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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

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.

RECORD ON APPEAL

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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*Attorney for Appellants,
Michael Mares and Emergency Power, LLC*

Dated: December 1, 2022
Myrtle Beach, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2020-CP-22-00991

Michael Mares and Emergency Power, LLC,)
)
Plaintiffs,)

vs.)

Bradley Douglas Marx (deceased) and)
Catherine Marx, individually and as)
Personal Representative of the Estate of)
Bradley Douglas Marx,)
)
Defendants.)

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS**

This matter comes before the Court upon the Motion of Defendant Catherine Marx, as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified as “Bradley Douglas Marx (deceased)” and Defendant Catherine Marx, individually, seeking an Order dismissing the Complaint filed in this action against Defendants by the plaintiffs, Michael Mares and Emergency Power, LLC. A hearing on the Motion was held on November 12, 2021, in Georgetown, South Carolina. Present at the hearing was Plaintiffs’ counsel, Reese R. Boyd, III, Esquire. Audra M. Byrd, Esquire of Turner Padgett Graham & Laney, PA, appeared at the hearing on behalf of Defendants. For the reasons set forth below, the Motion to Dismiss filed by Defendants is GRANTED.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of the Complaint, Plaintiff Mares and Bradley Douglas Marx, deceased, formed a limited liability company, Plaintiff Emergency Power, LLC (hereinafter 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, Plaintiffs allege Bradley

Douglas Marx moved to Georgetown County, South Carolina, and purchased a home with his wife, Defendant Catherine Marx. On November 24, 2019, Bradley Douglas Marx died, and Defendant Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020, by the Georgetown County Probate Court.

Thereafter, on September 1, 2020, Plaintiffs presented and filed a Notice of Claim to the Estate of Bradley Douglas Marx and with the Georgetown County Probate Court. In the Notice of Claim, Plaintiffs asserted claims against the Estate, alleging the Estate was liable for Mr. Marx'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. The Notice of Claim presented by Plaintiffs in the Probate Court mirrors closely the Complaint filed in the present action. Upon receipt and consideration of Plaintiffs' 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 Plaintiffs on October 22, 2020, as evidenced by the Proof of Delivery filed with the Probate Court and of which this Court takes judicial notice. The Notice of Disallowance contained a warning, as required by statute, Plaintiffs' claims would be forever barred unless a legal proceeding was commenced within thirty days after the mailing of the Notice of Disallowance.

Plaintiffs did not commence an action in the Probate Court and instead, filed the present action on December 7, 2020, asserting causes of action against all Defendants for Conversion, Unjust Enrichment, and Constructive Trust. Specifically, Plaintiffs allege Mr. Marx 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. In response to the Complaint, Defendants filed the present Motion to Dismiss on January 11, 2021. In the Motion,

Defendants argue the Complaint should be dismissed as untimely, relying primarily upon the applicable time limitations of the non-claim statute at issue. A hearing on the Motion to Dismiss 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 Court took the matter under advisement after Plaintiffs' counsel presented additional argument regarding the potential for liability insurance coverage, which if applicable, could affect the Court's decision. Both parties submitted supplemental briefs to the Court on the issue.

Thereafter, on February 8, 2021, Judge John 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 Plaintiffs against Defendants. Upon the expiration of the Court-ordered discovery period, Judge John advised counsel the Motion would be placed back upon the general motion roster for 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.¹ At the request of Defendants' counsel, once discovery was completed on the issue of liability insurance coverage, the Motion was scheduled for hearing before this Court on November 12, 2021, over nine months after discovery was ordered. Prior to the hearing on the Motion, Defendant Catherine Marx filed with the Court an affidavit, produced to Plaintiffs 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

¹ A true and accurate copy of the correspondence from the Court to counsel for the parties was provided to this Court during its hearing on the Motion and made part of its record.

insurance policy providing coverage to any Defendant for the claims and conduct asserted in the Complaint. During discovery, Plaintiffs produced four liability insurance policies, and Defendants produced a policy of insurance providing liability coverage involving the use of a motor vehicle. As of the date of the hearing of this Motion, no party could identify a policy of liability insurance which would provide coverage to any Defendant for the conduct and claims alleged by Plaintiffs in the Complaint.

II. LEGAL STANDARD

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, Defendants have moved 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, Defendants premise their Motion upon the timeliness of Plaintiffs' filing suit, in the interest of justice and judicial economy, the Court may withhold a determination until such time as Plaintiffs have had a full and fair opportunity to conduct discovery so as to enable them to address the timeliness of filing. In such cases, Plaintiffs may present 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 Plaintiffs a full and fair opportunity to conduct discovery on the issue of timeliness provides Plaintiffs with additional time in which to amend their pleadings to overcome new issues raised in the Motion to Dismiss. Id. In this case, no amendment was filed, and no additional evidence or facts were presented to the Court by Plaintiffs to overcome the issues of timeliness raised in the Motion to Dismiss.

To the extent the Court, after the initial hearing and subsequent order permitting discovery on the issue of the existence of liability insurance coverage, is considered to have converted the Motion to Dismiss to one for summary judgment on the issue of liability insurance coverage, the Court applies the applicable legal standard for motions seeking summary judgment. 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)).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. **PLAINTIFFS' CLAIMS WERE NOT FILED WITHIN ONE YEAR OF THE DEATH OF BRADLEY DOUGLAS MARX.**

As alleged in the Complaint filed by Plaintiffs, Bradley Douglas Marx died on November 24, 2019, and Defendant Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020. Plaintiffs filed the present action on December 7, 2020, more than one year after the death of Bradley Douglas Marx 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; . . .*

S.C. Code Ann. § 62-3-803 (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). The Court finds the causes of action asserted in the Complaint are undoubtedly ‘claims’ as defined by the Probate Code. As a result, Plaintiffs were required to file their claims on or before November 24, 2020, 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 Marks but also to the claims asserted against Defendant Catherine Marx, individually (as an alleged “nonprobate transferee” of Bradley Douglas Marks) and as Personal Representative of the Estate of Bradley Douglas Marks. 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. PLAINTIFFS’ CLAIMS WERE NOT FILED WITHIN THIRTY DAYS OF THE MAILING OF THE NOTICE OF DISALLOWANCE OF CLAIM.

The South Carolina Probate Code provides a specific mechanism for presenting claims against a decedent’s estate. See, 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.

In this case, Plaintiffs presented and filed a Notice of Claim on September 1, 2020, to the Estate of Bradley Douglas Marx and with the Georgetown County Probate Court. Thereafter, counsel for the Estate of Bradley Douglas Marx filed a Notice of Disallowance of Claim with the Probate Court on October 16, 2020, and mailed the Notice to counsel for Plaintiffs on October 22, 2020, as evidenced by the Proof of Delivery filed with the Probate Court, of which all of said filings the Court takes judicial notice. The Notice of Disallowance contained the necessary warning, as required by statute, Plaintiffs’ claims would be forever barred unless a legal proceeding was commenced within thirty days after the mailing of the Notice of Disallowance.

Plaintiffs did not commence an action in the Probate Court for allowance of their claims. Instead, Plaintiffs filed the present action, which the Court finds would have been appropriate if Plaintiffs had commenced within the thirty-day period provided by statute. See, S.C. Code Ann. § 62-3-804(5). (“[N]o 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.”). As such, Plaintiffs were required to file this action on or before November 23, 2020, which they failed to do. As such, the Court finds Plaintiffs’ claims are untimely and must be dismissed.

Additionally, Plaintiffs failed to “provide written notice to the probate court in which the decedent's estate is under administration that a legal proceeding has commenced for allowance of the claim, setting forth the court in which the legal proceeding is pending.” S.C. Code Ann. § 62-3-804(2).

In summary, the Court finds Plaintiffs failed to comply with the mandatory provisions of the South Carolina Probate Code by failing to file timely their action for allowance of claim and failing to provide written notice to the Probate Court of this proceeding. As such, dismissal is appropriate as a matter of law.

C. THE LIABILITY INSURANCE LIMITS COVERAGE EXCEPTION TO THE NON-CLAIM STATUTE IS NOT SUPPORTED BY THE ALLEGATIONS OF THE COMPLAINT OR ADDITIONAL FACTS OR EVIDENCE PRESENTED BY PLAINTIFFS AFTER A FULL AND FAIR OPPORTUNITY FOR DISCOVERY ON THIS 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 our Court of Appeals 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 Plaintiffs’ Complaint, the Court finds the discovery rule is inapplicable and applying the discovery rule would be reversible error. *Phillips*, 399 S.C. at 231-232, 731 S.E.2d at 329-330.

Plaintiffs 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). Plaintiffs provided the 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. The Court finds the Complaint in this 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 Plaintiffs' 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. Plaintiff Mares alleges he and Mr. Marx were the sole members of the Company, and if such a policy existed, the Court finds Plaintiffs would likely be aware of the same at the time of filing. Further, the Court finds the absence of such an allegation leads to the reasonable inference that no such liability policy exists. Regardless of whether the Company or any Defendant carried liability insurance affording coverage, the Court is 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 Plaintiffs' Complaint sets forth conduct or actions which would lead the Court to infer such claims would be covered by liability insurance. Plaintiffs allege the actions and conduct of Mr. Marx were taken in his individual capacity and not as an officer or director of the Company. It is the nature of Mr. Marx's alleged *ultra vires* actions and conduct that forms the basis of Plaintiffs' Complaint. Repeatedly, Plaintiffs allege Mr. Marx acted intentionally and deliberately in converting company funds and assets for his personal use.

Plaintiffs have provided the 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 Defendant 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 Court cannot reasonably infer any liability insurance policy for the Company or otherwise would provide coverage for Defendant Catherine Marx based upon the conduct alleged in the Complaint. Even more, the existence of a liability policy providing coverage for Defendant Catherine Marx was not pled and is not contained in the allegations of the Complaint. Plaintiffs have alleged causes of action for Conversion, Unjust Enrichment and Constructive Trust, and Plaintiffs have provided the Court with no 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 Plaintiffs’ demand for relief is not confined to the limits of any available coverage. Therefore, the Court finds there is no basis 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 Plaintiffs conceded the present 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. Since the applicable statute is a nonclaim statute, there is no equitable or other relief available to Plaintiffs 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 Court finds Plaintiffs have failed to meet the statutory filing requirements to survive the present Motion to Dismiss. Plaintiffs' 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 the Decedent, the Estate, or Catherine Marx individually, and Plaintiffs have failed to allege the limits of any such policy or limited their demand for relief to such limits.

Therefore, the Court finds the general one-year statute applies to Plaintiffs' claims, and as alleged, the claims are time-barred as a matter of law. As a result, the Court finds dismissal of the Complaint is appropriate as a matter of law.

D. THE TIME LIMITATIONS OF THE NON-CLAIM STATUTE ARE UNAFFECTED BY THE SOUTH CAROLINA SUPREME COURT ORDERS RELATED TO THE RELAXATION AND FORGIVENESS OF PROCEDURAL DEADLINES BECAUSE OF THE COVID-19 PANDEMIC.

In considering the timeliness of Plaintiffs' filing suit, the Court considered the Orders of the South Carolina Supreme Court related to extensions of time and forgiveness of procedural defaults during the COVID-19 pandemic. Specifically, the Court reviewed 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. While our Supreme Court expressed judicial concern for litigants affected by the pandemic, the Orders expressly reserve the issues *sub judice* to the legislative branch for consideration. In relevant part, the Order provides the following:

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.

Id. at 9, Section (c)(12).

At this time, the legislature has not acted on the concerns expressed by the South Carolina Supreme Court, and therefore, the non-claim statute at issue here is unaffected. Therefore, the Court finds dismissal is appropriate as a matter of law.

IV. CONCLUSION AND ORDER

Based upon the foregoing,

It is hereby ADJUDGED, ORDERED AND DECREED, the Motion to Dismiss filed by Defendants shall be GRANTED WITHOUT PREJUDICE; and

It is hereby further ADJUDGED, ORDERED AND DECREED, in the event liability insurance is found or more specific facts are established showing Defendant Catherine Marx, individually, is personally liable, Plaintiff may commence a new action for the same if commenced within the applicable statute of limitations.

AND IT IS SO ORDERED.

THE HONORABLE H. STEVEN DEBERRY, IV
Presiding Circuit Court Judge
For the Fifteenth Judicial Circuit

Dated: _____, 2021



Georgetown Common Pleas

Case Caption: Michael Mares , plaintiff, et al VS Bradley Douglas Marx , defendant,
et al
Case Number: 2020CP2200991
Type: Order/Dismissal

H. Steven DeBerry, IV

Circuit Court Judge 2771

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)	
)	
Michael Mares and Emergency)	
Power, LLC,)	
)	
Plaintiff,)	
)	
vs.)	ORDER
)	Case No.: 2020-CP-22-00991
)	
Bradley Douglas Marx (deceased))	
And Catherine Marx, Individually)	
and in her capacity as Personal)	
Representative of the Estate of)	
Bradley Douglas Marx,)	
)	
)	
Defendants.)	
)	
)	

The Plaintiff, Michael Mares and Emergency Power, LLC, requests the Court to reconsider the Order dated December 2, 2021 and filed in the Georgetown County Clerk of Court’s office.

Having duly considered the motion of the Plaintiff, this Court has determined that its original ruling of December 2, 2021 is fully supported by law and evidence and is hereby ratified and reconfirmed. The motion is therefore DENIED.

AND IT IS SO ORDERED.

Dated: _____

H. Steven DeBerry IV
Judge, Twelfth Judicial Circuit



Georgetown Common Pleas

Case Caption: Michael Mares , plaintiff, et al VS Bradley Douglas Marx , defendant,
et al
Case Number: 2020CP2200991
Type: Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771

Electronically signed on 2022-01-07 11:26:45 page 2 of 2

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GEORGETOWN) FIFTEENTH JUDICIAL CIRCUIT

Michael Mares and Emergency Power,)
LLC,)
)
Plaintiffs,)

Case No.: 2020-CP-22- _____

vs.)

SUMMONS

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

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Reese R. Boyd, III
Reese R. Boyd, III, Esq. (SC Bar #: 007151)
Davis & Boyd LLC
Post Office Box 70517
Myrtle Beach, SC 29572
(843) 839-9800
(843) 839-9801 (fax)
reese@davisboydlaw.com

Dated: December 7, 2020
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN) DOCKET NO.: 2020-CP-22-_____

Michael Mares and Emergency)
Power, LLC,)
)
Plaintiff,)

COMPLAINT

vs.

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

TO THE DEFENDANT above named:

COMES NOW the Plaintiffs, Michael Mares and Emergency Power, LLC (“Plaintiffs”), by and through their undersigned counsel, who would respectfully show unto the Court as follows:

Parties and Jurisdiction:

1. Plaintiff **Michael Mares** (hereinafter “Plaintiff” or “Mares”) is a resident of Garden City, Michigan.

2. Plaintiff **Emergency Power, LLC** (hereinafter “the Company” or “Emergency Power”) is a limited liability company organized and existing under the laws of the State of Michigan.

3. Defendant **Bradley Douglas Marx** (hereinafter "Decedent") was, upon information and belief, a resident of Murrells Inlet, South Carolina and died on November 24, 2019.

4. Defendant **Catherine Marx** (hereinafter "Marx") is, upon information and belief, a resident of Murrells Inlet, South Carolina and was appointed Personal Representative of the Estate of Bradley Douglas Marx, by the Georgetown County Probate Court on April 8, 2020.

Factual Background:

5. Plaintiff and Bradley Douglas Marx met in 1993 and on September 16, 1996 Plaintiff and Decedent formed Emergency Power, LLC with the Michigan Secretary of State, with each of the partners holding a 50% ownership interest in the LLC.

6. On March 22, 2018 Decedent purchased a home in Murrells Inlet, South Carolina with his wife, Catherine Marx as joint tenants with right of survivorship.

7. On November 24, 2019 Bradley Douglas Marx died.

8. On or about May of 2020 Plaintiff discovered that Decedent had been embezzling from the company from at least April 16, 2013 until the time of his death.

9. Decedent used his corporate American Express credit card to make personal purchases including, but not limited to, his personal auto insurance. Decedent transferred funds from the business to his personal account and withdrew company funds to purchase a private vehicle that was not used for business.

10. Upon information and belief, the Decedent deprived the company of no less than \$200,000.00 over time, through personal account transfers, and bonuses paid solely to himself without approval from the company.

11. Upon information and belief, Decedent transferred substantial assets of the company to his personal bank account.

12. Plaintiff is gravely concerned that these improper transfers by the Decedent have harmed Emergency Power, LLC, a company which Plaintiff Mares has devoted over twenty years of his life into building into a successful venture.

13. Plaintiff is, upon information and belief, informed and concerned that Decedent transferred large sums of corporate receipts and funds to Marx and other family members, thereby unjustly enriching Marx and other members of Decedent's family, at the expense of Plaintiffs.

FOR A FIRST CAUSE OF ACTION
Conversion

14. Plaintiff realleges and reiterates each and every allegation contained in Paragraphs 1 through 13, herein above, as if the same were fully set forth here verbatim.

15. Upon information and belief, the Defendant Decedent, either acting individually, or acting in concert and conspiracy with Defendant Catherine Marx, converted and/or misappropriated substantial amounts of cash directly from the bank accounts of Emergency Power, LLC, and has written checks to credit card companies and other third parties without legitimate corporate purpose, and used the funds of the company for his personal benefit, and for the personal benefits of his family members

and personal friends, and otherwise converted funds and assets in the accounts of Emergency Power, LLC to his own personal use and benefit. Emergency Power, LLC did not benefit from this use of company funds and has not been repaid by Defendant.

16. As a result of the Defendant's multiple acts of conversion of the assets of Emergency Power, LLC, the Plaintiff, and other interested parties, have been harmed, and are entitled to judgment from this Court for their damages in connection with such acts of conversion.

FOR A SECOND CAUSE OF ACTION
Unjust Enrichment

17. Plaintiff realleges and reiterates each and every allegation contained in Paragraphs 1 through 16, herein above, as if the same were fully set forth here verbatim.

18. At all times relevant to this litigation, Defendants owed a legal duty to Plaintiffs to not unfairly or unduly take advantage of Plaintiffs or commit wrongful acts in order to unjustly enrich themselves at the expense of Plaintiffs or at the expense of Plaintiffs' property or financial interests.

19. During the period from approximately April 6, 2013 through, Defendants unjustly enriched themselves by wrongfully converting, taking, utilizing or managing the property and financial interests of Plaintiffs.

20. Such acts and omissions leading to the Defendants' unjust enrichment were the actual and proximate cause of harm to Plaintiffs.

21. Accordingly, Defendants are liable in damages to Plaintiffs in excess of \$200,000.00, the exact amount to be proven at trial, arising out of Defendants' unjust enrichment.

FOR A THIRD CAUSE OF ACTION
Constructive Trust

22. Plaintiff realleges and reiterates each and every allegation contained in Paragraphs 1 through 21, herein above, as if the same were fully set forth here verbatim.

23. Decedent was a fiduciary of the Company as a 50% partner who had access to Company funds and Decedent utilized company funds, that did not equitably belong to him, to pay for property that Decedent had title to, but from which Plaintiffs derived no benefit.

24. As has been held by our courts, a constructive trust may be enforced in cases such as this where “a party obtains a benefit which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.” Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. S.C. 2009) (internal quotations omitted).

25. Due the Decedent’s wrongful acts in converting or otherwise diverting these funds from the Plaintiffs, Plaintiffs are informed and believe that they are entitled to have a constructive trust imposed over all such assets so converted or otherwise wrongfully diverted by the Decedent, to Marx or otherwise, to the extent that such assets can be traced or identified.

WHEREFORE, having set forth his claims and allegations in this matter, Plaintiff prays that this Court consider these matters and the issues raised herein, and render its Order:

- A. Granting the Plaintiff all relief sought in this Complaint, including
- B. Requiring Defendants to return, as appropriate, any misappropriated assets, or their value, to the Plaintiffs; and
- C. Directing that Defendants, as the Court may find appropriate, be held responsible for Plaintiffs' costs and expenses related to this action; and
- D. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

s/ Reese R. Boyd, III
Reese R. Boyd, III, Esq. (SC Bar #: 007151)
Kelly M. Turek, Esq.
Davis & Boyd LLC
Post Office Box 70517
Myrtle Beach, SC 29572
(843) 839-9800
(843) 839-9801 (*fax*)
reese@davisboydlaw.com

Attorney for the Plaintiffs

Dated: December 7, 2020
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GEORGETOWN) Civil Action No. 2020-CP-22-00991

Michael Mares and Emergency Power, LLC,)
)
Plaintiffs,)
)
vs.)

**NOTICE OF MOTION AND MOTION TO
DISMISS COMPLAINT SUBMITTED ON
BEHALF OF DEFENDANTS**

Bradley Douglas Marx (deceased) and)
Catherine Marx, individually and as)
Personal Representative of the Estate of)
Bradley Douglas Marx,)
)
Defendants.)

COMES NOW Defendant Catherine Marx, as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified as “Bradley Douglas Marx (deceased)” and Catherine Marx, individually, by and through her undersigned counsel, and hereby submits this Motion to Dismiss the Complaint filed by Plaintiff pursuant to Rule 12 of the South Carolina Rules of Civil Procedure as well as relevant statutory and case law. For the reasons set forth herein, counsel would show that the Motion to Dismiss should be granted as a matter of law.

ARGUMENT

I. PLAINTIFFS’ CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

As alleged in the Complaint filed by Plaintiffs, Bradley Douglas Marx died on November 24, 2019, and Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020. [Complaint at ¶¶ 3 – 4]. Plaintiffs filed the present action on December 7, 2020, more than one year after the death of Bradley Douglas Marx. 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; . . .*

S.C. Code Ann. § 62-3-803 (emphasis added).

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). The causes of action asserted in the Complaint are clearly ‘claims’ as defined by the Probate Code. As a result, Plaintiffs were required to file their claims on or before November 24, 2020, but they failed to do so.

Notably, the statute of limitations applies not only to claims against the Estate of Bradley Douglas Marks but also to the claims asserted against Catherine Marx, individually (as an alleged “nonprobate transferee” of Bradley Douglas Marks) and as Personal Representative of the Estate of Bradley Douglas Marks. 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 statute of limitations has expired, and Plaintiffs’ Complaint must be dismissed as a matter of law.

II. PLAINTIFFS’ CLAIMS ARE BARRED FOR FAILURE TO COMPLY WITH THE SOUTH CAROLINA PROBATE CODE.

The South Carolina Probate Code provides a specific mechanism for presenting claims against a decedent’s estate. See, 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 that 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.

In this case, Plaintiffs presented and filed a Notice of Claim on September 1, 2020, to the Estate of Bradley Douglas Marx. A true and accurate copy of the Statement of Creditor’s Claim is attached hereto and incorporated herein by reference as **Exhibit One**.¹ The Claim presented

¹ The Court may take judicial notice of these facts as established by records from the Georgetown County Probate Court without converting the present Motion to Dismiss into a Motion for Summary Judgment. Secretary of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”). Judicial notice “may be taken at any stage of the proceeding.” Rule 201(f), SCRE. Under Rule 201 of the South Carolina Rules of Evidence, “if requested by a party and supplied with the necessary information,” a court must take judicial notice of facts not subject to reasonable dispute in that they are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Rule 201(b) and (d), SCRE. It is well established that public records are not subject to reasonable dispute and are therefore appropriate matters for judicial

by Plaintiffs in the Probate Court mirrors the Complaint and claims asserted in the present action. While the allegations have been repackaged suitable for filing in this Court, the allegations and underlying claims are identical.

Upon receipt and consideration of Plaintiffs' Claim, counsel for the Estate of Bradley Douglas Marx filed a Notice of Disallowance of Claim with the Probate Court on October 16, 2020, and mailed the Notice to counsel for Plaintiffs on October 22, 2020, as evidenced by the Proof of Delivery filed with the Probate Court. True and accurate copies of the Notice of Disallowance of Claim and Proof of Delivery are attached hereto and incorporated herein by reference as **Exhibit Two**. The Notice of Disallowance contained the necessary warning, as required by statute, that Plaintiffs' claims would be forever barred unless a legal proceeding was commenced within thirty days after the mailing of the Notice of Disallowance. [See Exhibit Two].

To date, Plaintiffs have failed to commence an action in the Probate Court for allowance of their claims. Instead, Plaintiffs filed the present action in this Court, which would have been appropriate if Plaintiffs had commenced this suit within the thirty-day period provided by statute. See, S.C. Code Ann. § 62-3-804(5). (“[N]o 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.”). As such, Plaintiffs were required to file this action on or before November 23, 2020, which they failed to do. As such, Plaintiffs' claims are forever barred.

notice. Cox v. Fleetwood Homes of Ga., Inc., 329 S.C. 157, 159, 494 S.E.2d 463 n.2 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 55, 512 S.E.2d 498 (1999).

Further disregarding the mandates of the Probate Code, Plaintiffs, having chosen to improperly file the present action in the circuit court, Plaintiffs also failed to “provide written notice to the probate court in which the decedent's estate is under administration that a legal proceeding has commenced for allowance of the claim, setting forth the court in which the legal proceeding is pending.” S.C. Code Ann. § 62-3-804(2). To date, Plaintiffs have failed to provide such notice to the Probate Court for Georgetown County, which would likely be rejected in any event since the filing is significantly overdue.

In summary, Plaintiffs failed to comply with the mandatory provisions of the South Carolina Probate Code by failing to file timely their action for allowance of claim, improperly commencing this action in the circuit court, and failing to provide written notice to the Probate Court of this proceeding. As such, Plaintiffs’ claims are forever barred and should be dismissed as a matter of law.

III. THE COURT LACKS JURISDICTION AS THE PROBATE COURT HAS EXCLUSIVE ORIGINAL JURISDICTION OVER PLAINTIFFS’ CLAIMS.

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).

The present action clearly involves the Estate of Bradley Douglas Marx, and as such, the only appropriate forum in which Plaintiffs could have commenced this action is the Georgetown County Probate Court. While the suit may have been removable to this Court under the statute, Plaintiffs were nonetheless required to commence the action in the Probate Court, which they

failed to do. As such, this Court lacks jurisdiction, and Plaintiffs' Complaint should be dismissed as a matter of law.

CONCLUSION

For the reasons set forth above, Plaintiffs have failed to state a cause of action against Defendant Catherine Marx, as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified as "Bradley Douglas Marx (deceased)") and Catherine Marx, individually. Further, the applicable statute of limitations has expired, this Court lacks jurisdiction, and Plaintiffs' claims are barred by the South Carolina Probate Code and relevant case law. As such, Defendant requests that the Complaint be dismissed with prejudice, that Plaintiffs be charged with attorneys' fees and costs pursuant to S.C. Code Ann. § 62-1-111, and for such other and further relief as the Court should deem appropriate.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

By: /s/ Audra M. Byrd
 Audra M. Byrd, Esquire (S.C. Bar #76719)
 E-Mail: abyrd@turnerpadget.com
 2411 North Oak Street, Suite 301 (29577)
 Post Office Box 2116
 Myrtle Beach, South Carolina 29578
 Telephone: (843) 213-5500
 Facsimile: (843) 213-5555
*ATTORNEYS FOR DEFENDANT CATHERINE
 MARX, AS PERSONAL REPRESENTATIVE OF
 THE ESTATE OF BRADLEY DOUGLAS MARX
 (INCORRECTLY IDENTIFIED AS "BRADLEY
 DOUGLAS MARX (DECEASED)") AND
 CATHERINE MARX, INDIVIDUALLY*

January 11, 2021

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GEORGETOWN

STATEMENT OF CREDITOR'S CLAIM

IN THE MATTER OF:
BRADLEY D. MARX
(Decedent)

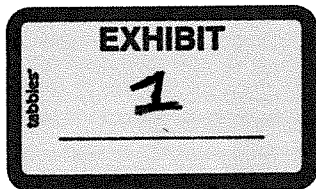
CASE NUMBER: 2020-ES-22-00191



Decedent's Date of Death (if known): NOVEMBER 24, 2019

Decedent's Last Mailing Address: 260 GRAYTWIG CIR., MURRELLS INLET, SC 29576

Creditor:	EMERGENCY POWER, LLC and MIKE MARES
Address:	c/o Reese R. Boyd, III, Esquire Davis & Boyd, LLC 1110 London Street, Suite 201, Myrtle Beach, SC 29577
Telephone:	843-839-9800
Email:	reese@davisboydlaw.com
Original Creditor:	EMERGENCY POWER, LLC
Address (if different from above)	26128 W. Seven Mile Rd. Redford, MI 48240
Claim Amount Due:	\$705,604.54
Account Number:	
Other Reference Number:	
Basis of claim (Ex: Contract, Services Rendered for decedent, etc):	Decedent is a 50% member of Claimant, and Claimant is entitled to reimbursement for personal expenses incurred by Decedent, and which Decedent caused to be paid by Claimant. Total personal expenses paid on behalf of Decedent as of this date are equal to \$233,868.18. A table of these amounts is attached hereto as Exhibit "A." A copy of the statements on which claim is based is on file with Mike Mares, who is the other 50% owner of Claimant, and will be produced upon request. Under Michigan Law, where Claimant is organized and has its principal place of business, and where all of the events giving rise to this claim occurred, an LLC damaged as a result of embezzlement may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorneys fees (MI 600.2919a), therefore Claimant tripled the amount of personal expenses and added \$4,000 in attorneys fees to determine this creditor's claim amount. Mike Mares joins in this Creditor's claim to protect his derivative interest in the claim.
Date claim will become due (if not already due)	
Nature of uncertainty as to the claim, if any (i.e. contingent claim, amount of claim, due date):	Ongoing investigation is expected to produce higher amount of claim.
Description of security as to the claim, if any (Ex: Collateral for the debt)	



Signature: *Reese R. Boyd, III*
 Printed Name: REESE R. BOYD, III, ESQ./Davis & Boyd, LLC
 Title: ATTORNEYS FOR CREDITOR
 Date: August 26, 2020

INSTRUCTIONS: Claims MUST be filed with the Probate Court of the county in which the Decedent's Estate is under administration and may be delivered or mailed to the fiduciary appointed to administer the estate.

ELECTRONICALLY FILED - 2021 Jan 11 10:41 AM - GEORGETOWN - COMMON PLEAS - CASE#2020C02200991

(see SCPC 62-3-803, 62-3-804, and 62-3-806).

No claim against a Decedent's estate may be presented or legal action commenced against a Decedent's Estate prior to the appointment of a Personal Representative to administer the Decedent's Estate (except see SCPC 62-3-804(1)(b)).

Satisfaction or withdrawal of claim (FORM 325) **MUST** be filed once claim is resolved.

Exhibit "A"
Table of Claim

Amount	Description
\$84,074.35	Personal charges on AMEX 1
\$29,377.27	Geico Insurance charges (on AMEX 1, but not included above)
\$27,635.78	All Cardmember charges
\$37,652.73	All AMEX 2 charges
\$8,760.00	Unauthorized Draws (2014 Ford Escape)
\$2,450.05	All Chase EZ Pay charges
\$9,918.00	Other Payouts (Misc)
\$34,000.00	Other Payout (transfers)
\$233,868.18	Amount Embezzled



STATE OF SOUTH CAROLINA)
)
COUNTY OF: GEORGETOWN)
)
IN THE MATTER OF:)
BRADLEY D. MARX)
(Decedent))

IN THE PROBATE COURT

NOTICE OF ALLOWANCE/DISALLOWANCE OF CLAIM

CASE NUMBER: 2020-ES-22-191

TO:	Creditor:	EMERGENCY POWER, LLC AND MIKE MARES
	Address:	C/O REESE R. BOYD, III ESQUIRE DAVIS & BOYD, LLC 1110 LONDON ST. SUITE 201 MYRTLE BEACH, SC 29577
	Telephone:	(843) 839-9800
	Email:	REESE@DAVISBOYDLAW.COM
	Original Creditor:	EMERGENCY POWER, LLC
	Address (if different from above)	26128 W. SEVEN MILE RD. REDFORD, MI 48240
	Filed Date of Claim:	SEPTEMBER 1, 2020
	Claim Amount:	\$705,604.54
	Account Number:	
	Other Reference Number:	

PROBATE COURT
2020 OCT 15
GEORGETOWN

Allowance of a claim is evidence the Personal Representative accepts the claim as a valid debt of the Decedent's estate. Allowance of a claim may not be construed to imply the estate will have sufficient assets with which to pay the claim.

- the claim is allowed.
- the claim is partially allowed in the amount of \$ _____ ; the balance is disallowed. Explanation (optional):
- the claim is disallowed in full. Explanation (optional): THIS CLAIM IS DISALLOWED IN FULL AS BEING BOTH WITHOUT MERIT AND FOR LACK OF JURISDICTION. ALL CLAIMS RELATE TO A MICHIGAN ENTITY LOCATED, ORGANIZED, AND OPERATING IN MICHIGAN, AND THE CLAIM ITSELF STATES ALL ALLEGED ACTIVITIES OCCURRED IN MICHIGAN.

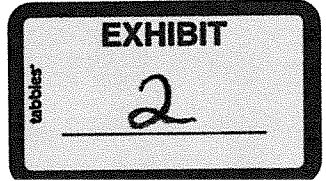
The disallowed claim or the disallowed portion of your claim will be forever barred unless you commence a legal proceeding requiring a Summons, a Petition and a filing fee of \$150.00 for allowance of the claim in accordance with SPC 62-3-804(2), within thirty (30) days after the mailing or other service of this Notice of Allowance/Disallowance of Claim.

Executed this 12 day of October, 2020

Signature: Catherine Marx
Print Name: CATHERINE MARX
Address: 260 GRAYTWIG CIR.
MURRELLS INLET, SC 29576
Telephone (Work): _____
(Home): _____
(Cell): _____
Email: _____

Attorney: MELODY J. E. BREEDEN
Address: PO BOX 2116
MYRTLE BEACH, SC 29578
Telephone: (843) 213-5500
Email: MBREEDEN@TURNERPADGET.COM

R 0036



STATE OF SOUTH CAROLINA

COUNTY OF: Horry

IN THE MATTER OF:
BRADLEY D. MARX
(Decedent)

IN THE PROBATE COURT

PROOF OF DELIVERY

CASE NUMBER: 2020-ES-22-191

COPY

On the 22nd day of October, 2020, I mailed or delivered the following document(s):

Form 372ES, Notice of Disallowance of Claim

- A copy of which is attached hereto and incorporated herein, or
- The original of which is on file with the Court.

PROBATE COURT
2020OCT27

Delivery was accomplished by the following method (check appropriate box):

GEORGETOWN

- personal delivery
- certified mail
- commercial delivery
- ordinary first-class mail
- registered mail
- electronic message (Article 7, Trust matters only)

to each of the following persons at the address shown:

NAME	ADDRESS
EMERGENCY POWER, LLC AND MIKE MARES	C/O REESE R. BOYD, III, ESQ. DAVIS AND BOYD, LLC 1110 LONDON ST. SUITE 201 MYRTLE BEACH, SC 29577
EMERGENCY POWER, LLC AND MIKE MARES	26128 W. SEVEN MILE RD. REDFORD, MI 48240

SWORN to before me this 22 day of October, 2020

Notary Public for South Carolina
My Commission Expires: 6/13/22

Signature: Hannah Cromley
 Print Name: HANNAH CROMLEY
 Address: PO BOX 2116
MYRTLE BEACH, SC 29578
 Telephone (Work): (843) 213-5500
 (Home): _____
 (Cell): _____
 E-mail: HCROMLEY@TURNERPADGET.COM
 Relationship to Decedent/Estate: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
DOCKET NO.: 2020-CP-22-00991

Michael Mares and Emergency)
Power, LLC,)
)
Plaintiffs,)

vs.)

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

**PLAINTIFF'S MEMORANUM
IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

TO THE DEFENDANTS above named:

Defendant Catherine Marx, as personal representative of the Estate of Bradley Marx, and in her individual capacity, has moved to dismiss this action on the grounds that Plaintiffs were outside the statute of limitations in their claims for Conversion, Unjust Enrichment, and Constructive Trust. Plaintiffs oppose Defendants' motion to dismiss for the following reasons:

- (1) Plaintiffs filed a Complaint within the statute of limitations pursuant to South Carolina Code § 15-3-530, as the deadline for filing these actions is within three years of discovery of the alleged complaints.
- (2) Plaintiffs filed a Claim within the time period allowed by the South Carolina Probate Code § 62-3-803.

- (3) Exigencies of the COVID-19 pandemic and other mitigating concerns would make it inequitable to dismiss the Plaintiffs' Complaint; and
- (3) This Court has Jurisdiction over matters stated in the Complaint.

Standard of Granting a Motion to Dismiss:

It is well settled law that, in evaluating a motion to dismiss based on Rule 12(b) of the South Carolina Rules of Civil Procedure, the Court must view the facts alleged in the pleadings and any reasonable inferences to be drawn therefrom in the light most favorable to the party seeking relief; if those facts and inferences would entitle that party to relief on any theory, then a dismissal for failure to state a claim is improper. Benedict College v. National Credit Systems, Inc., 400 S.C. 538, 735 S.E.2d 518 (S.C. App. 2012). If the facts alleged in the pleadings and the inferences deductible therefrom would entitle the party seeking relief to any relief, then dismissal for failure to state a claim is improper. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (S.C. 2012).

Argument

Defendants' Motion to Dismiss distorts the applicable legal standard. In order to defeat Defendants' Motion to Dismiss, Plaintiffs need only show that they have alleged facts that will support claims under which this Court could grant relief. Plaintiffs have met this burden, and the allegations contained therein, along with the inferences that may be drawn therefrom, when considered in a light most favorable to Plaintiffs, clearly support multiple grounds on which this Court could grant relief to the Plaintiffs.

The Defendants' Motion to Dismiss is premised on their claim that, under Rule 12(b), Plaintiffs have been barred pursuant to S.C. Code §62-3-803, because Plaintiffs are

allegedly outside of the statute of limitations. There are, however, genuine issues of material fact as to various aspects of the Plaintiffs' claims herein, which are not, or in some cases, arguably should not, be barred by any applicable statute of limitations.

Plaintiffs admit that the statute of limitations may have closed as to some of the Defendants, particularly the estate, but it has not closed as to the personal representative of the estate, or as to Catherine Marx in her individual capacity. Defendants fail to accurately define the statute of limitations for the remainder of the Complaint. In South Carolina, the statute of limitations is governed by the "discovery rule," and does not begin to run until discovery of "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." Burgess v. American Cancer Society, 300 S.C. 182, 185, 386 S.E.2d 798 (Ct. App. S.C. 1989)(internal citations omitted). Here, the Plaintiffs became aware of the Defendants' Conversion, Unjust Enrichment, and Constructive Trust approximately 6 months after the death of Bradley Marx, whose death occurred on November 24, 2019.

Even if Plaintiffs' claims are disallowed as to one Defendant (particularly, the Estate) pursuant to the Probate Code, Plaintiffs' claims are permitted against the remaining Defendants pursuant to the applicable statute of limitations, referenced above.

The Complaint properly alleges a cause of action for Conversion. The Plaintiffs' Complaint states that Bradley Marx, the decedent, had been embezzling from the Plaintiffs for a number of years. Catherine Marx, individually, has been a co-conspirator in her individual capacity for the same embezzlement, and should not be

shielded for these actions by a misplaced reliance on a single provision of the Probate Code, which does not bar the Plaintiffs' claims herein.

As discovery is very likely to reveal, the Company paid for specific housing expenses for Catherine Marx, which is why Plaintiffs are entitled to a constructive trust against the house (and any other property) that the Company paid expenses for, which were not authorized, and directly benefited Defendant Catherine Marx.

Finally, even if Catherine Marx is able to convince this Court that she did not knowingly participate in any of these events, the facts show that Catherine Marx was unjustly enriched by the embezzlement of company funds, and such unjust enrichment should not be sanctioned by this Court. Moreover, Plaintiffs' claim for unjust enrichment in this regard is not barred by any applicable statute of limitations.

Since the initial filing of Plaintiffs' Complaint, additional facts have come to light that will establish that Catherine Marx directly engaged and participated in the activities giving rise to each of the alleged causes of action, either in her individual capacity, as Personal Representative, and/or as a co-conspirator. As such, the claims asserted against her in this Action are not barred by § 62-3-803 of the S.C. Probate Code. For this reason, Defendants' Motion to Dismiss should be denied.

Plaintiff filed a Claim within the time period allowed by the South Carolina Probate Code § 62-3-803 against the Estate of Bradley Marx to recoup the embezzled amounts. The Personal Representative denied the claim due to this Court's lack of jurisdiction. Plaintiffs concede that they did not commence this action within 30 days of the Personal Representative's mailing of her Notice of Disallowance. However,

Plaintiffs note that the attorney on this file was out on maternity leave during the month of October and November, 2020, and the offices of Plaintiffs' counsel have experienced various staff members who have experienced COVID-related absences from work which have hampered operations and adherence to normal office procedures. Plaintiffs note that in December 2020, the Supreme Court of South Carolina updated its Administrative Order regarding the "Operation of the Trial Courts during the Coronavirus Emergency," which Order earlier provided for the certain "Extensions of Time" and certain "Forgiveness of Procedural Defaults." See Administrative Order dated Dec. 16, 2020 (Amended Order), "Operation of the Trial Courts During the Coronavirus Emergency", at p. 5. Plaintiffs do not suggest that the Order provides them specific relief for the circumstances before the Court here, but do suggest that these circumstances suggest that party litigants should be afforded some latitude when defenses related to the time-barring of claims are raised. Under these circumstances it would be unjust and improper to bar the Plaintiffs claims on the grounds asserted in the Defendants' Motion to Dismiss.

Conclusion

This Court has proper jurisdiction over all of the alleged matters raised in the Plaintiffs' Complaint, and Defendants' Motion to Dismiss should be denied based on the foregoing. Plaintiffs request that this Court deny the Defendants' Motion to Dismiss, and further requests leave to amend the Complaint to allege additional items related to Defendant's actions that have been discovered since the filing of their initial Complaint, and for such other and further relief as this Court may deem appropriate.

Respectfully submitted,

s/ Reese R. Boyd, III

Reese R. Boyd, III, Esq. (SC Bar #: 007151)

Kelly M. Turek (SC Bar #: 102455)

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Attorneys for the Plaintiffs

Dated: February 2, 2021
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2020-CP-22-00991

Michael Mares and Emergency Power, LLC,))
)
Plaintiffs,)
)
vs.)
)
Bradley Douglas Marx (deceased) and)
Catherine Marx, individually and as)
Personal Representative of the Estate of)
Bradley Douglas Marx,)
)
Defendants.)
_____)

**SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
COMPLAINT SUBMITTED ON BEHALF
OF DEFENDANT**

COMES NOW Defendant Catherine Marx, as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified as “Bradley Douglas Marx (deceased)” and Catherine Marx, individually, by and through her undersigned counsel, and hereby submits this supplemental filing based upon the Court’s request at the conclusion of the February 4, 2021 hearing on the Motion to Dismiss the Complaint pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, as well as relevant statutory and case law.

Defendants incorporate herein by reference their original Motion to Dismiss and the arguments made by counsel during the hearing in further support of this Court’s dismissal of Plaintiffs’ Complaint.

LEGAL STANDARD

A. Rule 12(b)(6), SCRCF

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), SCRCP, 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, this Court’s consideration of the Motion to Dismiss must be confined to the four corners of the Complaint. Id.

B. Statute of Limitations and Non-Claim Statute (S.C. Code Ann. § 62-3-803)

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 our Court of Appeals 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)).

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 Plaintiffs’ Complaint, the discovery rule is inapplicable, and our appellate courts have held that applying the discovery rule is reversible error. Phillips, 399 S.C. at 231-232, 731 S.E.2d at 329-330.

ARGUMENT

THE LIABILITY INSURANCE LIMITS COVERAGE EXCEPTION TO THE GENERAL STATUTE OF LIMITATIONS OF THE NONCLAIM STATUTE IS NOT SUPPORTED BY THE ALLEGATIONS CONTAINED IN THE COMPLAINT.

Plaintiffs rely on the following provision of the nonclaim statute contained in the Probate Code in support of their contention that the general one year statute of limitations 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) (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). Counsel was unable to locate any 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 that the liability insurance limits coverage exception to the general statute of limitations applies in cases where the Complaint itself reveals the potential for liability insurance coverage. The Complaint in this case contains no such allegations.

For example, there is no allegation in Plaintiffs’ Complaint to support a finding: (1) that there is a policy of insurance; (2) that the Decedent was insured under any policy of insurance; (3) that 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. Plaintiff Mares alleges that he and the Decedent were the sole members of Emergency Power, LLC. While it is unlikely that a two-person entity would carry Director's and Officer's liability insurance to cover the acts of the two individuals in the company (as suggested as a "possibility" during the hearing), that is a fact that Plaintiffs Mares and Energy Power, LLC would certainly have had knowledge of at the time of their pleading. The absence of such an allegation leads to the reasonable inference that no such liability policy exists. Regardless of whether the company carried insurance or not, the Court is confined to the allegations on the face of the Complaint, which fails to set forth any facts supporting the application of a statute of limitations other than the one year statute contained in the Probate Code, S.C. Code Ann. § 62-3-803(a)(1).

Even assuming a liability policy exists (despite the fact that it was not pled, it is not contained in the allegations of the Complaint, and is, therefore, inappropriate for consideration in the context of a motion to dismiss), nothing in Plaintiffs' Complaint sets forth conduct or actions that would be potentially covered by liability insurance. Plaintiffs allege that the actions and conduct of the Decedent were taken in his individual capacity and not as an officer or director of Emergency Power, LLC. It is the nature of Decedent's alleged *ultra vires* actions and conduct that forms the basis of Plaintiffs' Complaint. Repeatedly, Plaintiffs allege that the Decedent acted intentionally and deliberately in converting company funds and assets for his personal use.

Despite an exhaustive search, no case law could be found in which intentional torts were held to be covered by a Director's and Officer's insurance policy when the allegations related to *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).

Moreover, there are no allegations in the Complaint that 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, it would be a virtual impossibility that any liability insurance policy for the company or otherwise would provide coverage for Catherine Marx for the conduct alleged in the Complaint (again, the existence of a liability policy was not pled and is not contained in the allegations of the Complaint). Plaintiffs have alleged causes of action for Conversion, Unjust Enrichment and Constructive Trust, and no legal authority could be located to support a finding that these types of intentional and equitable claims would ever be subject to insurance protection. 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 policy are, and Plaintiffs’ demand for relief is not confined to the limits of any available coverage. Therefore, there is no basis for the application of the liability insurance limits coverage exception to the general one year statute of limitations contained in S.C. Code Ann. § 62-3-803(a)(1).

During the hearing on the Motion to Dismiss, counsel for Plaintiffs conceded that the 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. Since the applicable statute is a nonclaim statute, there is no equitable or other relief available to Plaintiffs in this matter based upon the failure to file timely and to follow the procedures clearly 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). To date, Plaintiffs have failed to make any filing in the Probate Court in response to the Disallowance of Claim filed by Defendant. As such, Plaintiffs' claims are barred by the unambiguous provisions of the Probate Code.

In summary, Plaintiffs have failed to meet the statutory filing requirements to survive the present Motion to Dismiss. Plaintiffs' attempted 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 the Decedent, the Estate, or Catherine Marx individually, and Plaintiffs have failed to allege the limits of any such policy or limited their demand for relief to such limits. Therefore, the general one year statute applies to Plaintiffs' claims, and they are barred as a matter of law based upon the expiration of the applicable statute of limitations and for failure to comply with the procedures set forth in the Probate Code regarding the presentation of claims.

CONCLUSION

For the reasons set forth above, as well as those in the original Motion to Dismiss and the arguments of counsel made during the hearing, Plaintiffs have failed to state a cause of action against Defendant Catherine Marx, as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified as "Bradley Douglas Marx (deceased)") and individually. The applicable statute of limitations has expired, this Court lacks jurisdiction, and Plaintiffs' claims

are barred by the South Carolina Probate Code and relevant case law. Plaintiffs have failed to allege facts sufficient to trigger the application of the liability insurance limits coverage exception to the general one year statute of limitations, and therefore, S.C. Code Ann. §62-3-803(d)(2) is inapplicable. As such, Defendant requests that the Complaint be dismissed with prejudice, that Plaintiffs be charged with attorneys' fees and costs pursuant to S.C. Code Ann. § 62-1-111, and for such other and further relief as the Court should deem appropriate.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

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*ATTORNEYS FOR DEFENDANT CATHERINE
MARX, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF BRADLEY DOUGLAS MARX
(INCORRECTLY IDENTIFIED AS "BRADLEY
DOUGLAS MARX (DECEASED)") AND
CATHERINE MARX, INDIVIDUALLY*

February 8, 2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
DOCKET NO.: 2020-CP-22-00991

Michael Mares and Emergency)
Power, LLC,)
)
Plaintiffs,)

vs.)

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

**PLAINTIFFS’
SUPPLEMENTAL MEMORANUM
IN OPPOSITION TO
DEFENDANTS’
MOTION TO DISMISS**

TO THE DEFENDANTS above named:

COME NOW the Plaintiffs, Michael Mares and Emergency Power LLC, who present this Supplemental Memorandum in Opposition to Defendants’ Motion to Dismiss (the “Motion”), filed with the Court on January 11, 2021.

Jurisdiction:

Defendants claim that this Court lacks jurisdiction, because the probate court has exclusive jurisdiction over the claims herein, is something of a “circular” argument, as Plaintiffs noted at the Motion hearing. First, some of Plaintiffs’ claims, and specifically, the individual claims of conversion and constructive trust against Catherine Marx, are claims which the probate court clearly lacks jurisdiction to hear, so a filing by the Plaintiffs in the probate court would have been futile in this matter. Second, the Probate Code clearly permits filings in circuit court, and Defendants conceded at the

Motion hearing that this Court has subject matter jurisdiction in this case. Moreover, the S.C. Probate Code specifically contemplates the concurrent jurisdiction of the probate courts and circuit courts in matters such as this case, which is specifically recognized at Section 62-3-804(3) of the Probate Code, which provides that:

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....

S.C. Code § 62-3-804(3) (Thompson, 2020 Supp.)(emphasis added). Thus, while Plaintiffs “could” have brought their claims in the probate court, such filing would have been futile because the claims go well beyond what the probate court may hear, and the matter would have necessarily been removed to the circuit court. The Probate Code does not require litigants to engage in this type of procedural “hoop-jumping,” however, as Section 62-3-804 makes clear. Thus, Plaintiffs submit, and renew our contention, that the claims raised herein are properly brought in the circuit court, and that this Court has jurisdiction over this matter, and this matter should proceed in the Circuit Court.

Argument:

As to Defendants’ argument that Plaintiffs’ claims against the Estate are time barred, at the hearing Plaintiffs noted an exception to the one-year statute of limitations for such claims:

Nothing in this section shall be construed as placing a limitation on the time for: . . . (2) 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) (Thompson, 2020 Supp.)(emphasis added). The Plaintiffs also note that, in the “Reporter’s Comment” section for S.C. Code Section 62-3-803, states as follows:

The limitations of Section 62-3-803 do not apply to proceedings to enforce mortgages, pledges, or other liens upon property of the estate, or *proceedings to establish liability of the decedent or the personal representative for which there is liability insurance*.

S.C. Code Ann. § 62-3-803, at Reporter’s Comment (Thompson, S.C. Probate Law Annotated, 2020 Supp., at p. 423)(emphasis added). Plaintiffs further note that our State Supreme Court has recognized that “Section 62-3-803(c)(2) allows liability claims against an estate otherwise disallowed by the nonclaim sections of the statute to the extent the decedent was protected by liability insurance.” Ex parte Estate of Evans, in re: Fleming v. Lynch, 384 S.E.2d 748, 299 S.C. 366 (S.C. 1989). To the extent that the decedent, Bradley Marx, may have had liability insurance, which discovery will reveal, the claims against the Estate herein are not time barred. Because the claims against the decedent, Bradley Marx, and the Personal Representative, involve claims of alleged malfeasance, fraud, and the wrongful conversion of corporate assets of the Plaintiff Emergency Power LLC, to their personal use and benefit, it is certainly possible that such claims may be covered under one or more insurance policies that may have been purchased by, or issued to, one or more of the parties involved here. For these reasons,

the Plaintiffs contend that their claims herein are not time-barred, and that this matter should proceed.

Conclusion

Based on the foregoing, the prior memorandum submitted by the Plaintiffs in this matter, and based upon the arguments made by counsel at the Motion hearing, this Court has proper jurisdiction over the allegations contained in the Plaintiffs' Complaint, and the Plaintiffs claims are not time-barred. As such, Defendants' Motion to Dismiss should be denied.

Plaintiffs hereby respectfully request that Defendants' Motion to Dismiss be denied, and further request any other and further relief as this Court may deem appropriate.

Respectfully submitted,

s/ Reese R. Boyd, III

Reese R. Boyd, III, Esq. (SC Bar #: 007151)

Kelly M. Turek (SC Bar #: 102455)

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Attorneys for the Plaintiffs

Michael Mares and Emergency Power LLC

Dated: February 8, 2021
Myrtle Beach, South Carolina

Mares and Emergency Power LLC v Estate of Bradley Marx et al

1 message

John, Steven H. Law Clerk (Jacob Lampke) <SJohnLC@sccourts.org> Mon, Feb 8, 2021 at 3:11 PM
To: Audra Byrd <AByrd@turnerpadget.com>, Cathy Plocinik <cathy@davisboydlaw.com>, Melody Breeden <MBreeden@turnerpadget.com>, "reese@davisboydlaw.com" <reese@davisboydlaw.com>, "Turek Esq. Turek Esq." <kelly@davisboydlaw.com>

Attorneys,

I am emailing you today on behalf of Judge John regarding the outcome of the motion hearing for the case of Mares et al. v. Marx et al. After reviewing the supplemental memoranda from both parties, the Court has decided to continue the motions in order to allow for further discovery regarding the issue of insurance liability.

Judge John is giving both parties ninety (90) days from the date of the order of continuance to conduct discovery on this issue. Thereafter, these motions will be placed back on the roster for argument. When this matter is brought back before the Court, John would like for both parties to be prepared to address to the presiding Judge the application of South Carolina Supreme Court Order 2020-000447(C)(9). That Supreme Court Order, issued on April 3rd of 2020, pertains to the extension of time and forgiveness of procedural defaults due to the Covid-19 pandemic.

The Court will issue in the next day or so a Form 4 order that will continue this matter. The Court is specifically not assuming jurisdiction of the case and it will appear as scheduled by the Clerk's Office.

Sincerely,

Jake Lampke

Law Clerk to the Honorable Steven H. John Resident Circuit Court Judge, Fifteenth Judicial Circuit Chief Administrative Judge, Court of General Sessions

1301 2nd Avenue

Conway, SC 29526

Phone: (843) 915-6697

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R 0056

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GEORGETOWN )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
DOCKET NO.: 2020-CP-22-00991

Michael Mares and Emergency )  
Power, LLC, )  
 )  
Plaintiffs, )

vs. )

**PLAINTIFFS’  
MOTION FOR RECONSIDERATION**

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

**TO THE DEFENDANTS above named:**

PLEASE TAKE NOTICE THAT, Plaintiffs, Michael Mares and Emergency Power, LLC (“Plaintiffs”), by and through their undersigned attorney, will move before this Honorable Court on the tenth (10th) day hereafter or at such time as the Plaintiffs may be heard for an Order of this Court reconsidering and altering, amending, or vacating its Order Granting Defendants’ Motion to Dismiss issued on December 2, 2021. This Motion is made pursuant to Rule 60(b)(2) and (3) of the South Carolina Rules of Civil Procedure, Plaintiffs ask that this Court reconsider, and alter, amend, or vacate its Order based on the following:

1. Plaintiffs’ Complaint includes allegations that are directed not only against Catherine Marx in her capacity as the Personal Representative of the Estate of Bradley Marx, but also in her individual capacity. Claims against the Defendant

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 Plaintiff's claims.

2. The Court has mis-interpreted and failed to properly apply the relief provided to litigants for procedural defaults under the Orders of the South Carolina Supreme Court related to extensions of time and forgiveness of procedural defaults during the COVID-19 pandemic. *See, 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.

**WHEREFORE**, based on the above stated reasons and applicable rules, Plaintiffs respectfully request that this Court reconsider and alter or amend its Order Granting Defendants' Motion to Dismiss.

This Motion will be supported by any exhibits, pleadings, affidavits, memoranda, or other documents as may be presented at a hearing on this matter and/or such case law, statutory law, or other legal authorities as movant may present to the Court.

Respectfully submitted,

s/ Reese R. Boyd, III

---

Reese R. Boyd, III, Esq. (SC Bar #: 007151)

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*Attorneys for the Plaintiffs*

Dated: December 10, 2021  
Myrtle Beach, South Carolina

**RECEIVED**

**Jan 18 2022**

**SC Court of Appeals**

ELECTRONICALLY FILED - 2022 Jan 24 12:18 PM - GEORGETOWN - COMMON PLEAS - CASE#2020CP2200991

**NOTICE OF APPEAL**  
The 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

---

Michael Mares and Emergency Power, LLC,

Plaintiffs/ Appellants,

*vs.*

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

Defendants.

---

NOTICE OF APPEAL

---

Michael Mares and Emergency Power, LLC appeal the Order of the Honorable H. Steven DeBerry IV, Circuit Court Judge dated January 7, 2022. Appellant received written notice of entry of this decision on January 7, 2022 via electronic mail. In accordance with Rule 6(a) of the South Carolina Rules of Civil Procedure this notice is timely filed as the deadline to file a Notice of Appeal fell on a Federal holiday.

**R 0061**

s/ Reese R. Boyd, III  
\_\_\_\_\_  
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Bret H. Davis  
**Davis & Boyd, LLC**  
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[reese@davisboydlaw.com](mailto:reese@davisboydlaw.com)  
[bdavis@davisboydlaw.com](mailto:bdavis@davisboydlaw.com)

*Attorneys for the Appellants,  
Michael Mares and Emergency Power, LLC*

Dated: January 18, 2022  
Myrtle Beach, South Carolina

**RECEIVED**

**Jan 18 2022**

**SC Court of Appeals**

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CERTIFICATE OF SERVICE

I certify that on this 18th day of January, 2022, a true copy of Plaintiffs', Notice of Appeal has been served upon each party or counsel of record by sending a copy of same via electronic mail and U.S. mail as follows:

Audra M. Byrd, Esq.  
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(843) 213-5555 (fax)  
[abyrd@turnerpadget.com](mailto:abyrd@turnerpadget.com)  
*Attorney for Defendants*



---

Catherine Plocinik  
Paralegal





Georgetown Common Pleas

**Case Caption:** Michael Mares , plaintiff, et al VS Bradley Douglas Marx , defendant,  
et al  
**Case Number:** 2020CP2200991  
**Type:** Order/Other

H. Steven DeBerry, IV

Circuit Court Judge 2771

Electronically signed on 2022-01-07 11:26:45 page 2 of 2

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**R 0065**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GEORGETOWN )

IN THE COURT OF COMMON PLEAS  
  
Civil Action No. 2020-CP-22-00991

**RECEIVED**  
**Jan 18 2022**  
**SC Court of Appeals**

Michael Mares and Emergency Power, LLC, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Bradley Douglas Marx (deceased) and )  
Catherine Marx, individually and as )  
Personal Representative of the Estate of )  
Bradley Douglas Marx, )  
 )  
Defendants. )  
 )

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

This matter comes before the Court upon the Motion of Defendant Catherine Marx, as Personal Representative of the Estate of Bradley Douglas Marx (incorrectly identified as “Bradley Douglas Marx (deceased)” and Defendant Catherine Marx, individually, seeking an Order dismissing the Complaint filed in this action against Defendants by the plaintiffs, Michael Mares and Emergency Power, LLC. A hearing on the Motion was held on November 12, 2021, in Georgetown, South Carolina. Present at the hearing was Plaintiffs’ counsel, Reese R. Boyd, III, Esquire. Audra M. Byrd, Esquire of Turner Padgett Graham & Laney, PA, appeared at the hearing on behalf of Defendants. For the reasons set forth below, the Motion to Dismiss filed by Defendants is GRANTED.

**I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

According to the allegations of the Complaint, Plaintiff Mares and Bradley Douglas Marx, deceased, formed a limited liability company, Plaintiff Emergency Power, LLC (hereinafter 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, Plaintiffs allege Bradley

Douglas Marx moved to Georgetown County, South Carolina, and purchased a home with his wife, Defendant Catherine Marx. On November 24, 2019, Bradley Douglas Marx died, and Defendant Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020, by the Georgetown County Probate Court.

Thereafter, on September 1, 2020, Plaintiffs presented and filed a Notice of Claim to the Estate of Bradley Douglas Marx and with the Georgetown County Probate Court. In the Notice of Claim, Plaintiffs asserted claims against the Estate, alleging the Estate was liable for Mr. Marx'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. The Notice of Claim presented by Plaintiffs in the Probate Court mirrors closely the Complaint filed in the present action. Upon receipt and consideration of Plaintiffs' 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 Plaintiffs on October 22, 2020, as evidenced by the Proof of Delivery filed with the Probate Court and of which this Court takes judicial notice. The Notice of Disallowance contained a warning, as required by statute, Plaintiffs' claims would be forever barred unless a legal proceeding was commenced within thirty days after the mailing of the Notice of Disallowance.

Plaintiffs did not commence an action in the Probate Court and instead, filed the present action on December 7, 2020, asserting causes of action against all Defendants for Conversion, Unjust Enrichment, and Constructive Trust. Specifically, Plaintiffs allege Mr. Marx 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. In response to the Complaint, Defendants filed the present Motion to Dismiss on January 11, 2021. In the Motion,

Defendants argue the Complaint should be dismissed as untimely, relying primarily upon the applicable time limitations of the non-claim statute at issue. A hearing on the Motion to Dismiss 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 Court took the matter under advisement after Plaintiffs' counsel presented additional argument regarding the potential for liability insurance coverage, which if applicable, could affect the Court's decision. Both parties submitted supplemental briefs to the Court on the issue.

Thereafter, on February 8, 2021, Judge John 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 Plaintiffs against Defendants. Upon the expiration of the Court-ordered discovery period, Judge John advised counsel the Motion would be placed back upon the general motion roster for 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.<sup>1</sup> At the request of Defendants' counsel, once discovery was completed on the issue of liability insurance coverage, the Motion was scheduled for hearing before this Court on November 12, 2021, over nine months after discovery was ordered. Prior to the hearing on the Motion, Defendant Catherine Marx filed with the Court an affidavit, produced to Plaintiffs 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

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<sup>1</sup> A true and accurate copy of the correspondence from the Court to counsel for the parties was provided to this Court during its hearing on the Motion and made part of its record.

insurance policy providing coverage to any Defendant for the claims and conduct asserted in the Complaint. During discovery, Plaintiffs produced four liability insurance policies, and Defendants produced a policy of insurance providing liability coverage involving the use of a motor vehicle. As of the date of the hearing of this Motion, no party could identify a policy of liability insurance which would provide coverage to any Defendant for the conduct and claims alleged by Plaintiffs in the Complaint.

## II. LEGAL STANDARD

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, Defendants have moved 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, Defendants premise their Motion upon the timeliness of Plaintiffs' filing suit, in the interest of justice and judicial economy, the Court may withhold a determination until such time as Plaintiffs have had a full and fair opportunity to conduct discovery so as to enable them to address the timeliness of filing. In such cases, Plaintiffs may present 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 Plaintiffs a full and fair opportunity to conduct discovery on the issue of timeliness provides Plaintiffs with additional time in which to amend their pleadings to overcome new issues raised in the Motion to Dismiss. Id. In this case, no amendment was filed, and no additional evidence or facts were presented to the Court by Plaintiffs to overcome the issues of timeliness raised in the Motion to Dismiss.

To the extent the Court, after the initial hearing and subsequent order permitting discovery on the issue of the existence of liability insurance coverage, is considered to have converted the Motion to Dismiss to one for summary judgment on the issue of liability insurance coverage, the Court applies the applicable legal standard for motions seeking summary judgment. 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)).

### III. ANALYSIS AND CONCLUSIONS OF LAW

#### A. **PLAINTIFFS' CLAIMS WERE NOT FILED WITHIN ONE YEAR OF THE DEATH OF BRADLEY DOUGLAS MARX.**

As alleged in the Complaint filed by Plaintiffs, Bradley Douglas Marx died on November 24, 2019, and Defendant Catherine Marx was appointed to serve as Personal Representative of his Estate on April 8, 2020. Plaintiffs filed the present action on December 7, 2020, more than one year after the death of Bradley Douglas Marx 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; . . .*

S.C. Code Ann. § 62-3-803 (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). The Court finds the causes of action asserted in the Complaint are undoubtedly ‘claims’ as defined by the Probate Code. As a result, Plaintiffs were required to file their claims on or before November 24, 2020, 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 Marks but also to the claims asserted against Defendant Catherine Marx, individually (as an alleged “nonprobate transferee” of Bradley Douglas Marks) and as Personal Representative of the Estate of Bradley Douglas Marks. 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. PLAINTIFFS’ CLAIMS WERE NOT FILED WITHIN THIRTY DAYS OF THE MAILING OF THE NOTICE OF DISALLOWANCE OF CLAIM.**

The South Carolina Probate Code provides a specific mechanism for presenting claims against a decedent’s estate. See, 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.

In this case, Plaintiffs presented and filed a Notice of Claim on September 1, 2020, to the Estate of Bradley Douglas Marx and with the Georgetown County Probate Court. Thereafter, counsel for the Estate of Bradley Douglas Marx filed a Notice of Disallowance of Claim with the Probate Court on October 16, 2020, and mailed the Notice to counsel for Plaintiffs on October 22, 2020, as evidenced by the Proof of Delivery filed with the Probate Court, of which all of said filings the Court takes judicial notice. The Notice of Disallowance contained the necessary warning, as required by statute, Plaintiffs’ claims would be forever barred unless a legal proceeding was commenced within thirty days after the mailing of the Notice of Disallowance.

Plaintiffs did not commence an action in the Probate Court for allowance of their claims. Instead, Plaintiffs filed the present action, which the Court finds would have been appropriate if Plaintiffs had commenced within the thirty-day period provided by statute. See, S.C. Code Ann. § 62-3-804(5). (“[N]o 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.”). As such, Plaintiffs were required to file this action on or before November 23, 2020, which they failed to do. As such, the Court finds Plaintiffs’ claims are untimely and must be dismissed.

Additionally, Plaintiffs failed to “provide written notice to the probate court in which the decedent’s estate is under administration that a legal proceeding has commenced for allowance of the claim, setting forth the court in which the legal proceeding is pending.” S.C. Code Ann. § 62-3-804(2).

In summary, the Court finds Plaintiffs failed to comply with the mandatory provisions of the South Carolina Probate Code by failing to file timely their action for allowance of claim and failing to provide written notice to the Probate Court of this proceeding. As such, dismissal is appropriate as a matter of law.

C. THE LIABILITY INSURANCE LIMITS COVERAGE EXCEPTION TO THE NON-CLAIM STATUTE IS NOT SUPPORTED BY THE ALLEGATIONS OF THE COMPLAINT OR ADDITIONAL FACTS OR EVIDENCE PRESENTED BY PLAINTIFFS AFTER A FULL AND FAIR OPPORTUNITY FOR DISCOVERY ON THIS 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 our Court of Appeals 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 Plaintiffs’ Complaint, the Court finds the discovery rule is inapplicable and applying the discovery rule would be reversible error. *Phillips*, 399 S.C. at 231-232, 731 S.E.2d at 329-330.

Plaintiffs 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). Plaintiffs provided the 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. The Court finds the Complaint in this 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 Plaintiffs' 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. Plaintiff Mares alleges he and Mr. Marx were the sole members of the Company, and if such a policy existed, the Court finds Plaintiffs would likely be aware of the same at the time of filing. Further, the Court finds the absence of such an allegation leads to the reasonable inference that no such liability policy exists. Regardless of whether the Company or any Defendant carried liability insurance affording coverage, the Court is 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 Plaintiffs' Complaint sets forth conduct or actions which would lead the Court to infer such claims would be covered by liability insurance. Plaintiffs allege the actions and conduct of Mr. Marx were taken in his individual capacity and not as an officer or director of the Company. It is the nature of Mr. Marx's alleged *ultra vires* actions and conduct that forms the basis of Plaintiffs' Complaint. Repeatedly, Plaintiffs allege Mr. Marx acted intentionally and deliberately in converting company funds and assets for his personal use.

Plaintiffs have provided the 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 Defendant 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 Court cannot reasonably infer any liability insurance policy for the Company or otherwise would provide coverage for Defendant Catherine Marx based upon the conduct alleged in the Complaint. Even more, the existence of a liability policy providing coverage for Defendant Catherine Marx was not pled and is not contained in the allegations of the Complaint. Plaintiffs have alleged causes of action for Conversion, Unjust Enrichment and Constructive Trust, and Plaintiffs have provided the Court with no 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 Plaintiffs’ demand for relief is not confined to the limits of any available coverage. Therefore, the Court finds there is no basis 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 Plaintiffs conceded the present 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. Since the applicable statute is a nonclaim statute, there is no equitable or other relief available to Plaintiffs 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 Court finds Plaintiffs have failed to meet the statutory filing requirements to survive the present Motion to Dismiss. Plaintiffs' 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 the Decedent, the Estate, or Catherine Marx individually, and Plaintiffs have failed to allege the limits of any such policy or limited their demand for relief to such limits.

Therefore, the Court finds the general one-year statute applies to Plaintiffs' claims, and as alleged, the claims are time-barred as a matter of law. As a result, the Court finds dismissal of the Complaint is appropriate as a matter of law.

D. THE TIME LIMITATIONS OF THE NON-CLAIM STATUTE ARE UNAFFECTED BY THE SOUTH CAROLINA SUPREME COURT ORDERS RELATED TO THE RELAXATION AND FORGIVENESS OF PROCEDURAL DEADLINES BECAUSE OF THE COVID-19 PANDEMIC.

In considering the timeliness of Plaintiffs' filing suit, the Court considered the Orders of the South Carolina Supreme Court related to extensions of time and forgiveness of procedural defaults during the COVID-19 pandemic. Specifically, the Court reviewed 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. While our Supreme Court expressed judicial concern for litigants affected by the pandemic, the Orders expressly reserve the issues *sub judice* to the legislative branch for consideration. In relevant part, the Order provides the following:

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.

Id. at 9, Section (c)(12).

At this time, the legislature has not acted on the concerns expressed by the South Carolina Supreme Court, and therefore, the non-claim statute at issue here is unaffected. Therefore, the Court finds dismissal is appropriate as a matter of law.

IV. CONCLUSION AND ORDER

Based upon the foregoing,

It is hereby ADJUDGED, ORDERED AND DECREED, the Motion to Dismiss filed by Defendants shall be GRANTED WITHOUT PREJUDICE; and

It is hereby further ADJUDGED, ORDERED AND DECREED, in the event liability insurance is found or more specific facts are established showing Defendant Catherine Marx, individually, is personally liable, Plaintiff may commence a new action for the same if commenced within the applicable statute of limitations.

AND IT IS SO ORDERED.

\_\_\_\_\_  
THE HONORABLE H. STEVEN DEBERRY, IV  
Presiding Circuit Court Judge  
For the Fifteenth Judicial Circuit

Dated: \_\_\_\_\_, 2021



Georgetown Common Pleas

**Case Caption:** Michael Mares , plaintiff, et al VS Bradley Douglas Marx , defendant,  
et al  
**Case Number:** 2020CP2200991  
**Type:** Order/Dismissal

H. Steven DeBerry, IV

Circuit Court Judge 2771

Electronically signed on 2021-12-02 11:37:51 page 17 of 17

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**R 0082**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GEORGETOWN )

IN THE COURT OF COMMON PLEAS  
  
Civil Action No. 2020-CP-22-00991

Michael Mares and Emergency Power, LLC, )  
 )  
Plaintiffs, )

vs. )

Bradley Douglas Marx (deceased) and )  
Catherine Marx, individually and as )  
Personal Representative of the Estate of )  
Bradley Douglas Marx, )  
 )  
Defendants. )

**NOTICE OF FILING AFFIDAVIT OF  
CATHERINE MARX**

COMES NOW Defendant Catherine Marx, as Personal Representative of the Estate of  
Bradley Douglas Marx (incorrectly identified as “Bradley Douglas Marx (deceased)”) and  
Catherine Marx, individually, by and through her undersigned counsel, and hereby submits the  
attached Affidavit of Catherine Marx in support of the pending Motion to Dismiss.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

By: /s/ Audra M. Byrd  
Audra M. Byrd, Esquire (S.C. Bar #76719)  
E-Mail: [abyrd@turnerpadget.com](mailto:abyrd@turnerpadget.com)  
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*ATTORNEYS FOR DEFENDANT CATHERINE  
MARX*

November 9, 2021

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GEORGETOWN ) Civil Action No. 2020-CP-22-00991

Michael Mares and Emergency Power, LLC, )

Plaintiffs, )

vs. )

Bradley Douglas Marx (deceased) and )  
Catherine Marx, individually and as )  
Personal Representative of the Estate of )  
Bradley Douglas Marx, )

Defendants. )

**AFFIDAVIT OF CATHERINE MARX**

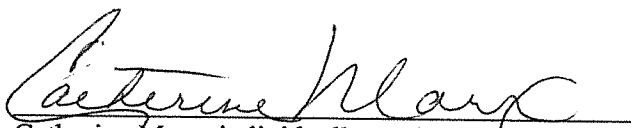
PERSONALLY APPEARED BEFORE ME, Catherine Marx, who after being duly sworn, deposes and says as follows:

- 1) I am over the age of eighteen (18) and competent to make this affidavit.
- 2) I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.
- 3) I was married to Bradley Douglas Marx until the time of his death on November 24, 2019.
- 4) I am currently serving as the Personal Representative of the Estate of Bradley Douglas Marx and have been since my appointment by the Georgetown County Probate Court on April 8, 2020.
- 5) I make this affidavit in my individual capacity and as the Personal Representative of the Estate of Bradley Douglas Marx.
- 6) I have never served as an officer, manager, director, member, agent, employee or representative of Emergency Power, LLC.

- 7) I have never assessed, transferred, or otherwise exercised any control over any banking account or other financial institution's account of funds belonging to Emergency Power, LLC.
- 8) I have never applied for, purchased, or made any payments for a policy of insurance for Bradley Douglas Marx, the Estate of Bradley Douglas Marx, Emergency Power, LLC, or me providing liability coverage for the conduct alleged in the Complaint.
- 9) I have conducted a thorough search of all documents and materials in my possession or under my control for the purpose of identifying the existence of any liability insurance policy providing coverage for Bradley Douglas Marx, the Estate of Bradley Douglas Marx, Emergency Power, LLC, or me.
- 10) I have no knowledge of or reason to believe that Bradley Douglas Marx had an insurance policy for any party providing liability coverage for the conduct alleged in the Complaint.
- 11) I do not have possession, control or knowledge of the existence of any insurance policy for any party providing liability coverage for the conduct alleged in the Complaint.
- 12) The Estate of Bradley Douglas Marx does not have possession, control or knowledge of the existence of any insurance policy for any party providing liability coverage for the conduct alleged in the Complaint.
- 13) The only insurance policies providing liability coverage for Bradley Douglas Marx, the Estate of Bradley Douglas Marx, or me are traditional policies such as automobile or homeowner's insurance which do not provide coverage for the conduct alleged in the Complaint.

FURTHER AFFIANT SAYETH NOT.

[SIGNATURE PAGE FOLLOWS]

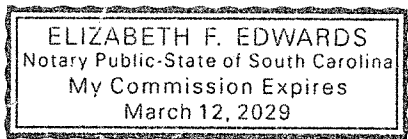


Catherine Marx, individually, and as Personal  
Representative of the Estate of Bradley Douglas Marx

SWORN to before me this  
28 day of February, 2021.

Elizabeth F. Edwards  
NOTARY PUBLIC FOR SOUTH CAROLINA

Georgetown County SC  
MY COMMISSION EXPIRES: 03/12/2029



STATE OF SOUTH CAROLINA )

IN THE PROBATE COURT

COUNTY OF GEORGETOWN )

STATEMENT OF CREDITOR'S CLAIM

IN THE MATTER OF: )  
BRADLEY D. MARX )  
(Decedent) )

CASE NUMBER: 2020-ES-22-00191



Decedent's Date of Death (if known): NOVEMBER 24, 2019

Decedent's Last Mailing Address: 260 GRAYTWIG CIR., MURRELLS INLET, SC 29576

|                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|---------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Creditor:                                                                                         | EMERGENCY POWER, LLC and MIKE MARES                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Address:                                                                                          | c/o Reese R. Boyd, III, Esquire Davis & Boyd, LLC<br>1110 London Street, Suite 201, Myrtle Beach, SC 29577                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Telephone:                                                                                        | 843-839-9800                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Email:                                                                                            | reese@davisboydlaw.com                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Original Creditor:                                                                                | EMERGENCY POWER, LLC                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Address<br>(if different from above)                                                              | 26128 W. Seven Mile Rd.<br>Redford, MI 48240                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Claim Amount Due:                                                                                 | \$705,604.54                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Account Number:                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Other Reference Number:                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Basis of claim (Ex: Contract, Services Rendered for decedent, etc):                               | Decedent is a 50% member of Claimant, and Claimant is entitled to reimbursement for personal expenses incurred by Decedent, and which Decedent caused to be paid by Claimant. Total personal expenses paid on behalf of Decedent as of this date are equal to \$233,868.18. A table of these amounts is attached hereto as Exhibit "A." A copy of the statements on which claim is based is on file with Mike Mares, who is the other 50% owner of Claimant, and will be produced upon request. Under Michigan Law, where Claimant is organized and has its principal place of business, and where all of the events giving rise to this claim occurred, an LLC damaged as a result of embezzlement may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorneys fees (MI 600.2919a), therefore Claimant tripled the amount of personal expenses and added \$4,000 in attorneys fees to determine this creditor's claim amount. Mike Mares joins in this Creditor's claim to protect his derivative interest in the claim. |
| Date claim will become due (if not already due)                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Nature of uncertainty as to the claim, if any (i.e. contingent claim, amount of claim, due date): | Ongoing investigation is expected to produce higher amount of claim.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Description of security as to the claim, if any (Ex: Collateral for the debt)                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

PROBATE COURT

2020SEP1PM12 18

GEORGETOWN SC

Signature: 

Printed Name: REESE R. BOYD, III, ESQ./Davis & Boyd, LLC

Title: ATTORNEYS FOR CREDITOR

Date: August 26, 2020

**INSTRUCTIONS:** Claims **MUST** be filed with the Probate Court of the county in which the Decedent's Estate is under administration and may be delivered or mailed to the fiduciary appointed to administer the Estate

(see SCPC 62-3-803, 62-3-804, and 62-3-806).

No claim against a Decedent's estate may be presented or legal action commenced against a Decedent's Estate prior to the appointment of a Personal Representative to administer the Decedent's Estate (except see SCPC 62-3-804(1)(b)).

Satisfaction or withdrawal of claim (FORM 325) **MUST** be filed once claim is resolved.

Exhibit "A"  
Table of Claim

| <b>Amount</b>       | <b>Description</b>                                          |
|---------------------|-------------------------------------------------------------|
| \$84,074.35         | Personal charges on AMEX 1                                  |
| \$29,377.27         | Geico Insurance charges (on AMEX 1, but not included above) |
| \$27,635.78         | All Cardmember charges                                      |
| \$37,652.73         | All AMEX 2 charges                                          |
| \$8,760.00          | Unauthorized Draws (2014 Ford Escape)                       |
| \$2,450.05          | All Chase EZ Pay charges                                    |
| \$9,918.00          | Other Payouts (Misc)                                        |
| \$34,000.00         | Other Payout (transfers)                                    |
| <b>\$233,868.18</b> | <b>Amount Embezzled</b>                                     |



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF: GEORGETOWN )  
 )  
 IN THE MATTER OF: )  
 )  
 BRADLEY D. MARX )  
 )  
 (Decedent) )

IN THE PROBATE COURT

**NOTICE OF ALLOWANCE/DISALLOWANCE OF CLAIM**

CASE NUMBER: 2020-ES-22-191

PROBATE COURT  
 2020 OCT 16 PM 1:18  
 GEORGETOWN SC

|     |                                   |                                                                                                            |
|-----|-----------------------------------|------------------------------------------------------------------------------------------------------------|
| TO: | Creditor:                         | EMERGENCY POWER, LLC AND MIKE MARES                                                                        |
|     | Address:                          | C/O REESE R. BOYD, III ESQUIRE<br>DAVIS & BOYD, LLC<br>1110 LONDON ST. SUITE 201<br>MYRTLE BEACH, SC 29577 |
|     | Telephone:                        | (843) 839-9800                                                                                             |
|     | Email:                            | REESE@DAVISBOYDLAW.COM                                                                                     |
|     | Original Creditor:                | EMERGENCY POWER, LLC                                                                                       |
|     | Address (if different from above) | 26128 W. SEVEN MILE RD.<br>REDFORD, MI 48240                                                               |
|     | Filed Date of Claim:              | SEPTEMBER 1, 2020                                                                                          |
|     | Claim Amount:                     | \$705,604.54                                                                                               |
|     | Account Number:                   |                                                                                                            |
|     | Other Reference Number:           |                                                                                                            |

Allowance of a claim is evidence the Personal Representative accepts the claim as a valid debt of the Decedent's estate. Allowance of a claim may not be construed to imply the estate will have sufficient assets with which to pay the claim.

the claim is allowed.

the claim is partially allowed in the amount of \$ \_\_\_\_\_ ; the balance is disallowed. Explanation (optional):

the claim is disallowed in full. Explanation (optional): THIS CLAIM IS DISALLOWED IN FULL AS BEING BOTH WITHOUT MERIT AND FOR LACK OF JURISDICTION. ALL CLAIMS RELATE TO A MICHIGAN ENTITY LOCATED, ORGANIZED, AND OPERATING IN MICHIGAN, AND THE CLAIM ITSELF STATES ALL ALLEGED ACTIVITIES OCCURRED IN MICHIGAN.

The disallowed claim or the disallowed portion of your claim will be forever barred unless you commence a legal proceeding requiring a Summons, a Petition and a filing fee of \$150.00 for allowance of the claim in accordance with SCPC 62-3-804(2), within thirty (30) days after the mailing or other service of this Notice of Allowance/Disallowance of Claim.

Executed this 12 day of October, 2020

Signature: *Catherine Marx*  
 Print Name: CATHERINE MARX  
 Address: 260 GRAYTWIG CIR.  
MURRELLS INLET, SC 29576  
 Telephone (Work): \_\_\_\_\_  
 (Home): \_\_\_\_\_  
 (Cell): \_\_\_\_\_  
 Email: \_\_\_\_\_

Attorney: MELODY J. E. BREEDEN  
 Address: PO BOX 2116  
MYRTLE BEACH, SC 29578  
 Telephone: (843) 213-5500  
 Email: MBREEDEN@TURNERPADGET.COM

**R 0090**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF: Horry )  
 )  
IN THE MATTER OF: )  
 )  
BRADLEY D. MARX )  
(Decedent) )

IN THE PROBATE COURT

**PROOF OF DELIVERY**

CASE NUMBER: 2020-ES-22-191

On the 22nd day of October, 2020, I mailed or delivered the following document(s):

Form 372ES, Notice of Disallowance of Claim

- A copy of which is attached hereto and incorporated herein, or
- The original of which is on file with the Court.


Delivery was accomplished by the following method (check appropriate box):

- personal delivery
- certified mail
- commercial delivery
- ordinary first-class mail
- registered mail
- electronic message (Article 7, Trust matters only)

to each of the following persons at the address shown:

| NAME                                | ADDRESS                                                                                                    |
|-------------------------------------|------------------------------------------------------------------------------------------------------------|
| EMERGENCY POWER, LLC AND MIKE MARES | C/O REESE R. BOYD, III, ESQ.<br>DAVIS AND BOYD, LLC<br>1110 LONDON ST. SUITE 201<br>MYRTLE BEACH, SC 29577 |
| EMERGENCY POWER, LLC AND MIKE MARES | 26128 W. SEVEN MILE RD.<br>REDFORD, MI 48240                                                               |
|                                     |                                                                                                            |
|                                     |                                                                                                            |
|                                     |                                                                                                            |
|                                     |                                                                                                            |
|                                     |                                                                                                            |

SWORN to before me this 22 day of October, 2020

  
Notary Public for South Carolina  
My Commission Expires: 6/13/22

Signature: Hannah Cromley  
Print Name: HANNAH CROMLEY  
Address: PO BOX 2116  
MYRTLE BEACH, SC 29578  
Telephone (Work): (843) 213-5500  
(Home): \_\_\_\_\_  
(Cell): \_\_\_\_\_  
E-mail: HCROMLEY@TURNERPADGET.COM  
Relationship to Decedent/Estate: \_\_\_\_\_

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN ) 2020-CP-22-00991

Michael Mares and Emergency )  
Power, LLC, )

Plaintiffs, )

vs. )

Bradley Douglas Marx (Deceased) )  
And Catherine Marx, )  
Individually and in her )  
Capacity as Personal )  
Representative of the Estate )  
Of Bradley Douglas Marx, )

Defendants. )

**Transcript of Record**

NOVEMBER 12, 2021

**B E F O R E:**

Honorable H. Steven DeBerry IV  
Georgetown County Courthouse  
Georgetown, South Carolina

**A P P E A R A N C E S:**

Reese R. Boyd, III, Esquire  
**Attorney for Plaintiff**

Audra M. Byrd, Esquire  
**Attorney for Defendant**

Sallie Beth Todd  
**Circuit Court Reporter**

**R 0092**

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I N D E X

| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|----------------|---------------|--------------|-----------------|----------------|
|----------------|---------------|--------------|-----------------|----------------|

(THERE WERE NO WITNESSES CALLED DURING THIS HEARING.)

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|                                    |    |
|------------------------------------|----|
| Certificate of Court Reporter..... | 16 |
|------------------------------------|----|

E X H I B I T S

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EV</u> | <u>PAGE</u> |
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|------------|--------------------|-----------|-----------|-------------|

(THERE WERE NO EXHIBITS MARKED DURING THIS HEARING.)

1           **THE COURT:** All right. So that brings us to 2020-CP-22-  
2 00991, Michael Mares versus Bradley Douglas Marx.

3           **MR. BOYD:** Good morning, Your Honor.

4           **THE COURT:** Good morning.

5           **MS. BYRD:** Good morning, Your Honor.

6           **THE COURT:** Good morning. All right. And this is the  
7 defendant's motion to dismiss?

8           **MS. BYRD:** Yes, sir, Your Honor.

9           **THE COURT:** All right.

10           **MS. BYRD:** Actually, I'm Audra Byrd and I represent the  
11 defendants Catherine Marx individually and as personal  
12 representative of the estate of her husband Bradley Marx. And  
13 actually, this is a continuation of a motion to dismiss  
14 hearing that was heard by Judge John in February. We've  
15 briefed this pretty thoroughly, but I can go back through the  
16 sort of procedural background and how we got here. I doubt  
17 Your Honor has had an opportunity to do that.

18           **THE COURT:** All right.

19           **MS. BYRD:** Essentially in -- Mr., the plaintiff, Mr.  
20 Mares and Mr. Marx who is now deceased started a company  
21 Emergency Power, LLC in 1996. And apparently from the  
22 complaint Mr. Mares alleges that he was in charge of the day-  
23 to-day operations and Mr. Marx was in charge of the finances.  
24 In 2013 they allege that Mr. Marx began embezzling funds and  
25 using money from the company to pay his own personal expenses.

1           At some point he, Mr. Marx, and his wife Catherine moved  
2 to Pawleys Island. And on November 24<sup>th</sup>, 2019 Mr. Marx died,  
3 the estate was opened, and Ms. Marx was named as the personal  
4 representative. Under the probate code, as allowed by the  
5 code, Mr. Mares, the plaintiff here, and the company filed a  
6 notice of claim with the Probate Court and it contained the  
7 same allegations, the exact same allegations that are  
8 presented in the complaint filed here. In September, I'm  
9 sorry, October the 16<sup>th</sup> the personal representative filed the  
10 notice of disallowance of the claim under the probate code  
11 statute. And in that notice, which was served on October 22<sup>nd</sup>,  
12 the statute is very clear that you have to have language in  
13 there that says if you do not commence an action within 30  
14 days you're forever barred. This is the nonclaim statute,  
15 Your Honor.

16           Instead of doing that, the plaintiffs filed this action  
17 on December the 7<sup>th</sup>, 2020 which was more than 30 days after the  
18 notice of disallowance of claim; and it was more than one year  
19 after the date of death of Mr. Marx. So when we argued this  
20 before Judge John it was primarily on the basis of the statute  
21 of limitations and the failure to comply with the probate code  
22 wherein you must file within 30 days, you must commence an  
23 action within 30 days and present the Probate Court with  
24 notice that you have commenced an action.

25           During our first hearing counsel for the plaintiff

1 conceded that it was just a mistake. He conceded that there  
2 was no filing within the one year of the date of death or the  
3 30 days allowed by the probate code. And Judge John took it  
4 under advisement. At the end of the hearing counsel raised an  
5 additional ground to perhaps defeat the statute of limitations  
6 argument, and there was an exception in the probate code that  
7 allows -- it's what they call the Liability Insurance Coverage  
8 Exception. So what Judge John did through his law clerk was  
9 e-mailed both me and Mr. Boyd and asked us to be prepared to  
10 present to Your Honor any issues regarding the application of  
11 the Covid order issued by the Supreme Court as it affects the  
12 statute of limitations. And he allowed 90 days for discovery  
13 on the issue of whether or not there existed a liability  
14 insurance policy that might provide coverage and give an  
15 exception to the statute of limitations.

16 That discovery has been completed. It has gone on for  
17 nine months. And after nine months, to date, there has been  
18 no policy that has been identified that would provide  
19 liability insurance or coverage for the acts complained of in  
20 the complaint which are conversion, conspiracy, and a  
21 constructive trust.

22 As Your Honor knows, it would be very difficult to find  
23 and insurance policy that covered intentional torts like that  
24 of an officer, manager, or member and that's exactly what we  
25 have here. Mr. Boyd has presented us with four different

1 insurance policies. They are commercial real estate policies,  
2 there's some commercial liability policies, and in each of  
3 those policies damage is not defined as money, there are  
4 exclusion of course or claims known by the insured. Which if  
5 Mr. Marx was embezzling, he certainly would have known. But  
6 also, both policies exclude dishonest, criminal, or fraudulent  
7 acts of an insured or any partner, member, or person in  
8 collusion with that person. So, Your Honor, with regard to  
9 the insurance liability coverage exception there is none. So  
10 we would argue that there is no exception to the statute of  
11 limitation.

12 With regard to the Covid order, Your Honor, the Supreme  
13 Court in its order specifically said -- this is the order  
14 2020-00447 and it dealt with the Coronavirus. And the  
15 relevant section is section 12 which deals with the statute of  
16 limitations. The Court recognized that there was an issue and  
17 that some litigants might miss that. However, the Supreme  
18 Court says we recognize that this might be an issue but it's  
19 inappropriate for the Court to consider at this time and we  
20 submitted the issue to the General Assembly which has done  
21 nothing to change the statute of limitations.

22 And, Your Honor, we submitted a supplemental brief  
23 pursuant to Judge John's directive. And in this case the  
24 statute that we're dealing with which is 62-3-804 and 803 it  
25 is a nonclaim statute, so it is much different than a statute

1 of limitations. The nonclaim statutes essentially say it is  
2 not a defense, it is if you do not file within a certain  
3 period of time then you are barred. It gives a right to a  
4 cause of action if it is commenced in accordance with the  
5 statute. That was concededly not done here. So, Your Honor,  
6 we would just ask that the motion to dismiss be granted.

7 **THE COURT:** All right. Thank you.

8 **MS. BYRD:** Thank you, Your Honor.

9 **THE COURT:** Mr. Boyd.

10 **MR. BOYD:** Thank you, Your Honor. Reece Boyd on behalf  
11 of the plaintiffs Emergency Power and Michael Mares. First of  
12 all, Your Honor, I agree with most of what Ms. Byrd has said.  
13 I don't disagree with the fact that Judge John did start  
14 asking us about insurance and it became several questions  
15 about insurance at the initial hearing on this matter, but it  
16 wasn't primarily about the insurance question.

17 We have conducted discovery; we haven't conducted nine  
18 months of brutal discovery. We just sent out some requests.  
19 We haven't really, as Ms. Byrd has stated, we haven't really  
20 identified any coverage that would apply apparently to the  
21 claims in question.

22 But I would say just briefly, Your Honor, I disagree with  
23 the assessment of the statute of limitations. First of all,  
24 the defendants in this action are Bradley Douglas Marx, he is  
25 the decedent; Catherine Marx, his wife, is sued individually

1 and in her capacity as personal representative. And there are  
2 allegations in the complaint that relate to her individually.  
3 The allegation essentially is, Your Honor, that she also  
4 participated in this conspiracy to defraud Emergency Power.  
5 So none of the motion to dismiss arguments that have been made  
6 would apply to Ms. Marx individually.

7 The second thing that I would say, Your Honor, and we  
8 have briefed this extensively. I would refer the Court to the  
9 first memorandum that we submitted in opposition to the motion  
10 to dismiss. That was filed in February. And then to the  
11 supplemental memorandum, Your Honor, that we filed in the case  
12 in opposition to the motion to dismiss and that document is  
13 also dated February of 2021, Your Honor.

14 And first of all, Your Honor, I don't disagree with the  
15 timing, in terms of the dates, that Ms. Byrd has provided.  
16 But I would note that it was a timely filed notice of creditor  
17 claim in the Probate Court. We brought the action in circuit  
18 court. Obviously, we have the right to do that under the  
19 probate code. There was initially a discussion that the  
20 probate code had exclusive jurisdiction, Your Honor. But as  
21 we point out in our brief, the code clearly provides  
22 concurrent jurisdiction, and this Court has the ability to  
23 entertain this matter pursuant to 62-3-804(3).

24 And what I would say about the timing of the complaint,  
25 Your Honor, is first of all I would submit to you that the

1 filing of the creditor claim was sufficient to toll the  
2 statute, that's the first thing.

3 And then as it relates to the actual filing of the  
4 complaint, Ms. Byrd is correct. The administrative relief  
5 provided by the Supreme Court in the order that she  
6 referenced, that's order 2020-0047. There's two versions of  
7 that order, Your Honor, that are controlled -- that are  
8 relevant in this case. The order as was issued at the time of  
9 the events in question is the version that was amended, that's  
10 2020-04-22 -- excuse me, Your Honor.

11 **REPORTER'S NOTE:** (Cellphone ringing in the courtroom.)

12 **MR. BOYD:** That's embarrassing. My apologies to the  
13 Court.

14 The version that was enforced, Your Honor, at the time of  
15 these events in question is 2020-04-22-01 issued April 22,  
16 2020. It was subsequently amended, Your Honor, in December  
17 and that version was issued on December 16 of 2020. But if  
18 you'll look at the -- and it's very clear from the order, as  
19 Ms. Byrd indicated, that it's not intended to apply to  
20 statutes of limitations. If you have a three-year statute of  
21 limitations from an event you have to file a complaint. It  
22 doesn't tack on 30 days, but it does, and I would argue that  
23 the operative provisions for purposes of, with the way the  
24 Probate Court works and the statute that Ms. Byrd cited, is  
25 when the notice of disallowance is issued by the personal

1 representative then the claimant does have 30 days to bring an  
2 action if they're going to bring an action, Your Honor. And I  
3 would submit to you that that's exactly -- it doesn't operate  
4 in a way that a statute of limitations operates. It is a  
5 nonclaim statute, Your Honor, but it does fall within the  
6 scope of this order. The order says at section 9 of the  
7 order, and I can give the Court a copy if the Court would like  
8 to have a copy, it says extensions of time and forgiveness of  
9 procedural default, it talks about the Covid crisis, further  
10 since it is important for lawyers and litigants appearing for  
11 trial purposes to have time to take actions to protect  
12 themselves. Due dates for all trial court filings due on or  
13 after the affective date of this order are hereby extended by  
14 30 days. Then it continues in section B, forgiveness of  
15 procedural defaults since May 13, excuse me, March 13, 2020.  
16 In the event a party to a case or another pending -- is  
17 required to take certain action on or before, or after, excuse  
18 me, March 13<sup>th</sup>, 2020 but has failed to do so, that procedural  
19 default is hereby forgiven and the required action shall be  
20 taken within 30 days.

21 So if you -- frankly, Your Honor, the Covid pandemic is  
22 exactly what contributed to this. Our office was working  
23 remotely. These events occurred in October, November of 2020.  
24 By the way, in the subsequent version of the order that was  
25 issued in December, the Court added a sunset to that provision

1 and indicated that those extensions and the forgiveness of  
2 procedural defaults -- it added a sunset provision to that:  
3 Further, the automatic extension shall not apply to any action  
4 or event due on or after January 16, 2021. So in December the  
5 Court came back and revised the order and put in a sunset  
6 provision of January 26, 2021. But they did that in December  
7 after this had all transpired, and there's no argument that  
8 the dates -- that the events here transpired between those two  
9 dates. So whichever version of the order you look at, we're  
10 within the period, we're within the timeframe.

11 So our argument is that's a 30-day window to respond to  
12 an action of the personal representative. Our office was  
13 operating remotely. We were delayed in getting notice of the  
14 personal representative's denial of our claim. And as Ms.  
15 Byrd stated on my behalf, and I'll concede to the Court, we'll  
16 admit that we made a mistake, but we believe that's just  
17 exactly what the Court is talking about in this executive  
18 order and that 30-day deadline should not be 30, it should be  
19 60. And if it's 60 then it was a timely filed response. But  
20 regardless, even if the Court does take the position that the  
21 estate is barred, we would disagree with that, but regardless  
22 the other defendant, the individual defendant Catherine Marx,  
23 is not excused or the arguments don't apply to her so the  
24 action would continue with Ms. Marx as an individual  
25 defendant.

1           **THE COURT:** All right.

2           **MR. BOYD:** Thank you.

3           **THE COURT:** Ms. Byrd.

4           **MS. BYRD:** Yes, Your Honor, very briefly.

5           I would just like to read to you from the statute itself  
6 which is 62-3-803. And what it says is that all claims  
7 against the decedent's estate, and I won't read the whole  
8 thing, but it says are barred against the estate, the personal  
9 representative, the decedent's heirs, the devisees, and non-  
10 probate transferees of the decedent unless presented within  
11 the following, one year of death. So, Your Honor, this does  
12 apply to Ms. Marx individually because of the non-probate  
13 transferee; and it does apply to her as personal  
14 representative of the estate. It's very clear in the statute.

15           Again, I want to emphasis that the Court of Appeals has  
16 held that it is reversible error or allow a complaint to go  
17 forward under 62-3-803 when it is not complied with. There is  
18 no equitable tolling. And in our supplemental memorandum  
19 there is case after case holding that this is a nonclaim  
20 statute which bars all claims that are not timely filed. It  
21 bars all claims including actions against assets already  
22 distributed, and that it's reversible error to find  
23 differently.

24           And with regard to the Supreme Court order, Your Honor,  
25 the section that Attorney Boyd is reading from deals with

1 default and that is simply not what we have here. It's not  
2 where we commenced an action and where we failed to respond.  
3 And we could certainly agree that there is an extra 30 days.  
4 In this case, Your Honor, there is a very specific provision  
5 of the order that deals with statute of limitations and the  
6 Supreme Court specifically said that they are not going to do  
7 anything about that.

8 And what's interesting in this case is although  
9 Coronavirus, we concede was an issue, there was no problem  
10 with the plaintiff's filing their notice of claim in the  
11 probate court in September. So it's difficult to imagine why  
12 they would be unable to do so in December. However, Your  
13 Honor, even if that argument was accepted by the Court, our  
14 courts have consistently held there is no equitable exception  
15 under a nonclaim statute, which is what we have here.

16 And, Your Honor, we have submitted recently the affidavit  
17 of Ms. Marx wherein she swears under penalty of perjury that  
18 there is no liability insurance available for coverage.

19 **THE COURT:** All right. Just let me ask you, Judge John -  
20 - so he entered an order and that was basically for this case  
21 to get back on the docket to determine whether or not there  
22 was any liability insurance that might be applicable; or  
23 number two, whether or not there is relief under the Covid  
24 order from the Supreme Court with regards to the statute of  
25 limitations. Is that right?

1           **MS. BYRD:** Yes, Your Honor. If I may approach? I have  
2 what was the -- we have a Form 4 order where he took it under  
3 advisement, and then we subsequently received an e-mail from  
4 Judge John. May I approach, Your Honor?

5           **THE COURT:** Yes, ma'am.

6           So does that -- am I correct in assuming that Judge John  
7 agrees that if there isn't an exception based on the Covid  
8 order by the Supreme Court then there is a statute of  
9 limitations violation?

10          **MS. BYRD:** Yes, Your Honor.

11          **MR. BOYD:** I don't know that I agree with that, Your  
12 Honor. He hasn't said that in any writing that I've seen.

13          **THE COURT:** Okay. All right. We'll I certainly take --  
14 is there anything further from anybody?

15          **MR. BOYD:** If I may make two brief points, Your Honor.

16          **THE COURT:** Yes, sir.

17          **MR. BOYD:** We've argued it, and the briefs, I think, are  
18 there and Your Honor will review them, I'm sure. But as Ms.  
19 Byrd said, it's not a statute of limitations that we're  
20 dealing with. Again, it's a very compressed timeline and it  
21 does key to the action of the PR's counsel. You've got 30  
22 days from her denial of your claim to move the claim to the  
23 Court. But again, the claim was presented to the PR well  
24 within the statute of limitation. So, thank you, Your Honor.

25          **THE COURT:** All right. Anything further?

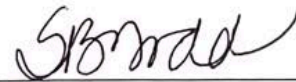


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C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Michael Mares and Emergency Power, LLC versus Bradley Douglas Marx (deceased) and Catherine Marx, individually and in her capacity as Personal Representative of the Estate of Bradley Douglas Marx in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on November 12, 2021.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



\_\_\_\_\_  
Sallie Beth Todd, CVR  
Official Reporter

February 1, 2022.

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN ) 2020-CP-22-00991

MICHAEL MARES AND )  
EMERGENCY POWER, LLC, )

Plaintiffs, )

vs. )

BRADLEY DOUGLAS MARX )  
(DECEASED) AND CATHERINE )  
MARX, INDIVIDUALLY AND AS )  
PERSONAL REPRESENTATIVE )  
OF THE ESTATE OF BRADLEY )  
DOUGLAS MARX, )

Defendants. )

**Transcript of Record**  
(Virtual Motion to Dismiss)

February 4, 2021

**B E F O R E:**

**VIA: WEBEX**

Honorable Steven H. John

**A P P E A R A N C E S:**

**VIA: WEBEX**

Reese R. Boyd, III, Esquire  
**Attorney for Plaintiff**

Audra M. Byrd, Esquire  
Melody E. Breeden, Esquire  
**Attorneys for Defendant**

Kay H. Richardson  
**Circuit Court Reporter**

**R0108**

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I N D E X

FEBRUARY 4, 2021

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| Motion to Dismiss .....             | 3  |
| Certificate of Court Reporter ..... | 19 |

E X H I B I T S

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(No exhibits were marked or admitted.)

1 **FEBRUARY 4, 2021**

2 **ON THE RECORD - 10:46 A.M.**

3 THE COURT: All right. This is the case of Michael  
4 Mares, Plaintiff, versus Bradley Douglas Marx. It is set  
5 forth as a motion to dismiss.

6 All right. Ms. Breeden, I see you -- I'm sorry. Ms.  
7 Byrd, I see you. There's Ms. Breeden. And waiting for Mr.  
8 Boyd to appear.

9 MR. BOYD: I'm trying, Your Honor. Bear with me.

10 THE COURT: Sometimes down at the bottom, there's a start  
11 video or stop video.

12 MR. BOYD: It says I've got video on, but -- oh, there we  
13 go.

14 THE COURT: Very good. You've got it. Very good. All  
15 right. Good deal.

16 All right. Again, Michael Mares, Plaintiff, and others,  
17 versus Bradley Douglas Marx, Defendant. Motion to dismiss.  
18 Why don't we start off with identifying yourself for the court  
19 reporter.

20 Mr. Boyd, state your name and the party you represent,  
21 please.

22 MR. BOYD: Yes, Your Honor. Reese Boyd, and I'm also  
23 here with Kelly Turek in my office, and I represent Michael  
24 Mares and Emergency Power, LLC, the plaintiff in the action,  
25 Your Honor.

1 THE COURT: All right. Very good.

2 All right. Ms. Byrd?

3 MS. BYRD: Yes, sir, Your Honor. Good morning. I'm  
4 Audra Byrd. I represent Bradly Douglas Marx, Catherine Marx,  
5 individually and as Personal Representative of the Estate of  
6 Bradley Marx.

7 THE COURT: All right.

8 And Ms. Breeden?

9 MS. BREEDEN: Yes, Your Honor. My name is Melody  
10 Breeden. I also represent Bradley Douglas Marx and Catherine  
11 Marx in the Estate of Bradley Douglas Marx.

12 THE COURT: Okay. Very good. All right. So it appears  
13 -- the clerk has it as the motion to dismiss has been filed by  
14 Ms. Byrd. Who is gonna argue that?

15 MS. BYRD: Your Honor, I will be doing the argue.

16 THE COURT: All right. Go ahead.

17 MS. BYRD: All right. Your Honor, briefly, some factual  
18 background. Based on the allegations of the complaint, the  
19 plaintiff, Michael Mares, and Bradley Marx formed the  
20 plaintiff, Power Energy -- Emergency Power, LLC in Michigan in  
21 1996. They were 50/50 partners in the business. And,  
22 according to the complaint, beginning in around 2013, Mr. Marx  
23 began embezzling funds from the company for his personal use.  
24 On November the 24th, 2019, Mr. Marx passed away and his wife,  
25 Catherine Marx, who is a named defendant, was appointed as

1 personal representative of the estate that's open in  
2 Georgetown County. In September, on September the 1st of  
3 2020, the plaintiffs, these two exact same plaintiffs, Mr.  
4 Mares and Emergency Power, LLC filed a notice of claim with  
5 the Probate Court estate and served it to the PR in accordance  
6 with the probate code. The PR's counsel, then on October the  
7 22nd, mailed and served a notice of disallowance of that claim  
8 to Mr. Boyd and the two plaintiffs. Thereafter, the -- this  
9 action was filed with the Probate Court in -- I'm sorry -- it  
10 was filed with the Circuit Court on December the 7th, 2020.  
11 And, Your Honor, we filed the present motion to dismiss on  
12 three grounds. First of all, Your Honor, the statute of  
13 limitations has expired. Second, they failed to comply with  
14 the Probate Court process for claims. And third, the Court  
15 lacks jurisdiction as exclusive original jurisdiction of the  
16 case lies with the Probate Court.

17 Your Honor, under the Probate Court -- under the code  
18 applicable to this case, all claims against the estate, the  
19 personal representative, the devisees, the non-probate  
20 transferees are barred forever if not brought within one year  
21 after death. And in this case, the claims were not brought  
22 with anyone here. Mr. ---

23 THE COURT: And I'm sorry. I should've asked you to do  
24 this -- and I'm sorry, Ms. Byrd. How about let's start off  
25 with we're in the wrong place.

1 MS. BYRD: Yes, sir.

2 THE COURT: All right. Okay? How about let's start off  
3 with that.

4 MS. BYRD: All right. Your Honor, I'll be glad to.

5 Your Honor, under Section 62-1-302(a)(1) of the Probate  
6 Code, it provides that exclusive original jurisdiction lies  
7 with the Probate Court over estates of decedents including  
8 determination of property in which the estate of the decedent  
9 has an interest. And, Your Honor, I don't think there can be  
10 any dispute that this falls underneath that section where  
11 exclusive original jurisdiction lies with the Probate Court.

12 THE COURT: All right. Go ahead. I'm just having my  
13 clerk pull the code section.

14 MS. BYRD: Yes, sir.

15 THE COURT: I -- you know, normally, I would be pulling  
16 it up on the computer, but ---

17 MS. BYRD: I understand.

18 THE COURT: I'm not that talented. Okay. If I do that,  
19 I'm positive I'll screw up the virtual courtroom and we'll  
20 lose the hearing. So I'm gonna go back to the book, okay,  
21 just to make sure that doesn't happen. So, if you'll give me  
22 one second while he's pulling that.

23 MS. BYRD: Yes, sir, Your Honor.

24 THE COURT: All right. Hold on a second.

25 All right. So tell me the code section again.

1 MS. BYRD: It is 62 ---

2 THE COURT: 62-1-302?

3 MS. BYRD: 62-3-803.

4 THE COURT: 62-3-803, okay.

5 MS. BYRD: Yes, sir, Your Honor.

6 THE COURT: 62-3-803. All right. Hold on a second.

7 All right.

8 All right. Go ahead, ma'am.

9 MS. BYRD: Yes, sir. So is there anything further on the  
10 lack of jurisdiction argument, Your Honor? That's all I have.  
11 I think the statute is very clear that it applies not only to  
12 the estate but to the personal representative, heirs,  
13 devisees, and non-probate transferees, which is all we have  
14 here.

15 And the second part of our argument was the failure to  
16 ---

17 THE COURT: How about ---

18 MS. BYRD: Yes, sir, Your Honor.

19 THE COURT: Let's -- let's address -- for my benefit,  
20 let's address them one at a time. All right?

21 So, Mr. Boyd, how about your argument basically that  
22 we're in the wrong place, you should be in the Probate Court?

23 MR. BOYD: Well, Your Honor, I think this is an area  
24 where there is concurrent jurisdiction. And, you know, I've  
25 been in quite a few cases in the Probate Court where the

1 litigation -- the Court declined to exercise jurisdiction over  
2 other aspects of the case. I think this is one of those cases  
3 where we've not just sued the PR in her capacity as personal  
4 representative, Your Honor, but there are allegations that go  
5 well beyond that, if you look at the complaint. And, you  
6 know, I've had cases in the Probate Court where we've had  
7 allegations that go beyond the four corners of the will to  
8 independent actions of the fiduciary in their individual  
9 capacity and the Court has declined to exercise jurisdiction  
10 and ---

11 THE COURT: But that hasn't happened in this case,  
12 though?

13 MR. BOYD: No, that's not happened in this case, Your  
14 Honor. Well, actually, our allegation -- let me just back up,  
15 Your Honor. As Ms. Byrd said, this case arises from a  
16 business that was created on a equal basis between the  
17 decedent and my client, Mr. Mares. And they operated the  
18 business for several years, as Ms. Byrd noted, on that basis,  
19 and the business continues to operate today. What my client  
20 handled was the nuts-and-bolts end of the business, Your  
21 Honor, and the decedent, Mr. Marx handled the financial, the  
22 -- more the back office, the accounting, that sort of stuff.  
23 And my client, frankly, was largely in the dark on the  
24 finances of the business as long as Mr. Marx was running the  
25 business during his lifetime. It wasn't until the decedent

1 passed away that my client began to discovery upon needing to  
2 become involved in the financial side of the business that  
3 there were various transactions that had transpired over the  
4 years preceding the decedent's passing that were improper.  
5 And, so when he drilled down into that, he learned that there  
6 were various personal expenses of Ms. Marx that were being  
7 paid out of the business; that basically she and her husband  
8 had worked together and essentially conspired to embezzle  
9 funds from the business. And so that, in my estimation, Your  
10 Honor, takes it beyond the limited jurisdiction of the Probate  
11 Court and creates, again, one of those cases where the  
12 jurisdiction in the Circuit Court is proper. And even, if  
13 you'll notice in the complaint, they allege that -- they state  
14 that the claims were reformatted for proper pleading in the  
15 Circuit Court. We didn't reformat anything. We're just  
16 alleging what happened or what we believe -- what we contend  
17 happened, Your Honor, which is that Ms. Marx, the personal  
18 representative, she has liability in this case, not as the  
19 personal representative or not exclusively as the personal  
20 representative, but for her own independent acts that gave  
21 rise to the embezzlement and the misdirection of funds that  
22 are what this case is about. And, so we include allegations  
23 in our complaint that include constructive trust and  
24 conversion, and that takes that beyond the limited  
25 jurisdiction that Ms. Byrd is describing. If this was just a

1 simple claim against the estate, Your Honor, she would  
2 probably be correct. But, I think as Your Honor knows,  
3 estates are sued in Common Pleas all the time. I've got a  
4 couple of them right now in my office where an estate has been  
5 sued in Common Pleas. So I think because of the allegations  
6 that we make, it was appropriate and is appropriate that this  
7 case was brought in the Court of Common Pleas.

8 THE COURT: What say you about that, Ms. Byrd?

9 MS. BYRD: Your Honor, I don't disagree that the Circuit  
10 Court has -- certainly has subject matter jurisdiction to  
11 entertain the causes of action contained in the complaint. My  
12 assertion is based solely on the clear and unambiguous language  
13 of the statute which provides that all claims must be filed  
14 with the Probate Court. And, Your Honor, in this case,  
15 there's no doubt that Mr. Boyd could have removed this action  
16 to the Circuit Court and been successful in that motion.  
17 However, he's required under the statute that we have cited to  
18 file this with the Court -- at the Probate Court because it  
19 does have exclusive jurisdiction.

20 THE COURT: All right. Let's go on to your other  
21 arguments now.

22 MS. BYRD: Yes, sir, Your Honor.

23 With regard to the Probate Code 62-3-804, there's a  
24 specific procedure that's laid out when someone has a claim  
25 against a decedent. And, in this case, Mr. Boyd's clients,

1 the plaintiffs, followed that procedure. They filed with the  
2 Probate Court their notice of claim and it was disallowed by  
3 the personal representative. And under the statute, there's  
4 several things that in that disallowance of claim that the PR  
5 must include. And one of those things is that there must be a  
6 warning that, if an action is not commenced within 30 days of  
7 the date of filing, then your claim will be forever barred.  
8 The notice of claim that was filed by the plaintiffs is  
9 identical to what was filed in the Circuit Court, the notice  
10 of disallowance of claim was mailed on October the 22nd, and  
11 no action was commenced within 30 days, as required by the  
12 statute.

13 THE COURT: All right. When was the summons and  
14 complaint filed?

15 MS. BYRD: The summons and complaint was filed on  
16 December the 7th, 2020.

17 THE COURT: Okay. All right.

18 So what's -- what's your argument on that, Mr. Boyd?

19 MR. BOYD: Well, Your Honor, we -- we outline this in our  
20 brief, and I will not disagree with Ms. Byrd as to the timing  
21 of the matter, Your Honor, and the issue of the 30 days. If  
22 you will look on page 3 of our brief, essentially, I will  
23 concede, Your Honor, this is one of those -- this is one of  
24 those instances where -- I'm trying to phrase this, Your  
25 Honor, in a way that doesn't hurt my feelings -- but we just

1 made a mistake, Your Honor. And this is -- we do point in our  
2 memorandum in opposition to the point that the Court has  
3 issued guidance this year, in light of the COVID-19 pandemic  
4 and the operation of the courts on a limited and virtual  
5 basis. There has been some guidance from the Supreme Court  
6 related to the relaxing of -- the relaxation -- in particular  
7 we point to the guidance that the Court issued, most recently  
8 issued on December 16 of last year, Operation of Trial Courts  
9 during the Coronavirus Emergency, which suggests some leniency  
10 may be in order as we -- that's on page 4 and 5 of our  
11 memorandum, Your Honor. But I -- and I will simply note that  
12 the attorney in the office that was working on the file was  
13 out on maternity leave, and several of us were working  
14 virtually or were out of the office due to either COVID or  
15 COVID in the family, and all I can tell you, Your Honor, as  
16 Ms. Byrd has astutely observed, there is a 30-day deadline  
17 which we missed by I believe 12 days. So it -- that is  
18 something that I cannot argue that we did not miss that  
19 deadline, Your Honor. I would say for the record I think it  
20 would be less than equitable to punish the client for a  
21 mistake that was simply a mistake of his counsel. But, she is  
22 correct, Your Honor, in asserting the point that we missed the  
23 deadline.

24 THE COURT: All right. So, if the Court agreed with  
25 that, it would dismiss the action ---

1 MR. BOYD: We would argue, Your Honor, that if the Court  
2 did agree with that, it would dismiss the action, the claim as  
3 to the estate.

4 THE COURT: As to the estate but not to the other ---

5 MR. BOYD: Yes, Your Honor, correct, as to Ms. Marx ---

6 THE COURT: But the wife, the wife of the individual.

7 MR. BOYD: Yes, Your Honor. That's correct.

8 THE COURT: All right. All right.

9 And your last argument, Ms. Byrd?

10 MS. BYRD: Your Honor, I think we've already touched on  
11 it briefly, which was just the lack of ---

12 THE COURT: You did, but I kind of -- I kind of cut you  
13 off, so I wanted to give you an opportunity to go back to it.

14 MS. BYRD: No, sir, Your Honor. I was just -- once  
15 again, you beat me to it, and point you to the statute 62-1-  
16 302(a)(1) that provides that this should be filed within the  
17 Probate Court's exclusive jurisdiction.

18 THE COURT: All right. Thank you.

19 MS. BYRD: Yes, sir, Your Honor.

20 THE COURT: All right. Any -- Ms. Breeden, anything that  
21 you wanted to add to this?

22 MS. BREEDEN: No, Your Honor.

23 THE COURT: Okay. And Mr. Boyd, any final argument you  
24 wanted to make?

25 MR. BOYD: I think you've heard what I had to say, Your

1 Honor, so I -- I would reiterate, you know, Ms. Byrd did  
2 concede that obviously the Court does have subject matter  
3 jurisdiction and estates are sued, you know, routinely in  
4 Circuit Court, as Your Honor is well aware. You know, it puts  
5 us in the position that theoretically, I would just -- if the  
6 Court for instance did dismiss the matter with prejudice, and  
7 we brought it in the Circuit -- I mean, in the Probate Court,  
8 of course, we would be dismissed -- we'd certainly be  
9 dismissed under the time bar statute. And at that point, we  
10 would, you know, re-bring the case or re-bring the case in  
11 Circuit Court. It really -- it's sort of a circular -- sort  
12 of a circular argument at that point. I think it's clear that  
13 the Court has subject matter jurisdiction as Ms. Byrd  
14 conceded, so...

15 THE COURT: All right. I'm going to take this one under  
16 advisement and go back and -- based upon the arguments that  
17 y'all have made, go back and re-read the applicable statutes  
18 and the -- in conjunction with the filings that all of y'all  
19 have made in this matter. I won't take long, but I want to go  
20 back and look at all that again before I come to a firm  
21 decision in this matter. But, I will let y'all know shortly  
22 about that through an email from my clerk of court.

23 Whatever assistance the Court requires regarding the  
24 drafting of an order, I just remind everybody that when you do  
25 that, please tell the clerk of court to make it to -- or you

1 make it to my attention, because if you just generally file it  
2 in the E-filing system, then it takes some time to get to me.  
3 So just note when you file it with the clerk of court, it  
4 needs to come to my attention.

5 All right?

6 MR. BOYD: Your Honor ---

7 THE COURT: I'll let y'all know shortly and I appreciate  
8 it very much. Thank y'all.

9 MS. BYRD: Thank you, Your Honor.

10 THE COURT: Yes, sir, Mr. Boyd?

11 MR. BOYD: I apologize. There was one other item. I'm  
12 looking at my notes here and there was one other item that I  
13 meant to mention. May I briefly interject one more point for  
14 the Court's consideration.

15 THE COURT: Sure.

16 MR. BOYD: This is something that I had not noticed  
17 before. In reviewing the statute 62-3-803 that Ms. Byrd  
18 relies on, I noticed something last evening that I had not  
19 noticed before, and I've been doing this for quite a while and  
20 I've never noticed this. But, if the Court looks at the  
21 reporter's comments -- so I just want to note this for the  
22 record -- and I don't have the full argument on this, Your  
23 Honor; as I said, I just noticed this last evening for the  
24 first time. But, the reporter's comments, and I'm looking --  
25 I'm not exactly sure what Your Honor is reviewing in the way

1 of text in terms of a book -- but I'm looking at the Thompson  
2 Reuters 2020 Edition of South Carolina Probate Code Annotated.

3 THE COURT: Okay.

4 MR. BOYD: It's this volume, Your Honor.

5 THE COURT: Yeah. I'm -- as I told you, the reason I  
6 went to the book was I didn't want to lose the virtual  
7 courtroom. I will go back ---

8 MR. BOYD: I understand. So I'm -- I'm juggling a book  
9 and a screen, which I don't usually do. But, the last  
10 paragraph under reporter's comments for 62-3-803 has the  
11 following: And it says, the limitations of 62-3-803 do not  
12 apply to proceedings, obviously mortgages, pledges, security  
13 interests, liens on property, things that I was familiar with.  
14 And then, but at the end it says, ...or proceedings to  
15 establish liability of the decedent or the personal -- or  
16 proceedings to establish liability of the decedent or the  
17 personal representative for which there is liability  
18 insurance. That is an exception to the time constraints of  
19 62-3-803, which frankly I had never -- I have never heard and  
20 hadn't heard of until I read that comment late last night for  
21 the first time, Your Honor. And theoretically, I just wanted  
22 to observe for the Court if this was some -- is proven to be a  
23 wrongful act on the part of the personal -- excuse me --  
24 strike that -- on the part of the decedent in his capacity as  
25 a partner in this business and to the extent that there might

1 be DNO insurance or other insurance coverage of the business  
2 that would implicate coverage for embezzlement by an officer,  
3 that might well be an exception to 62-3-803, that would defeat  
4 the time bar statute.

5 But, frankly, Your Honor, I apologize, I read that for  
6 the first time late in the evening last night when I was  
7 looking at this book. It's not an argument I've used in the  
8 past, and it's not one that I'm familiar with, but I am  
9 looking at it at the moment, I can assure you, and I'll -- but  
10 I just want to raise that. That's as much as I can share with  
11 you at this moment but I ---

12 THE COURT: Well, I -- okay. Obviously, it's brand new  
13 to everybody, so I'm gonna give y'all until Monday, noon, on  
14 that particular issue, since it's brand new. If anybody wants  
15 to send anything to me, I'll be glad for you to do it by  
16 Monday, noon, please. Send it to my clerk by email. It would  
17 be sjohnlc@sccourts.org.

18 MR. BOYD: Thank you, Your Honor. And I apologize for  
19 bringing it at the last minute.

20 THE COURT: All right. That's all right. That's all  
21 right. But, I'll give y'all an opportunity on that one  
22 particular issue if you've got something you want me to  
23 examine about it. I'll be glad to do it. All right?

24 Thank y'all.

25 MS. BYRD: Thank you.

1 MS. BREEDEN: Thank you, Your Honor.

2 THE COURT: Yes, ma'am.

3 MR. BOYD: Thank you.

4 **ADJOURNED - 11:58 A.M.**

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the virtual hearing held in the case of Michael Mares, et al. v. Bradley Douglas Marx, et al., held in the Court of Common Pleas for Georgetown County via WebEx on March 26, 2021.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

\_\_\_\_\_  
Kay H. Richardson  
Official Court Reporter

March 26, 2021.