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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge  
Common Pleas Case No. 2022-CP-23-01064

Appellate Case No. 2022-000731

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IN THE MATTER OF:

Estate of Florence Petrak Mensch,

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

*Appellant,*

v.

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

*Respondents.*

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INITIAL BRIEF OF RESPONDENTS

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\_\_\_\_\_  
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**STATEMENT OF ISSUES ON APPEAL**

- 1. May appellant challenge subject matter jurisdiction?**

2. **Did the probate court have jurisdiction over the entire action?**
3. **Is the appeal untimely?**
4. **Does Judicial Estoppel prevent appellant's contrary positions?**

### **STATEMENT OF THE CASE**

Litigation between family members in this matter began years ago when Sterling Mensch, III, pursuant to a power of attorney granted to him by his mother, began to steal from his mother. Florence Mensch died on April 26, 2018. (first amended complaint, paragraph 4) On May 15, 2019 Shauna M. Waddell and John R. Mensch filed a petition against Sterling Mensch, III. After Sterling Mensch, III had been removed as personal representative of the estate of Florence Mensch, an amended petition was filed against Sterling Mensch, III individually and as personal representative of the estate of Florence Mensch alleging improper management of the decedent's assets both before and after her death. (7/29/2021 summary judgment order, page 2-3)

A trial was held before the probate court over a number of days ultimately concluding in an order dated January 26, 2022 awarding \$984,763.00 in damages against Sterling Mensch, III. On February 22, 2022 appellant filed a motion to alter or amend pursuant to Rule 59 (probate court order dated 2/17/2022) In her order, Judge Faulkner found that appellant had failed to comply with the provisions of Rule 7(b)(1) of the South Carolina Rules of Civil Procedure. On February 23, 2022, Sterling Mensch, III appealed to the circuit court the order from the probate court.

On February 25, 2022, respondents moved to dismiss the appeal as untimely on the grounds that the time to appeal had not been stayed by the filing of a defective Rule 59 motion. (2/25/2022 motion to dismiss) Following the hearing, the circuit court granted the Motion to Dismiss the

appeal and did not address the various other grounds raised by the appeal. The circuit court order found that the appeal deadline was not tolled by the motion to alter or amend in the probate court, and dismissed the appeal. Thereafter, Sterling Mensch, III appealed to this court. (5/27/2022 notice of appeal by petitioner)

### **STANDARD OF REVIEW**

In a probate appeal, the circuit court, court of appeals, or supreme court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) of the South Carolina Code (Supp. 2018). "[I]f the action is at law, the circuit court should uphold the findings of the probate court if there is any evidence to support them." In re *Estate of Weeks*, 329 S.C. 251, 260, 495 S.E.2d 454, 459 (Ct. App. 1997).

Respondents submit this is an action at law and as such, the findings of the probate court and circuit court must be upheld if there is any evidence to support them.

### **ARGUMENTS**

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

The dispute regarding Sterling Mensch's breach of his duties towards Florence Mensch and her successors in interest began when he was acting as her power of attorney. Following her death, litigation ensued between the parties. In the action, Sterling Mensch litigated vigorously in the probate court of Greenville County the issues raised by the pleadings in the underlying action. After an adverse verdict against him, Mr. Mensch filed an appeal with the circuit court for Greenville County specifically asserting the jurisdiction of the circuit court. In that appeal Mr. Mensch specifically contended that the probate court order was final. It goes without saying that Mr. Mensch could not have filed an appeal of an order that was not "final". Thereafter, apparently

for strategic reasons, Mr. Mensch took the position that the circuit court had no appellate jurisdiction because there was no “final order” from the probate court. Nowhere at the trial court level did Mr. Mensch ever challenge the jurisdiction of the probate court prior to the issuance of the final order dated January 26, 2022. While it is true that subject matter jurisdiction may be raised at any time, even on appeal, it is also true that a party may not invoke the provisions of Rule 60(b) where it is clear the issue could have been litigated at trial.

“[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.” *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939). An argument that is not raised to an intermediate appellate court is not preserved for review by this Court. *United Dom. Realty Trust v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992). Even though subject matter jurisdiction may be raised at anytime, there is no error preservation exception allowing a party to bypass calling an erroneous ruling to the attention of the tribunal making it before appealing that ruling to a higher court. *Compare Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322, 199 S.E. 296 (1938) (once the issue of subject matter jurisdiction has been decided adversely to a party, he must preserve his exception or be barred from raising the issue later); *cf. DeTreville v. Groover*, 219 S.C. 313, 65 S.E.2d 232 (1951) (party abandoned subject matter jurisdiction issue by failing to argue it in brief). The State failed to ask the circuit judge to reconsider her subject matter jurisdiction ruling before appealing the order to this Court. Accordingly, it has failed to preserve any issue related to that ruling for our review. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) (holding Rule 59 applies to circuit court sitting in appellate capacity to review criminal

convictions); *State v. Bailey*, 368 S.C. 39, 626 S.E.2d 898 (Ct.App.2006), *cert. denied*, March 8, 2007 (circuit court's appellate error must be called to its attention by petition for rehearing in order to be preserved for further appellate review).

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

From a procedural perspective, up to this point the appellant Sterling Mensch has noticed an appeal from probate court to circuit court but then argued that no appellate jurisdiction exists because the probate court did not issue a "final order". (Notwithstanding the fact it was appellant who appealed this "non-final" order from probate court to circuit court.) Then, Mr. Mensch argues the probate court had no jurisdiction (yet admitted jurisdiction in his answer) to address the litigation before it. Now Mr. Mensch comes before this court continuing to attempt to advance the same inconsistent arguments. Specifically, the arguments in this appeal illustrate the conflicting positions taken by Mr. Mensch. In this appeal he seeks a ruling from this court that the probate court lacked subject matter jurisdiction then argues that the probate court which lacked subject matter jurisdiction issued an order Mr. Mensch appealed, but that order was not final. Mr. Mensch goes on to argue that if there was jurisdiction and the probate court entered a final order, that final order was timely appealed because his motion to alter or amend tolled the deadline to appeal. Mr.

Mensch cannot have his cake and eat it too. As he did in all of the underlying actions, Mr. Mensch changes his position not in accordance with the facts, but in accordance with his view of what position may be most helpful to advance at any given time. The court should not condone such conduct. Appellant continues to misapprehend the import and application of the rules of civil procedure to his conduct in this matter versus conduct referenced in case law cited in his brief.

For instance, *Nextstar Media Group, Inc. vs. Davis Roofing Group, LLC*, 431 S.C., 593, 848 S.E. 2d 597 (S.C. App. 2020) did not hold that a skeleton post trial motion was sufficient to toll the time for appeal. Rather, based on the facts presented, the appeals court disagreed that the motion for reconsideration lacked sufficient specificity pursuant to Rule 7.

With regard to appellant's continuing arguments that the probate court did not have jurisdiction of various claims before it, appellant continues his incorrect analysis of the applicable law. By way of additional example, appellant cites *Roche vs. SC Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E. 2d 243(1975) for the proposition that the raised and ruled upon requirement is only a doctrine of error preservation. In point of fact, *Roche* illustrates an example where the appellate court refused to address two issues before it as neither issue was raised in the court below. Hence the inclusion in the quotation from *Roche* contained in appellant's brief "accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him." *Roche*, 263 S.C. at 245, 211 S.E. 2d at 455.

Sterling Mensch was ordered by the probate court to pay almost \$1,000,000.00 immediately to the personal representative of his mother's estate. Mr. Mensch literally destroyed his mother's financial situation beginning while she was alive and continuing following her death. Once caught, Mr. Mensch has attempted to drag out the litigation against him in hopes of avoiding

his day of reckoning. It is time to bring an end to Mr. Mensch's efforts to cheat his mother and following her death, her estate.

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

Appellant contends, that his misdeeds undertaken pursuant to his Power of Attorney before the death of his mother are somehow out of reach of the probate court. Notwithstanding his agreement as to jurisdiction over both the subject matter and parties made in his pleadings, Sterling Mensch now contends the probate court could not issue its order because it had no jurisdiction over actions which were taken prior to Ms. Mensch's death. Appellant references several statutes in his initial brief which have nothing to do with the primary cause of action in this case which was an action requesting the court to restore the value of the Estate to what it would have been had the violations not occurred pursuant to S.C. Code § 62-8-117 of the South Carolina Power of Attorney Act. Appellant cites S.C. Code § 62-2-201 which is the statute concerning a spouse's elective share, but appears to be arguing that the creditor's claims statute S.C. Code § 62-3-804 somehow applies to prevent the court from having jurisdiction over pre-death claims by the estate or the beneficiaries of the estate. The creditor's claim statute concerns claims by creditors against a decedent's estate, not claims the estate has against an agent under a power of attorney. S.C. Code § 62-3-302 is referenced by Appellant which has nothing to do with the probate court's jurisdiction (it concerns informal probates).

It has already been submitted and established that the probate court had jurisdiction over the matters before it. Obviously, probate courts are not limited in jurisdiction to merely matters that

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

Furthermore, the probate court clearly has jurisdiction pursuant to § 62-8-117 of the South Carolina Power of Attorney Act, which states, “An agent that violates this article is liable to the principal or to the principal’s successors in interest for the amount required to: (1) restore the value of the principal’s property to what it would have been had the violation not occurred. . .” The violations contemplated by this act will nearly always be before the death of the principal considering a power of attorney is only applicable while the principal is alive. The inclusion in the statute of **successors in interest** clearly accounts for a principal who has passed away after the violations occurred. Pursuant to § 62-8-117 of the South Carolina Power of Attorney Act, the probate court certainly has jurisdiction to restore the value of the Estate to what it would have been had the violations of the power of attorney not occurred, which is exactly what Judge Faulkner did

in her final Order.

In addition to the prior examples of probate court jurisdiction of pre-death actions, if the probate court did not have jurisdiction to address pre-death actions and misdeeds, there would be no ability for a final accounting to be prepared and addressed by the probate court as described in S.C. Code Ann. §62-3-805.

The purpose of the four-day trial on damages and the resulting final Order of Judge Faulkner was to restore the value of the Estate to what it would have been had Sterling Mensch not so egregiously violated his duties as agent under power of attorney for Florence Mensch.

### **III. Appeal is untimely.**

In *Camp v. Camp*, the Court of Appeals stated, “‘A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(f), SCRCF, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.’” *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting *Elam v. South Carolina Dep’t of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCF. “Rule 7(b)(1), SCRCF requires that motions ‘shall state with particularity the grounds therefor, and shall set forth the relief or order sought.’ ” *Camp*, 386 S.C. at 575, 689 S.E.2d at 636. “The particularity requirement ‘is to be read flexibly in recognition of the peculiar circumstances of the case.’ ” *Id.* (quoting *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 760 (1<sup>st</sup> Cir.1996)). “ ‘By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.’ *Id.* (quoting *Calderon v. Kansas*

*Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10<sup>th</sup> Cir.1999)). The Court in *Camp* further stated, “The purposes of insufficient and successive post-trial motions appear to be the same: both attempt to buy time without asserting a meritorious claim. These tactics further neither justice nor efficiency, and we cannot facilitate their use. *Id.*”

The holding in *Camp* was overruled by the Supreme Court, but for reasons that do not exist in the present case. The Supreme Court held that “we do not believe applying the particularity requirement in an overly technical fashion **in this case** would serve the purpose behind the rule.” (emphasis added) However, the Supreme Court goes on to state that it is not necessary to apply the particularity requirement in that case because (1) neither party was prejudiced and (2) the court was able to both comprehend the motion and deal with it fairly.

In the case at bar, Appellant did not state sufficient grounds for the relief sought, leaving the Court unable to comprehend the motion or deal with it fairly. Unlike cases in which the court and the parties can comprehend the basis of the motion and deal with it fairly, in this case Judge Faulkner specifically found in her February 23, 2022 order “the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.”

In the February Order, Judge Faulkner referenced the S.C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency which directs that hearings on motions should be minimized. The Order directs trial judges to dispose of motions without merit without waiting on a return or other response from opposing counsel. Therefore, **in this case** Appellant did not state sufficient grounds or relief sought and the court was unable to comprehend the motion or deal with it fairly.

Judge Faulkner's order denying the motion to alter or amend is consistent with the spirit and letter of Rule 7(b)(1). No overly technical application of the Rule was being applied nor asked for. It was incumbent upon Appellant to comply with the requirements of Rule 7(b)(1) in order to trigger the stay provided by Rule 59(f).

The legal effect of Appellant's failure to specify the grounds of his motion is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCF. Therefore, Appellant's notice of appeal was untimely. As such, Appellant has failed to comply with the provisions of

S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the Probate Court's order for damages dated January 26<sup>th</sup>, 2022. This failure to timely appeal was confirmed by the circuit court. As noted by Judge Kinlaw in his order filed May 17, 2022:

the legal effect of appellant's failure to specify the grounds of his motion is that the filing of the motion did not stay a time for appeal pursuant to Rule 59(f), SCRCF. Therefore, appellant's notice of appeal was untimely. As such, appellant has failed to comply with the provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court's order for damages dated January 26, 2022. Based on the foregoing, this court dismisses the appeal of the underlying orders from the probate court as there exists no appellate jurisdiction of this court.

(order filed May 17, 2022; page 6-7)

Based on the foregoing, it is respectfully submitted this Court must dismiss the appeal as there existed no appellate jurisdiction in the circuit court from which to appeal to this court.

#### **IV. Judicial Estoppel.**

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "Judicial estoppel comes into play when the court is forced to take a

position based on a factual assertion." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003); see also *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 554 n.6, 556 S.E.2d 718, 723 n.6 (Ct. App. 2001)

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

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

Sterling Mensch specifically admitted subject matter jurisdiction of the probate court in lines 9 and 10 of his answer to the first Amended Petition. (First Amended Petition and Answer) After affirmatively agreeing that the probate court had jurisdiction, then taking the position the probate court had no jurisdiction over matters previously litigated, Mr. Mensch yet again changes his mind. It borders on frivolity to allege that the probate court did not have jurisdiction over this matter because it involved actions Sterling Mensch took prior to the death of Florence Mensch. Such a position flies in the face of logic, reason, and the law.

Sterling Mensch, III advanced the position that the probate court had jurisdiction, as noted above admitted that jurisdiction and then following an adverse ruling had a change of heart. Mr.

Mensch then took the position that the circuit court had jurisdiction to consider an appeal from probate court but then arguing that the circuit court had no jurisdiction because there was no final order.

In this case, there has been no newly discovered evidence which would compel a change in position by Sterling Mensch, III. Rather, Mr. Mensch has attempted to assert a certain version of the facts in litigation but has attempted to change those facts when the initial version no longer suited him. This is exactly the truth-seeking function of the judicial process that is undermined by such conduct. As such, judicial estoppel precludes Mr. Mensch's appeal.

### **CONCLUSION**

A trial was held before the probate court over four days ultimately concluding in an Order dated January 26, 2022 awarding \$984,763.00 in damages against Sterling Mensch, III. On February 22, 2022, Appellant filed a motion to alter or amend pursuant to Rule 59 which was denied by the probate court. (probate court order dated 2/17/2022) In the aforementioned order, Judge Faulkner found that appellant had failed to comply with the provisions of Rule 7(b)(1) of the South Carolina Rules of Civil Procedure. On February 23, 2022, Sterling Mensch, III appealed to the circuit court the order from the probate court.

On February 25, 2022, respondents moved to dismiss the appeal as untimely on the grounds that the time to appeal had not been stayed by the filing of a defective Rule 59 motion. (2/25/2022 motion to dismiss) Following the hearing, the circuit court granted the Motion to Dismiss the appeal and did not address the various other grounds raised by the appeal. The circuit court order found that the appeal deadline was not tolled by the motion to alter or amend in the probate court and dismissed the appeal. If the court affirms Judge Kinlaw's Order dismissing the Appeal, then

there is no need to consider the other issues contained in Appellant's appeal. In Appellant's initial brief, they are actually asking the court to dismiss the appeal, although they want the court to dismiss it and remand to probate court because they argue that **their appeal** was premature. This Court should affirm the circuit court's Motion to Dismiss the appeal, but to remand this case for any reason would only assist Sterling Mensch's attempts to delay supplemental proceedings for as long as possible.

The family of Florence Mensch has attempted for years now to recover from Sterling Raymond Mensch, III the clear and devastating financial harm caused by his actions. Mr. Mensch has at every opportunity attempted to obscure and drag out the judicial process sought by the estate to remedy the damages caused. The fact that Mr. Mensch continues to redundantly argue the same issues when those issues have been determined against him is simply more evidence of the lengths of which he will go to avoid fairly and adequately compensating his mother's estate for his misdeeds. The court should summarily end such conduct and fully affirm the previous orders of the probate court and circuit court dismissing the appeal.

Respectfully submitted,

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