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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 REPLY BRIEF OF APPELLANT STERLING RAYMOND MENSCH, III

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Appellant, Sterling Raymond Mensch, III, respectfully replies to the Brief of Respondent as follows:

ARGUMENT[1]

I. If this Court Has Appellate Jurisdiction, It Can Decide Whether the Probate Court Exceeded Its Jurisdiction.

A. The Appeal of the Probate Court's Order Was Premature.

In the Brief of Appellant, Mr. Mensch showed that the notice of appeal that he filed to the Circuit Court was out of an abundance of caution as it was not a final order under applicable precedent, thereby rendering the appeal premature. [Init. Br. of Appellant at 8-11]. The Brief of Respondent does not attempt to show otherwise.

To the extent, if any, that the Brief of Respondent is attempting to argue that Mr. Mensch was somehow required to ask the Circuit Court to reconsider its ruling on finality as a prerequisite to appeal, *see* [Init. Br. of Resp. at 4], that claim is wrong. The Circuit Court ruled upon the issue that Mr. Mensch raised. Nothing more was required. *See, e.g.*, *Wilder Corp. v. Wilke*, 330 S.C. 71, 77 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial...." (citation omitted)).

B. If the Probate Court's Order Was Final and an Appeal to the Circuit Court Was Timely, this Court Can Reach the Jurisdictional Problems in the Probate Court's Order.

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[1] For reasons that remain unclear, the Brief of Respondent does not follow the order of issues presented in the Brief of Appellant. To attempt to assist the Court's review, this brief will follow the ordering of the Brief of Respondent.

Likely recognizing the problems with the Probate Court's exercise of jurisdiction, the Brief of Respondent appears to claim that the issue of the Probate Court exceeding its jurisdiction was not preserved because it was not ruled upon below. *See* [Init. Br. of Resp. at 3-5]. That argument fails.

As the Brief of Respondent itself correctly concedes, "subject matter jurisdiction may be raised at any time....." [Init. Br. of Resp. at 3]. Accordingly, Mr. Mensch was not required to obtain a ruling from the Probate Court on the jurisdictional challenges before raising them on appeal. *See, e.g.*, *Bunkum v. Manor Props.*, 321 S.C. 95, 99 (Ct. App. 1996) ("[I]ssues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." (citations omitted)).

To the extent, if any, that the Brief of Respondent is attempting to argue through its citations to *Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322 (1938), and *De Treville v. Groover*, 219 S.C. 313 (1951), that a motion to alter or amend was required in the Circuit Court, to ask it to issue a ruling as to the Probate Court's jurisdiction, that claim fails. The Circuit Court believed that it lacked appellate jurisdiction due to the timing of the filing of the notice of appeal. [5/17/22 Order]. *See also Mears v. Mears*, 287 S.C. 168, 169 (1985) ("[T]he timely service of the notice of intent to appeal will remain a jurisdictional requirement"). If so, the Probate Court's damages order was not properly before the Circuit Court for appellate revision. As such, any attempt to have the Circuit Court decide the Probate

Court's jurisdiction to enter the order would have itself been a nullity. *See, e.g.*, *Wagener v. Booker*, 31 S.C. 375, 377 (1889) (noting that "acts, done without jurisdiction..., being ultra vires, are absolutely void"). Because the Circuit Court could not—and surely would not—opine about issues about which it had no appellate jurisdiction, any motion to alter or amend to obtain a (potentially advisory) ruling on Mr. Mensch's jurisdictional challenge would have been entirely futile. Our Supreme Court "does not require parties to engage in futile actions in order to preserve issues for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 415 (2000) (collecting cases).

So long as the Probate Court's order is before this Court, it can reach on direct appeal the jurisdictional issues with the Probate Court's order.[2]

II. If the Probate Court's Damages Order Was Immediately Appealable, Mr. Mensch Timely Appealed It.

While Mr. Mensch filed his appeal to the Circuit Court too early out of an abundance of caution, the Brief of Respondent wrongly claims that the appeal to the Circuit Court actually came too late.

The Brief of Respondent explicitly agrees that if Mr. Mensch's motion to alter or amend tolled the time to appeal, the appeal to the Circuit Court (and then to this Court) was timely. *See* [Init. Br. of Resp. at 10]. Likewise, it explicitly agrees that *Camp v. Camp*, 386 S.C.

[2] Otherwise, they will have to wait for a collateral challenge after appeal pursuant to R. 60, SCRCP.

571 (2010) allows skeletal post-trial motions that do not comply with the particularity requirements of Rule 7(b)(1), SCRCP, to toll the time for appeal. [Init. Br. of Resp. at 8-9]. Further, it concedes by not disputing that the text of Mr. Mensch's post-trial motion was as particularized as the one at issue in *Camp*, 386 S.C. 571, and *more* particularized than the one at issue in *Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC*, 431 S.C. 593 (Ct. App. 2020), *compare* [Init. Br. of Appellant at 14], with [Init. Br. of Resp. at 8-10]—both of which were held to have tolled the time to appeal.

In an ironic turn, the Brief of Respondent makes no attempt to offer a particularized showing of prejudice to Respondent or unfairness to the trial judge, particularly given that no return was ever filed, nor any hearing on the motion ever held. Given *Camp* and *Nexstar*, that silence is not surprising: No prejudice was suffered—much less that within the meaning of *Chastain v. Hiltabidle*, 381 S.C. 508, 517 (Ct. App. 2009) (requiring the allegedly prejudice party to show that the party "would have done something different...[to] advanc[e] his or her case")—and the summary denial of the motion was a fair disposition of the motion in the trial judge's view. The motion was, therefore, sufficient to toll the time to appeal from any final order.

III. The Probate Court Lacked Jurisdiction to Award Damages for Predeath Actions Because the Estate Could Only Bring those Claims Under the Survival Statute.

Despite the occasional bombast in the Brief of Respondent, much of the important jurisdictional analysis is not in dispute.

First, in the Brief of Appellant, Mr. Mensch established that a *chose in action* for predeath injury does not fall with the statutorily defined grant of jurisdiction set forth in S.C. Code § 62-1-302(a). [Br. of Appellant at 15-16]. The Brief of Respondent makes no attempt to claim otherwise; it does not even cite the statute.

Second, even if predeath *choses in action* could fall under S.C. Code § 62-1-302(a), the General Assembly would have specifically divested any jurisdiction that would have otherwise existed here. The parties agree that Estate's claims for predeath actions were for common-law torts and for statutory claims. *Compare* [Br. of Appellant at 17], *with* [Initial Br. of Resp. at 2 (stating the action below was an action "at law")]. The Brief of Appellant established that all legal claims abate upon death but for the survival statute. [Br. of Appellant at 17]. The Brief of Respondent does not claim otherwise. And S.C. Code § 62-1-302(b) explicitly strips the Probate Court of jurisdiction over actions involving the survival statute except for "the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate," *id.*[3] The Brief of Respondent, understandably, does not contend that the General Assembly did not mean what the General Assembly said.

Insofar the Brief of Respondent seeks to invoke *Vaughn v. Bernhardt*, 339 S.C. 125 (Ct. App. 2000), the case cannot resolve the jurisdictional challenge presented here because

[3] In the Initial Brief, while Appellant correctly quoted the statutory text, Appellant occasionally listed the jurisdictional statute as S.C. Code § 62-3-302(b) instead of § 62-1-302(b).

it did not explicitly consider whether jurisdiction existed. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) ("When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. We therefore view the question as an open one." (quotation and footnote omitted)). Besides, that case involved money from a joint account that was withdrawn and then placed into an account solely titled in the defendant's name; the Estate was seeking to recover the exact dollars that the decedent had owned, which became the Estate's property upon her passing. *See Vaughn*, 339 S.C. at 128. Here, by contrast, the Probate Court purported to award damages for dollars that had been spent. Certainly, a Personal Representative may use the Probate Court to obtain the recovery of Estate property that is still in the hands of a third party. S.C. Code § 62-3-619 (rendering one an executor de son tort who illegally obtained control over the decendent's property); S.C. Code § 62-3-620 ("Acting sua sponte or upon the petition of any interested person, the probate judge of the county in which a deceased person was domiciled at the time of his death may order the executor de son tort to account for the property *in his possession*." (emphasis added)). But when the property is no longer in the (alleged) wrongdoer's hands, the Personal Representative must use the Circuit Court (or Magistrate's Court) to obtain damages for the loss.[4]

[4] A ruling that a lawsuit for predeath actions must be filed in Probate Court would render as nullities every lawsuit for wrongful death filed in Common Pleas—where, of course, such actions are (properly) filed. *See, e.g.*, *Singletary v. Shuler*, 433 S.C. 600 (Ct. App. 2021) (wrongful death action filed in Common Pleas).

Finally, the Brief of Respondent's citation to S.C. Code § 62-8-117, [Init. Br. Resp. at 7], is not any help, either. That statute allows a cause of action against an agent who has misused a power of attorney. But the statute is silent as to where the action must be brought. Where, as here, a principal has died before the action has begun, the survival statute allows the Personal Representative to maintain the action despite the principal's death—and S.C. Code § 62-1-302(b) prohibits the action from being filed in Probate Court. An agent can be "liable to ... the principal's successors" in Circuit Court, S.C. Code § 62-8-117.

Finally, insofar as the Brief of Respondent claims that requiring a Personal Representative to file an action in Circuit Court would prevent a final accounting, [Init. Br. of Resp. at 8], the claim is simply incorrect. The final accounting is simply delayed until the unliquidated *chose in action* is resolved. Filing an action in the Probate Court in the first instance would not alter that fact—because a defendant could simply remove the action to the Circuit Court. S.C. Code § 62-1-302(d).

IV. Judicial Estoppel Has No Application Here Under the Law or the Facts.

It is no surprise that the Brief of Respondent has been unable to cite a single case holding that, through party conduct, judicial estoppel can ever confer jurisdiction beyond that which would otherwise exist. Caselaw in this State is squarely to the contrary: "[T]he parties cannot, by their actions or agreements, confer subject matter jurisdiction upon the trial court...." *State v. Richburg*, 304 S.C. 162, 165 (1991). Only the General Assembly, in its discretion, can authorize jurisdiction for a non-constitutional court like the Probate Court. *See generally Peterson v. Peterson*, 333 S.C. 538, 548 (Ct. App. 1998) ("The jurisdiction

of a court is determined *by the sovereign* creating it...." (quotation omitted) (emphasis added)). Furthermore, while the Opposition notes that *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242 (1997), adopted the doctrine of judicial estoppel in this State, the Supreme Court there "explicitly adopt[ed] the doctrine of judicial estoppel as it relates to matters of *fact* (not law)." *Id.* at 251 (original emphasis). But "[t]he question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567 (Ct. App. 2007) (citations omitted). Judicial estoppel has no legal relevance to the jurisdictional question raised here.

Even if it could theoretically extend jurisdiction beyond the statutory limits that the General Assembly has set, the doctrine is not properly invoked on this record. Judicial estoppel requires multiple factual findings, including that "the party taking the position must have been successful in maintaining that position and have received some benefit; ... [that] the inconsistency must be part of an intentional effort to mislead the court; and ... [that] the two positions must be totally inconsistent." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598 (2013) (citation omitted). Here, however, Mr. Mensch did not successfully convince the Probate Court to rule in a way that benefited him; the Probate Court's extra-judicial rulings were against him. Nor did Mr. Mensch intentionally seek to mislead the Court into exercising more jurisdiction than it had. Had Mr. Mensch been able to have been heard on his post-trial motion, he could have presented the jurisdictional problems that he discovered. Finally, the position taken here is not "totally inconsistent" with that raised in the Answer. Mr. Mensch agrees that the Probate Court acted within its jurisdiction as to $

208,043 of the damages, fees, and costs awarded. It thus possessed some jurisdiction. It lacked jurisdiction as to the remaining $ 776,720.

Because judicial estoppel is not appropriate as a matter of law or fact, it is irrelevant to the jurisdictional inquiry here.

CONCLUSION

This Court should reverse the judgment below and remand for further proceedings in the Circuit Court.

Dated this 3rd day of January, 2023.

Respectfully submitted,

STERLING RAYMOND MENSCH, III

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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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