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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Common Pleas Case No. 2022-CP-23-01064

Appellate Case No. 2022-000731

IN THE MATTER OF:
Estate of Florence Petrak Mensch,

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

Appellant,

v.

SHAUNA M. WADDELL, individually and as Personal Representative of the Estate of Florence Petrak Mensch, and JOHN R. MENSCH,

Respondent.

FINAL BRIEF OF APPELLANT STERLING RAYMOND MENSCH, III

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STATEMENT OF ISSUES ON APPEAL

1. Does appellate jurisdiction exist where the Probate Court has not yet entered a final, appealable order?
2. If the Probate Court entered a final, appealable order, did the Circuit Court err in holding that Mr. Mensch did not timely appeal that order, even though he timely filed a post-trial motion that tolled the time to appeal?
3. Did the Probate Court have subject-matter jurisdiction to award damages for alleged misconduct that occurred prior to Florence Petrak Mensch's death, when no statute authorizes such jurisdiction?

STATEMENT OF THE CASE

I. Proceedings in the Probate Court

Florence Petrak Mensch died on April 26, 2018. [R. 65-104].

On January 23, 2019, Appellant Sterling Raymond Mensch, III, filed an application for admission of the decedent's Will and Codicil to the Probate Court. [R. 1-9].

On May 15, 2019, Shauna M. Waddell and John R. Mensch filed a Petition against Mr. Mensch. [R. 1-9]. After Mr. Mensch had been removed as Personal Representative of the Estate of Florence Petrak Mensch, an amended Petition was filed against Mr. Mensch by Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch; and John R. Mensch against Appellant Mensch, alleging improper management of the Decedent's assets both before and after her death. [R. 1-9; R. 65-104]. Mr. Mensch denied the claims. [R. 105-116].

Following a summary judgment hearing held on March 17, 2021, the Probate Court entered partial summary judgment on liability, as to some claims, in favor of Ms. Waddell and John Mensch. [R. 1-9]. Specifically, the Probate Court entered summary judgment as to liability for breach of fiduciary duty, violation of the Uniform Power of Attorney Act, and conversion. [*Id.*].

The Probate Court held a hearing on the remaining claims, which concluded on September 17, 2021. [R. 10-23].

Without a hearing and without a return to Mr. Mensch's motion, the Probate Court filed an Order on February 17, 2022, stating that Appellant failed to comply with SCRCP 7(b)(1) and denying the motion to alter or amend "[a]fter careful review of the final Order in its entirety." [R. 24].

On February 23, 2022, Respondent served a notice of intent to appeal to the Circuit Court. [R. 9251].

II. Proceedings in the Circuit Court

On appeal to the Circuit Court, Appellant Mensch sought to raise four issues: (1) that this appeal was premature in that no final order had yet been entered below; (2) that the Probate Court did not have jurisdiction to award pre-death damages; (3) that a constructive trust was improperly imposed; and (4) that the award of attorney's fees was improperly calculated. [R. 9267].

On February 25, 2022, Respondent moved to dismiss the appeal as untimely. [R. 7011-7013]. Following a hearing, the Circuit Court rejected Mr. Mensch's position that the appeal was premature, as no final order had been entered below. It also rejected his position that his motion to alter or amend in the Probate Court tolled the deadline to appeal. [R. 28-35]. The Circuit Court's formal order of dismissal was electronically filed on May 17, 2022. [*Id.*].

Mr. Mensch served his notice of appeal to this Court on May 27, 2022. [R. 9271-9230].

ADDITIONAL FACTS

I. Probate Court Findings and Conclusions

Included among the Probate Court's findings and conclusions are the following, which are also relevant to this appeal:

A. Misappropriation of Funds During the Decedent's Lifetime

In 2010, Decedent named the Appellant Mensch as her agent under her durable power of attorney ("POA"), which continued in effect until her death in 2018. [R. 10-23]. The Probate Court found that Appellant Mensch, during the Decedent's lifetime, had made 239 improper transfers from the Decedent's financial accounts into his own. [R. 10-23]. Those transfers totaled \$820,382.00. [*Id.*].

B. Other Misconduct

On April 18, 2007, the Decedent purchased a home located in Greenville, South Carolina. The Decedent never intended to live at the property but intended that Appellant Mensch purchase the home at a later date. [R. 10-23]. Appellant Mensch lived in this home for twelve years and subsequently moved out of the home in September of 2020. [*Id.*]. The Estate paid \$10,000.00 for cleaning and repairs to the property so that it was presentable for potential buyers. [R. 10-23].

From 2010 to 2018, Appellant Mensch failed to file tax returns for the Decedent. [R. 10-23]. Additionally, Appellant Mensch allowed the Decedent's pension to continue to auto deposit after her death. [R. 10-23] After Respondent Waddell was appointed as Personal Representative of the Estate in place of Appellant Mensch, she filed an appeal with

the Internal Revenue Service over a portion of tax penalties. [R. 10-23]. That appeal remains pending.

C. Award of Damages

The Probate Court calculate the \$984,763.00 in damages and fees owed to the Estate as follows:

- \$546,921.00 – misappropriated funds (after credit to Appellant Mensch for the 1/3 portion of the \$820,382 that he would have inherited had the funds not been misappropriated)
- \$24,559.00 – failure to itemize Decedent’s tax return.
- \$40,314.00 – 2018 taxes penalties and interest
- \$13,820 – other tax penalties and interest
- \$163,420 – avoidable income tax due by Appellant Mensch taking more than the required minimum distributions from individual retirement accounts
- \$30,157.00 – pension overpayment
- \$10,000.00 – cost to estate and clean and repair of Tarleton Way
- \$28,000.00 – annual exclusion gift to himself in 2015 and 2016
- \$127,572.00 – attorney’s fees and costs¹

¹ The probate court reduced the requested fee award by \$6,380, which it held were for non-compensable items. [R. 10-23].

As to the \$40,314.00 in taxes, penalties, and interests, the Probate Court stated as follows: “This amount is on appeal with the IRS. [Appellant Mensch] is allowed to reduce the total judgment should this amount change as a result of the appeal.” [R. 10-23]

II. The Circuit Court’s Order of Dismissal

In its order dismissing the appeal, the Circuit Court provided two reasons why it thought that the Probate Court had entered a final order below. First, the Circuit Judge found that nothing would be left for the Probate Court to do once the IRS appeal concluded, as the Order already addressed the possibility of a credit. [R. 28-35]. Second, although jurisdictional, the Circuit Court held that because the issue was not raised and ruled upon in the Probate Court, it could not be asserted for the first time on appeal. [R. 28-35].

As for its reasoning that the appeal was too late, the Circuit Court held that the motion to alter or amend did not give fair notice of the grounds and that the Probate Court could not deal with it fairly. [R. 28-35]. Accordingly, it held that the motion could not toll the time to appeal, thus rendering untimely the notice of intent to appeal to the Circuit Court. [*Id.*].

STANDARD OF REVIEW

All issues presented here are jurisdictional ones and thus are subject to the same standard of review. “The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties....” *Anderson v. Anderson*,

299 S.C. 110, 115 (1989). Accordingly, it can be raised “at any stage of the proceeding,” including for the first time on appeal. *Eaddy v. Eaddy*, 283 S.C. 582, 584 (1984). Whether jurisdiction exists is a question of law for the court....” *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104 (Ct. App. 1993) (citation omitted).

ARGUMENT

I. Appellate Jurisdiction Does Not Exist Where the Probate Court Has Not Yet Entered a Final, Appealable Order.

The Circuit Court should have concluded that the notice of appeal was premature and thus insufficient to confer appellate jurisdiction.

“[A]n appeal is not to be allowed from an inferior tribunal, except where it is expressly granted by law.” *Turner v. Joseph Walker Sch. Dist.*, 215 S.C. 472, 476 (1949) (quotation omitted). The Supreme Court has held that S.C. Code § 62-1-308 provides the exclusive statutory grant of appellate jurisdiction from Probate Code. *Dorn v. Cohen*, 421 S.C. 517, 520 (2017) (rejecting concurrent applicability of jurisdictional grant found in S.C. Code § 14-3-330, which only applies to appeals from Circuit Court).

The General Assembly has decided to only permit appeals from final orders in Probate Court: “A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court....” S.C. Code § 62-1-308(a). The entry of an interlocutory order in Probate Court confers no appellate jurisdiction. *See, e.g., Fulmer v. Cain*, 380 S.C. 466,

470 (2008) (holding that denial of motion to remove action from Probate Court to Circuit Court was not immediately appealable).²

South Carolina law takes a strict view of finality. “If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory [rather than final]. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.” *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335 (1993) (quotation omitted).

Contrary to the Circuit Court’s holding, [R. 28-35], the Probate Court’s order of January 26, 2022, cannot be deemed a final order for appeal purposes because “open questions of fact” remain and the order left “further act[s]” for the probate judge to do, *id.* As to the former, the order set a damages figure of \$984,763—provided that the Estate’s appeal to the IRS is ultimately unsuccessful. [R.10-23 & n.10 (including in the damage award \$40,314.00 unpaid taxes, penalties, and interest but further providing as follows: “This amount is on appeal with the IRS. SRM is allowed to reduce the total Judgment should this amount change as a result of the appeal.”)]. An open question of fact thus exists as to the (eventual) result of the IRS appeal. Further, if the Probate Court later finds as a matter of fact that the Estate did succeed in reducing or eliminating the taxes, penalties, and interest,

² A constitutional exception exists when a court deprives a party of a trial by jury. *See id.* That exception is not relevant here.

the Probate Court would then have an additional act to perform—that is, to modify the judgment amount.

The potential need to modify the judgment amount poses several practical issues that amplify the prematurity of an appeal. First, as a nonparty to the IRS appeal, Mr. Mensch will not receive notice of the IRS' decision. Second, there may be no procedural vehicle to use to effect the change in the judgment. While the “IRS appeal could take a substantial amount of time,” [R. 28-35], post-judgments motions based on new evidence cannot be “more than one year after the judgment.” R. 60, SCRCF. *See also Coleman v. Dunlap*, 306 S.C. 491, 495 (1992) (“The petitioners are correct in stating that one year is the absolute time limit [for motions under R. 60(b)(1)-(3), SCRCF].”).

Insofar as the Circuit Court thought that the issue of finality had to be raised and ruled upon the Probate Court, [R. 28-35], the Circuit Court was mistaken there, too. For one thing, the raised-and-ruled-upon requirement is only a doctrine of error preservation. *Roche v. S.C. Alcoholic Beverage Control Comm'n.*, 263 S.C. 451, 455 (1975) (“[T]he purpose of appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him.” (citation omitted)). But the requirement of finality is a limitation on the Circuit Court's (and this Court's) authority—not on the Probate Court. Furthermore, the law in this State is well

settled that jurisdiction “can be raised for the first time on appeal.” *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248 (Ct. App. 1998) (citations omitted).

Unlike appeals from the Family and Circuit Court—in which interlocutory appeals are also statutorily authorized for orders that determine some “substantial matter” in the case, *Stone v. Thompson*, 426 S.C. 291, 294 (2019) (citation omitted)—the General Assembly has decided that appeals from Probate Court must await final judgment, despite the accompanying delay.³ S.C. Code § 62-1-308(a). Mr. Mensch’s notice of appeal (which was filed out of an abundance of caution) was premature; therefore, no appellate jurisdiction yet exists. This Court should vacate the Circuit Court’s judgment and remand with instructions to dismiss the appeal as premature.

II. If the Probate Court Entered a Final Order, Mr. Mensch Timely Appealed It Because His Motion to Alter or Amend Tolded the Time to Appeal.

If the time to appeal had begun because a final order had been entered, the Circuit Court should have proceeded to the merits of the appeal, rather than concluding that Mr. Mensch had appealed too late, [R. 28-35].

“The South Carolina Rules of Civil Procedure (SCRCP) adopted for the circuit court and other rules of procedure in this title govern formal proceedings [under the Probate

³ If Respondent would rather not wait for the IRS appeal to conclude before obtaining a final judgment, a readily available option exists: Dismiss the claim for the \$40,314.00 after remand. Once the Probate Court accepts that dismissal, the judgment for the remaining items can be reviewed on appeal.

Code].” S.C. Code § 62-1-304. Under the Rules of Civil Procedure, “[t]he time for appeal for all parties shall be stayed by a timely motion [to alter or amend under R. 59, SCRCPP] and shall run from the receipt of written notice of entry of the order granting or denying such motions.” R. 59(f), SCRCPP.

In contrast to the federal system, the South Carolina appellate courts do not recognize the plain-error doctrine and insist that alleged errors be raised and ruled upon at the trial level. *Elam v. S.C. DOT*, 361 S.C. 9, 24 (2004). Consequently, parties are not only encouraged to file motions to alter or amend, but sometimes required to do so. *Id.*

“Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.” *Id.* at 25. To that end (and again in contrast to the federal system), even though R. 7(b)(1), SCRCPP, requires motions to “state with particularity the grounds therefor,” *id.*, our Supreme Court has determined that a motion that fails to comply with that rule can still toll the time for appeal. *Camp v. Camp*, 386 S.C. 571, 576 (2010) (reversing Court of Appeals’ dismissal of the appeal). *See also id.* at 578 (Waller, J., dissenting) (criticizing majority for holding that time to appeal can be tolled via “a post-trial motion that identifies neither the grounds on which it relies nor the relief sought” (quotation omitted)). “When neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical reading of the rules does not serve the purpose of Rule 7(b)(1), SCRCPP.” *Id.* at 576. A party can only be prejudiced from a

lack of notice under Rule 7(b)(1), SCRCP, if the party can “establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case.” *Chastain v. Hiltabidle*, 381 S.C. 508, 517 (Ct. App. 2009) (citation omitted).

Given the high bar for prejudice—particularly where a post-trial motion is denied and the original order stands—skeletal post-trial motions have been approved so as to enable appellate review of a trial outcome. For example, in *Camp*, the Supreme Court accepted a post-trial motion that merely asked the trial judge “to reconsider the ruling in his Order dated July 26, 2006, in awarding Plaintiff, William James Camp's college expenses and costs.” *Camp*, 386 S.C at 573-74 (quoting post-trial motion). Likewise, this Court recently held that a skeletal post-trial motion that read as follows was sufficient to toll the time to appeal in the absence of any record evidence of prejudice:

This motion is based upon the applicable Rules of Court, South Carolina case law, and any affidavits and/or memorandum which may be filed prior to the hearing. Davis Roofing further alleges that Davis Roofing is prompt in filing for relief, the existence of meritorious defenses, and Nexstar and Mahoney will not be adversely prejudiced.

Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC, 431 S.C. 593, 598 (Ct. App. 2020) (brackets omitted).

Here, although the Probate Court’s Order of January 26, 2022, addressed both liability and damages, Mr. Mensch’s February 2, 2022, motion indicated that he sought “to alter or amend the Order granting [the Estate] damages.” [R. 7008-7010]. In that sense, it was as

particular as the motion in *Camp* and more particular than the motion in *Nexstar*. Because the Probate Court denied that motion without a hearing, the Estate could not have suffered prejudice, as the Estate has never argued that it “would have done something different,” much less that, having taken that different course of action, it would have “affect[ed] the decision of the trial court and advanced [its] case.” *Chastain*, 381 S.C. at 517. After all, it won the motion. Even the Probate Judge was not inconvenienced. The judge did not hold a hearing but indicated that she would deny the motion “[a]fter a careful review of the final Order in its entirety....” [R. 24]. Consequently, Mr. Mensch’s motion sufficed to toll the time to appeal, rendering timely his notice of appeal filed and served six days after that motion was denied. [R. 9251-9266].

III. The Probate Court Lacked Subject-Matter Jurisdiction to Award Damages for any Misconduct Prior to Florence Petrak Mensch’s Death.⁴

Under our constitution, the Circuit Court is this state’s general trial court with original jurisdiction in all civil cases except those cases in which exclusive jurisdiction lies in an inferior court. S.C. Const. art. V, § 11. Because the Probate Court is not a constitutional court, its subject-matter jurisdiction is limited to those classes of cases that the General Assembly has authorized by statute. *Judy v. Judy*, 393 S.C. 160, 169 (2011); *Kosciusko v.*

⁴ If this Court lacks jurisdiction over this appeal either because no final judgment has issued or because the appeal was not timely filed, the Court will not be able to reach this issue. Instead, Mr. Mensch will be required to file a R. 60(b)(4), SCRCP, motion in the Probate Court. Mr. Mensch sought, but was denied, leave from this Court to file that motion during the pendency of this appeal. *See* R. 60(b), SCRCP (“During the pendency of an appeal, leave to make the motion must be obtained from the appellate court.”).

Parham, 428 S.C. 481, 492 (Ct. App. 2019). *Cf also*

As explained below, S.C. § 62-3-302(a) does not confer jurisdiction to adjudicate pre-death claims. While S.C. Code § 62-3-302(b) does confer some jurisdiction over pre-death claims, the grant of jurisdiction extends only to settlement approval and disbursement, which were not at issue here.

A. S.C. Code § 62-3-302(a)’s General Grant of Jurisdiction of “Estates” Does Not Include Pre-Death Claims.

The Probate Court’s general jurisdictional grant extends, as relevant here, 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 § 62-3-302(a)(1).

Insofar as the Respondents sought to adjudicate claims for alleged misconduct predating the Decedent’s death, they were not administering an “estate” within the meaning of the Probate Code. Indeed, the “claims[] that Probate Court can administer are those “which arise at or after the death of the decedent.” S.C. Code § 62-2-201(4). Thus, an estate can use the Probate Court to authorize the recovery for damages to or theft of property after a person has died, that authority does not extend to adjudicating pre death damage or theft. *See generally Greenfield v. Greenfield*, 245 S.C. 604 (1965) (recognizing that a person who takes or injures a decedent’s property after the decedent’s death can be liable in the Probate Court as an executor de son tort).

Indeed, if S.C. Code § 62-3-302(a) already conferred jurisdiction over pre-death claims, then the (limited) grant of jurisdiction conferred under S.C. Code § 62-3-302(b) for pre-death claims, discussed below, would be superfluous. But statutes must not be read to render any portion of them meaningless. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128 (2012).

Accordingly, under S.C. § Code 62-1-302(a), the Probate Court was without jurisdiction to award damages for pre-death conversion of property (\$546,921 after the 1/3 credit against the \$820,382), for failure to have itemized the Decedent's tax returns (\$24,559), tax penalties (\$13,820), avoidable income tax (\$163,420), and annual gift-tax exclusion during the Decedent's lifetime (\$28,000). If the estate wanted to litigate those items, it was required to have filed an action in the Court of Common Pleas. Because the Probate Court's order was void as to those items, this Court should vacate those items and reduce the damages award by \$776,720.⁵

B. S.C. Code § 62-3-302(b) Confers limited Jurisdiction over Claims Falling under the Survival Statute.

The General Assembly has granted the Probate Court very limited jurisdiction over actions under the survival statute. The Probate Court's "jurisdiction over matters

⁵ The Probate Court did have statutory jurisdiction to award damages concerning the failure to timely file the 2018 post-death tax return (\$40,314), the failure to stop the pension overpayment (\$30,157), and the cost to repair the home (\$10,000). *See* S.C. Code § 62-3-301(a). Additionally, the Probate Court had jurisdiction to award attorney fees. S.C. Code § 62-1-111.

involving...actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements... and to the allocation of settlement proceeds among the parties involved in the estate.” S.C. Code § 62-1-302(b) (emphasis added). South Carolina’s survival statute provides, in relevant part, that “[c]auses of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal... representative... of a deceased person....” S.C. Code § 15-5-90. The General Assembly passed that statute to overturn “the common-law rule that a personal right of action dies with the person” *Page v. Lewis*, 203 S.C. 190, 193 (1943). Abatement at common law extended to all tort claims. *See Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 261 (1941) (“Under the common law there was no survival of actions in tort.”).⁶ Likewise, statutory claims abated upon death, *Claussen v. Brothers*, 148 S.C. 1, 4 (1928) (citation omitted), until the passage of the survival statute.

Here, almost all the damages awarded against the Appellant Mensch were for alleged wrongful acts that occurred prior to the death of the Decedent in 2018, [R. 10-23]. The damages were for torts and statutory actions that, but for the survival statute, would have been extinguished upon the Decedent’s passing. The Probate Court’s jurisdiction over

⁶ Respondents cannot argue that their cause of action for breach of fiduciary duty was a contractual one; “a cause of action for breach of fiduciary duty sounds in tort rather than in contract.” *Moore v. Moore*, 360 S.C. 241, 256 (Ct. App. 2004).

those actions was thus limited to settlement approval and proceeds distribution, which were not at issue.

Accordingly, to whatever extent jurisdiction may have otherwise existed under the general grant of jurisdiction under S.C. Code § 62-1-302(a), that jurisdiction was stripped under S.C. § Code 62-1-302(b) for an adjudication of damages for pre-death conversion of property (\$546,921 after the 1/3 credit against the \$820,382), for failure to have itemized the Decedent's tax returns (\$24,559), tax penalties (\$13,820), avoidable income tax (\$163,420), and annual gift-tax exclusion during the Decedent's lifetime (\$28,000). If the Estate wanted to litigate those items, it was required to have filed an action in the Court of Common Pleas. Because the Probate Court's order was void as to those items, this Court should vacate those items and reduce the damages award by \$776,720.⁷

CONCLUSION

Based on the foregoing, this Court should vacate the lower court's order and remand the proceeding back to Circuit Court to hear Appellant's appeal.

⁷ The Probate Court did have statutory jurisdiction to award damages concerning the failure to timely file the 2018 post-death tax return (\$40,314), the failure to stop the pension overpayment (\$30,157), and the cost to repair the home (\$10,000). *See* S.C. Code § 62-3-301(a). Additionally, the Probate Court had jurisdiction to award attorney fees. S.C. Code § 62-1-111.

Dated this 3rd day of January, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, served a copy of this Initial Brief of Appellant and Reply Brief of Appellant on the following counsel of record this 4th day of January 2023, by email and U.S. mail to the following addresses of record:

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