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Dec 29 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
In the Court of Common Pleas

Dale Atkinson, Presiding Judge

Appellate Case No. 2020-000782

In the Matter of Estate of Herbert Franklin Dickson, Jr.
Milton Oakley Dickson, Appellant,

v.

Arthur B. Beasley, Jr., as Personal Representative
of the Estate of Herbert F. Dickson, Sr., Respondents,

**APPELLANT’S PETITION FOR REHEARING AND IN THE ALTERNATIVE A
MOTION TO REMAND TO THE CIRCUIT COURT**

Pursuant to Rule 221 SCACR and Rule 240 SCACR, Appellant Milton Oakley Dickson, respectfully petitions for a rehearing and in the alternative a motion to remand to the circuit court of the Court’s decision in its Order of December 14, 2022, dismissing the Appellant’s appeal for lack of appellate jurisdiction on the basis that Appellant failed to file with the circuit court prior to appeal to this court.

Appellant respectfully submits that this Court’s dismissal of its appeal overlooked or misapprehended the presence of these other appealable issues and that rehearing is warranted and/or in the alternative a motion to remand to the circuit court. Appellant suggests that the Court

overlooked and/or misapprehended the following points in affirming the decision of the Trial Court.

1. The Court's decision misapprehended, overlooked and ignored the clear and unambiguous language and evidence in the record by finding that the probate court applied the correct burden of proof.
2. The Court's decision misapprehended, overlooked and ignored the clear and unambiguous language and evidence in the record by finding that Arthur B. Beasley, Jr.'s claims against the Estate should be allowed and he should not be removed as personal representative for breaching his fiduciary duties.
3. The Court's decision misapprehended, overlooked and ignored the clear and unambiguous language and evidence in the record by not substituting its findings for the probate court.
4. The essential character of the Appellant's cause of action was grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence.
5. The Respondent also failed to meet the required burden of proof by failing to accurately account for the estate and all pieces of personal property that was connected.
6. The Probate Court incorrectly applied the applicable burden of proof by placing the burden on Appellant as opposed to Respondent the Personal Representative of the Estates.
7. In the case before the Probate Court, Respondent could not meet the required burden of proof as personal representative of the Estate of Melba Beasley because respondent neglected to account for all of the Estate's assets in the inventory and appraisal, including

jewelry, cars, and property. Respondent failed to transfer the assets to the Estate of Herbert Dickson at the death of Melba Dickson.

8. As personal representative of the Estate, Respondent continued to have the lights, cable, and water bill turned on at the property owned by Melba Beasley, even though he had a fiduciary duty to uphold. Respondent had a duty to uphold these responsibilities as personal representative of the state, and therefore breached the required fiduciary duties.
9. In the case before the Probate Court, Respondent could not meet the meet the required burden of proof as personal representative of the estate's by neglecting to individually list the following items belonging to Herbert Dickson's estate on the inventory and appraisal.
10. The Court's Order placed the burden of proof on Appellant to demonstrate how Respondent had acted inappropriately (and in violation of his fiduciary duties) as opposed to placing the burden on Respondent to prove he acted in a manner consistent with his fiduciary duties. This is improper and the Order of the Probate Court should be reversed by this Court.
11. Respondent had a fiduciary duty. Respondent breached that duty in the handling of the Estate of Melba Beasley and Hebert Dickson. Probate Court did not apply the proper burden of proof to require Respondent to show how did not breach the duty but instead required Appellant to "prove" that he did; This is in direct violation of well settled South Carolina Law. The Probate Court's Order dated February 13, 2019, is clearly erroneous and should be reversed by this Court.
12. In South Carolina when an administrator of an estate submits a claim against estate, he is not entitled to payment or reimbursement from the estate without full proof of the claim. *Matter of Howard*, 315 S.C. 356 (1993); *Cunningham v. Cauthen*, 37 S.C. 123 (1892);

Helvering v. Highland, 124 F.2d 556 (4th Cir. 1942). Respondent had a duty to account as personal representative of the Estate. The Respondent's failure to accurately account and deductions from the estate for Respondent's self-interest was a failure to perform as personal representative for the Estate.

13. A fiduciary relationship exists between each heir or beneficiary of an estate and the administratrix. *Ex parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 836 (Ct. App. 2009).
14. A breach of fiduciary duty claim may sound in equity if the relief sought is equitable. *Id.*
15. A fiduciary relationship existed between the Appellant and Respondent. Based on the overwhelming evidence contained in the record, Respondent breached his fiduciary duty to the Estate and should be required to make a full accounting and be removed as Personal Representative. The matter is equitable in nature because of the breach of the fiduciary duty between the parties. The present matter is equitable and the Court should therefore substitute its findings for the lower court.
16. The court has held in *Ex parte Wheeler v. Estate of Green*, Probate proceeding in which personal representative petitioned for approval of contract for sale of real estate, and beneficiaries counterclaimed for breach of fiduciary duty and sought injunction to disapprove the contract, was equitable in nature, and thus equitable standard of review applied, such that circuit court was to make factual findings according to its own view of the preponderance of the evidence, though breach of fiduciary duty claim was an action at law; such claim took on an equitable form because of the injunctive relief sought. *Ex parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 836 (Ct. App. 2009)

Pursuant to S.C. Code Ann. § 18-9-30, the Supreme Court and the Court of Appeals shall have jurisdiction of all questions of law arising in the course of the proceedings of the circuit court in probate matters in the same manner as provided by law in other cases. Jurisdiction of subject-matter may be raised at any time and cannot be conferred by consent. *Senn v. Spartanburg Cnty.*, 192 S.C. 489, 7 S.E.2d 454 (1940). The Supreme Court stated that “[t]he failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of “appellate” jurisdiction over the case, but it does not affect the court's subject matter jurisdiction.” *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 94, 668 S.E.2d 795, 796 (2008) (emphasis added).

The primary legal definition of the word “may” means “[t]o be permitted to.” Black's Law Dictionary 1000 (8th ed. 2004). The Appellant is aware of no South Carolina case law restricting the meaning of the word “may” as used in *Skinner* to mean anything other than the primary legal definition and the Appellant is aware of no cases in the probate context where a court has held that failure to comply with a jurisdictional requirement must result in deprivation of appellate jurisdiction. Therefore, in the absence of contrary South Carolina case law, the Appellant contends that the court erred in dismissing appeal.

The Appellant also recognizes the decision of the Supreme Court in *In re Cretzmeyer*, affirming the dismissal of an appeal from probate court for failure to comply with the procedural requirements of S.C. Code Ann. §62-1-308. *In re Cretzmeyer*, 365 S.C. 12, 615 S.E.2d 116 (2005). However, the Appellant contends that *In re Cretzmeyer* is distinguishable on its facts. The Court in *In re Cretzmeyer* limited its evaluation of the question of jurisdiction under S.C. Code Ann. §62-1-308(a) solely to an evaluation of whether the appellant satisfied the ten-day requirement for filing notice of intention to appeal with the courts, not whether the appellant served the appropriate

interested persons. *Id.* In this case, there were formal proceedings, timely notice, the Appellant received the Probate Court's Order and filed the notice of intention to appeal in the court of appeals within the ten day period required.

The question of whether S.C. Code Ann. §62-1-308 preempts Rule 5(a) of the South Carolina Rules of Civil Procedure is a matter of first impression in the courts of this state. At the outset, the Appellant acknowledges that S.C. Code Ann. §62-1-308 establishes procedures for appeals from probate court. *Fulmer v. Cain*, 380 S.C. 466, 469, 670 S.E.2d 652, 654 (2008). The Appellant contends, however, that a court evaluating the procedure for appeals from probate court must evaluate more than merely S.C. Code Ann. §62-1-308 alone to understand the required procedure. If read alone, then S.C. Code Ann. §62-1-308(g) would be rendered entirely without meaning. S.C. Code Ann. §62-1-308(g) provides that “[i]f the parties not in default consent either in writing or on the record at a hearing in the probate court, a party to a final order, sentence, or decree of a probate court who considers himself injured by it may appeal directly to the Supreme Court[.]” S.C. Code Ann. §62-1-308(g) (2009).

In the event, that the petition for rehearing is denied, the Appellant moves that the matter be remanded to the Circuit Court. Rule 240 SCACR, governs all motions or petitions filed in the appellate court, including but not limited to: motions for extension of time, motions to reinstate, petitions for rehearing, motions to be relieved as counsel or for substitution of counsel, petitions for supersedeas, motions to remand or dismiss and petitions for hearing *en banc*. Rule 240 SCACR. Additionally, pursuant to Rule 204, SCAC, in the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court. If a court finds that, in the interest of justice, a proceeding or a file should be located in another court of probate in South Carolina, the court

making the finding may transfer the proceeding or file to the other court. S.C. Code Ann. § 62-1-303(c). In this case, the action was filed in Probate Court, an Order was issued, the Appellant timely filed its appeal to the Court of Appeals, provided formalized notice, and in the interest of justice the proceeding should be transferred to the circuit court. Even if the matter was filed in the wrong appellate court, the Court of Appeals should transfer this case to the Circuit Court as the notice of appeal was filed timely and the circuit court has jurisdiction over the proceeding. The Appellant maintains that the court of appeals erred as Appellant complied with the notice of appeal requirements, considered himself injured, and Appellant did not lack appellate jurisdiction. Therefore, this matter must be remanded to the Circuit Court pursuant to the South Carolina Code of Laws.

The South Carolina Supreme Court has recognized that “[a] judgment of a court without subject-matter jurisdiction is void.” *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005). Subject-matter jurisdiction, of course, “is the ‘power to hear and determine cases of the general class to which the proceedings in question belong.’” *Id.* (quoting *Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). Thus, it “is fundamental” to a court entering an order. *Badeaux v. Davis*, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999).

It is axiomatic that lack of subject matter jurisdiction is a complete defense that may be raised at any stage of a proceeding, even for the first time on appeal before the Supreme Court. It cannot be waived, even by consent of the parties, and can and should be raised *sua sponte* by the court where it appears to be absent. See *Ex parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993); *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989).

In *Great Games, Inc. v. S.C. Dep't of Revenue*, the court held that failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of

appellate jurisdiction over the case, but it does not affect the court's subject matter jurisdiction. *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000). In *Mordecai v. Canty*, the court held that where it appeared on appeal from a decree of the probate court in probate proceedings that the case was decided on a question of law without considering the facts though issues of fact were involved, it was discretionary with the circuit court to order a trial de novo before a jury, instead of reversing the judgment and remanding the case to the probate court for new trial. *Mordecai v. Canty*, 86 S.C. 470, 68 S.E. 1049 (1910). In *Jeffers v. Jeffers*, the court held where a party on appeal from the probate court to the circuit court contests the case upon the merits in a matter of which the circuit court has jurisdiction, that court, even if it had no jurisdiction of the person in the first instance, acquired such jurisdiction by submission of the party. *Jeffers v. Jeffers*, 89 S.C. 244, 71 S.E. 810 (1911). The Court has also held, that an order of a circuit court remanding a case in a probate matter to the probate court for the purpose of obtaining omitted testimony without hearing the appeal denies the successful party below his legal right to have the appeal heard in the circuit court and such order is appealable in the Supreme Court. *Ex parte White*, 33 S.C. 442, 12 S.E. 5 (1890).

In this present case, the Appellant contested the matter and timely appealed the matter contesting the case on the merits, in which the circuit court would have jurisdiction. Therefore the Appellant has a right to have his appeal heard in the circuit court and the matter should be remanded to the circuit court rather than the probate court.

Appellant respectfully submits that this Court's dismissal of its appeal overlooked or misapprehended the presence of these other appealable issues and that a rehearing is warranted and/or in the alternative remanded to the circuit court.

Respectfully submitted,

By: /s/ S. Jahue Moore
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APPEAL FROM SUMTER COUNTY
PROBATE COURT

Appellate Case No. 2020-000782

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Milton Oakley Dickson, Appellant,

v.

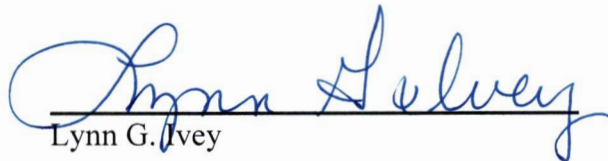
Arthur B. Beasley, Jr., as Personal Representative
of the Estate of Herbert F. Dickson, Sr., Respondent,

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Bradley Myers Law Firm, P.A., certify that I have served the Appellant's Petition for Rehearing and in the Alternative a Motion to Remand to the Circuit Court by depositing a copy of it in the United States Mail, postage prepaid, on December 29, 2022, to the following individuals:

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Lynn G. Ivey



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SC Court of Appeals

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December 29, 2022

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RE: In the Matter of Estate of Herbert Franklin Dickson, Jr.
C.A. No.: 2020-000782

Dear Ms. Kitchings:

Please find enclosed our firm check in the amount of \$50.00 for the filing fee associated with our Petition for Rehearing and in the Alternative a Motion to Remand to the Circuit Court which was filed by email today.

Sincerely,

Lynn G. Ivey
Assistant to S. Jahue Moore

Enclosures

cc: S. Jahue Moore, Esq.
Kenneth R. Young, Jr., Esq.
J. Cabot Seth, Esq.