both during the life of the Decedent, and while individually owned by Appellant which was after Decedent’s death. *Id.*

Finally, as applied to Appellant’s argument that the “fidelity of [the Appellant] as personal representative” should be before the Probate Court. It is, by way of the Petition for Removal of Personal Representative pending in the Bamberg County Probate Court and filed after the Orangeburg Circuit Court case. See *Appellant’s Brief, pg. 11.* While some argument can be made that Appellant was not able to do anything until after the appeal that was denied in October

2017, that is still over two years before the Probate action was stayed by the filing of the Petition for Removal. The filing date of the Removal was as Appellant indicated in her Brief, July 6, 2020. *Id at 8*. The Circuit court action that is currently under appeal was filed July 9, 2018-an entire two (2) years prior.

For these reasons, Appellant's argument that the Probate court had exclusive jurisdiction should fail. At the initial filing of the action, Circuit court was the only court that possessed jurisdiction, and applicable case law indicates that once a court of concurrent jurisdiction is utilized, that court must complete the action. Additionally, and more importantly, all events and actions complained occurred during the life of the Decedent and were not testamentary in nature. Should the Decedent have still been alive at the time of the proceedings, it is unlikely that anything would have substantially changed, given that the action complained of took place during her life. The fact that the Decedent passed prior to the discovery of the action that led to this suit, does not alter that the Circuit Court has jurisdiction. Appellant's own filings in the Probate Court further supports that Probate Court would have been an inappropriate forum to bring this action. Finally, the fact that the outcome may or may not affect the status of a separate pending litigation does not necessarily divest a court of its jurisdiction.

**II. THE ISSUES OF FORGERY, FRAUD, MISREPRESENTATION, BREACH OF FIDUCIARY DUTY, BREACH OF TRUST, AND SELF DEALING WERE NOT MOOT.**

In order for a party to be heard by a court they must first qualify by having standing, in a controversy, that is ripe. Justiciability is required to pursue a litigation. Mootness is the antithesis to ripeness and means that the matter is either speculative or stale- no relief can be granted. A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25; 630

*S.E.2d 474, 477(2006)*. However, while mootness can be the death of a claim or controversy, there are exception that may allow a court to hear issues that would otherwise be categorized as moot. These exceptions are the issue is repetitive, or capable of repetition but evades review; of imperative manifest urgency to public interest; and may affect future events or have collateral consequences for the parties. *Holden v. Cribb, 348 S.C. 132, 138; 561 S.E.2d 634, 638(Ct. App. 2002)*.

In *Sloan*, the question of mootness was raised as the controversy surrounded the production of documents pursuant to FOIA. *Sloan at 24, 476-477*. At the time the matter came to trial, the documents had been produced. *Id. at 26, 477*. The Court reviewed exceptions to mootness, but ultimately found that the exceptions did not apply. *Id. 28, 479*. Conversely, in *Holden* the Court found that an exception to mootness did apply, specifically that the controversy was capable of repetition, yet evading review. *Holden at 138, 637-638*. Whereas *Sloan* only cited to two exceptions, 1) issue capable of repetition, but evading review, and 2) questions of important public interest, *Holden* cites to a third, where a decision by the trial court may affect future events or have collateral consequences for the parties. *Sloan at 26-27, 478; Holden at 138, 637-638; both citing Curtis v. State of South Carolina 345 S.C. 557, 568; 549 S.E.2d 591, 596 (2001)*.

Tied into Appellant's argument for lack of subject matter jurisdiction, Appellant also raises an issue of mootness. Appellant takes the position, that once she conveyed the property back to the estate, all other issues were rendered moot. As is seen from the record, transferal of the property did render several of the alleged causes of actions moot, and they were dismissed. *R. p. 190, lines 13-20*. However, conveyance of the property back to the estate did not address the issues of the signature of "Theodocia K. Reed" appearing on the Quitclaim Deed; or the fact that

Appellant executed a Florida Power of Attorney after the Decedent was determined to be incapacitated and used such power of attorney to justify the deed. The reconveyance did not magically erase the forgery/fraudulent and misrepresentative actions that Appellant took or the years of continual delays and gamesmanship that the Appellant engaged in while the Older Sisters sought to resolve those issues.

Even if *in arguendo*, the Appellant was correct and the issues were moot, there is an applicable exception. A judicial ruling on the matters of Forgery, Fraud, Misrepresentation, Breach of Fiduciary Duty, Breach of Trust, and Self-Dealing has collateral consequences for the Appellant and the Older Sisters. As Appellant has included in her brief, there is a pending probate, and due to the information gained during this civil litigation, the Older Sisters did file an appropriate action in the Probate court. This places those issues squarely within the third exception to mootness.

For these reasons, the remaining issues of Forgery, Fraud, Misrepresentation, Breach of Fiduciary Duty, Breach of Trust, and Self-Dealing were not moot and properly heard by the Circuit court.

**III. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF WILLFUL AND WANTON CONDUCT AND SUBSTANTIAL JUSTIFICATION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS.**

Older Sisters made some heavy allegations against the Appellant in this case. That is not lost on them, nor do they believe that it was lost on the Circuit court. A finding of willful and wantonness requires clear and convincing evidence, as does any request for punitive damages as punitive damages require a finding of willfulness. *Taylor v. Medenica*, 324 S.C. 200, 222; 479 S.E.2d 35, 46 (1996); *Kenndey v. Richland County School District*, 428 S.C. 98, 120-121; 833 S.E.2d 414, 426 (Ct. App. 2019). There are several ways a court can find that conduct is willful.

The party in question may have made a conscious effort to exercise due care, or engaged in negligence *per se*, which while not dispositive of willful conduct, does help support a finding of willfulness. *Taylor at 221, 46* and *Fairchild v. SC Dept. Transport, 398 S.C. 90, 99; 727 S.E.2d 407, 411-412 (2012)*. The ultimate question is ‘would a person of ordinary reason or prudence be conscious of the act as an invasion of the rights of another?’ *Fairchild at 99, 411-412*.

In *Taylor*, a medical malpractice case, clear and convincing evidence was found to support an award for punitive damages. The doctor failed to use standard treatments, chose treatments for which there was no academic or medical support for use on the condition being treated, failed to inform the patient of the risks of such treatment, failing to notice a secondary condition arise from the treatment, as well as ordered unnecessary tests and billed the patient for those tests. *Taylor at 221, 46*. Overall, the doctor made a conscious failure to exercise due care. *Id.*

Similarly in *Kennedy*, a jury found that appellants acted with a conscious disregard for due care and the Court upheld the submission of the same to the jury. *Fairchild 122-123, 427*. In reviewing the submission of the circuit court to the jury, the Court found that clear and convincing evidence existed to permit the jury’s finding. *Id.* The circuit court in *Fairchild* was actually reverse for failing to put the issue of punitive damages to the jury. The Supreme Court upheld the Court of Appeals reversal, find that there was sufficient evidence to create a question of recklessness for the jury. *Fairchild 101, 413*.

The Circuit court found Appellant, “willfully and wantonly forged the Deed to the Orangeburg property; breached her duty as (sic) Personal Representative; and attempted to defraud Ms. Gladden and Ms. Reed . . . intentionally executed the Florida Power of Attorney to obfuscate the South Carolina Power of Attorney and intentionally transferred the property to herself for her own benefit.” *R. p. 51.* The Circuit court also attributed the continual delay and

prolonging of the litigation to the Appellant. Appellant attempts to argue that there was insufficient evidence to support such findings; however, her own testimony and her numerous requests for continuances upon the call of the case provides the basis for most of these findings.

Appellant testified repeatedly that the Decedent and her had conversations about the property prior to her death, notwithstanding numerous hearsay and “Dead Man Statute” objections. However, Decedent requested and received a court order prohibiting the disposition of her real property by any of the sisters. Decedent then followed up with executing a new power of attorney adopting the Richland County Probate Court’s order - expressly prohibiting the Appellant from transferring any real property. These actions took place after some of the conversations that Appellant indicated occurred. *R. pp. 430, lines. 12-15; 431, lines. 5-10.* Appellant specifically testified that the property should have been conveyed 10 years before the Quitclaim Deed in favor of Appellant was recorded, placing such discussions in 2005. *R. p. 471, line 2.* However, the Decedent’s request and the Richland Probate Order was issued after this 2005 period.

Notwithstanding the new Power of Attorney and the standing Court Order, Appellant maintains that she was not acting in her own self-interest and does not acknowledge her actions violated the prior Probate Order. Appellant also apparently is disregarding her own testimony that the property was not expressly carved out in the Last Will and Testament of Theodocia K. Reed executed in June 2008 – again after these purported discussions of the Decedent’s intent to convey the Orangeburg property to Appellant. *R. p. 459, lines 7-14 and R. p. 478.*

Additionally, it is clear from Appellant’s testimony that given the disputes between the siblings and Appellant’s involvement in the execution of both a Will and powers of attorneys in 2008, that she was familiar with the legal effect of these documents. More than that, she was

aware that such documents were legal in nature. However, her testimony reflects that she elected to rely on recommendations from non-attorneys, and non-South Carolina notaries, despite her previous knowledge and experience. *R. p. 447, lines. 17-23.* Appellant consciously disregarded due care and consideration. Additionally, by her own testimony she did not trust the 2010 power of attorneys solely because she was not involved in their creation. *R. pp. 450, lines 22-25; 451, lines. 1-3.* As for the Florida Power of Attorney, Appellant testified that she relied on the advice of medical personnel. However, the medical personnel were never informed of the existence of the 2010 Power of Attorney granted to Appellant. *R. pp. 452, lines. 22-25; 453-455.* She also clearly did not advise the drafter of the Florida Power of Attorney of the Richland Probate Orders either.

Additionally, there was testimony from both the Older Sisters and Appellant, that Appellant had previously signed documents as a power of attorney, and in those signatures, she did not just sign the Decedent's name - in line with the legal information she was given in 2008. *R. pp. 317, lines 13-25; 318, lines 1-7.* However, at the advice of a non-attorney, Appellant tries to argue that she is excused for signing the Decedent's name, and that it is not forgery. *R. pp. 460, lines 9-25; 461.* Again, there was a conscious disregard of reasonable behavior.

Appellant additionally argues that the Court erred in finding a violation of a criminal statute. A reading of the Final Order and Judgment shows that is not what happened. Appellant even cites the language in her brief. The Civil Court found that she "willfully and wantonly forged the Deed" but there is no additional language that says, 'in violation of criminal statutes.' The use of the word forgery was to support that the Appellant's actions were willful and wanton, and that she acted if not reckless, then knowingly when she "breached her duty as Personal Representative [sic – Power of Attorney was the intended term]; and attempted to defraud [the

Older Sisters] . . . intentionally executed the Florida Power of Attorney to obfuscate the South Carolina Power of Attorney, and intentionally transferred the property to herself for her own benefit.” *R. p. 51.*

Additionally, Appellant failed to raise any objection to the allegation of forgery being before the Circuit Court during the trial or at any time prior to this appeal, despite the Court and the parties going over the causes of action to be tried extensively. (*see R. pp. 191, lines 21-25; 192, lines 1-19*) Appellant’s brief does not contest that the Circuit Court would have subject matter jurisdiction. *Appellant’s Brief, pg. 14.* Therefore, such issue is not properly raised for the first time on appeal. Further, it is not uncommon for there to be civil review of criminal statutes for civil relief, or the use of criminal conduct to support a civil finding. *F. Dean Rainey, Jr., Negligence Per Se in South Carolina: The Effect Given in Civil Action to the Violations of Criminal Statutes, 11 S. C. L. Rev. 207(1959).* While the review focuses on how violations of criminal statutes apply to allegations of negligence, the same theories are applicable to claims of willful misconduct, if not more so.

There is more than enough evidence to support a finding of willful conduct clearly and convincingly, especially when the facts are viewed in a light favorable to the Older Sisters. As for the attorney’s fees, the Order Granting the Motion to Reconsider filed on January 16, 2020, “restored” the previously dismissed Motions, including the Motion to Reinstate Attorney’s Fees and Motion for Sanctions, as well as all the requests for attorneys’ fees in the discovery motions as the Court itself noted. *R. p. 223, lines 6-14.* Notwithstanding the factual finding supporting such an award, the gamesmanship that the Circuit court itself pointed out does, as well as a review of the procedural history. Appellant took a 60-day extension to find counsel and drew

that out almost two (2) years. Appellant took advantage of the system of rotating judges to delay and prolong this litigation.

For these reasons, Appellant's argument that there was insufficient factual evidence to support the findings and the attorneys' fees award should fail.

### **CONCLUSION**

Despite Appellant's attempt to feign confusion of the issues in this case, it is clear through her testimony and her actions that the case was properly before the Orangeburg Circuit Court. The actions the Older Sisters complained of took place during the Decedent's life, and the property at issue was not included in the Appellant's own filings to the appropriate probate court. A clear distinction between the cases cited in support of the issues also makes clear that the probate court would have jurisdiction only if the wrongful actions taken by the Appellant had taken place after the Decedent's death. Further, Appellant agreeing to transfer the property back to the Decedent's estate did not magically wash away the bad acts that Appellant engaged in to transfer the property to begin with. Those acts were still subject to review by a Court and the Court reviewed such acts appropriately. Appellants actions, both during the life of the Decedent that led to this litigation and the acts Appellant engaged in during this litigation, supported an award of attorney's fees and costs. From dodging service of the Complaint, to continually being unprepared for hearing, to avoiding discovery until the day of trial, there is sufficient cause in the record to support Older Sisters claim of attorney's fees and for the Court to have awarded the same.

For these reasons, the Older Sisters respectfully request that the Final Order and Judgment of the Orangeburg Circuit Court be affirmed, and that they be awarded attorney's fees and costs pursuant to the Rules of Appellate Procedure.

(Signature on Next Page)

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**PROOF OF COMPLIANCE**

**I certify that the final electronic version of Respondents Brief served to the Curt of Appeals and Appellant complies with Rule 211 of the South Carolina Appellate Court Rules.**

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