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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Case No. 2021-CP-32-00633
Appellate Case No. 2022-001602

Rene S. Wells and Wilson Shealy, Jr.,
as Co-Personal Representatives of
Wilson Shealy, Sr., ... Respondents,

v.

David Shealy, ... Appellant.

David Shealy, ... Appellant,

v.

Rene Shealy Wells, Wilson Shealy, Jr.,
and Mimi Shealy, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

As alleged in the Complaint, the Wilson Shealy, Sr. (the "Father") brought this complaint after he determined that the Defendant David Shealy had stolen over $425,000 in cash and cash equivalents from him. The Plaintiff included in this action a request that the court determine if the Defendant had an interest any of the personal property located on the real property (the "Real Property") that the Wilson Shealy, Sr. (the "Father") was renting from SCE&G now Dominion Energy ("Dominion"). The Defendant went into default and moved to set aside the Default having claimed to not have been served with the Summons and Complaint. Prior to setting aside the default and during the pendency of this litigation, the Defendant and his attorney entered the property and began removing valuable personal property without any showing that the property being removed belonged to the Defendant or providing any list of what property he removed.

The Plaintiff and Third-Party Defendants moved for the preliminary injunction to prevent further removal of property and provided pictures of the Defendant and his attorney removing items and affidavits that the Defendant was threatening physical violence against the Father and the Third-Party Defendants in this case. The parties were able to resolve the motion through an agreement that was then memorialized in the Consent Restraining Order and Preliminary Injunction (the "Consent Restraining Order") and entered by the court on July 23, 2018. As part of Consent Restraining Order, the Defendant was given the opportunity to provide to the Court and to the Plaintiff and Third Party Defendants those items of personal property that he did not wish to have removed from the Real Property. This list of claimed property was provided on July 25, 2018 (the "Claimed Property").

After obtaining relief from the default judgment, David Shealy filed an Answer and Counterclaims and Third Party Complaint against his siblings (the "Original Answer"). David

Shealy alleges causes of action for Conversion, Civil Conspiracy, Breach of Fiduciary Duty, and Negligence. The Breach of Fiduciary Duty claim was later withdrawn. In his Original Answer, David Shealy incorporates the list of claimed property. In his Amended Answer, Counterclaim and Third Party Complaint, he no longer incorporates any list of any claimed property and seek only monetary damages.

Because the Plaintiff and Third-Party Defendants had a list of "Claimed Property", the Plaintiff engaged in discovery to determine the basis for the claim. See the Defendant's Responses to the Plaintiff's First Set of Interrogatories included in the Plaintiff's First Motion to Compel. Question 5 specifically asks for the factual basis for the claimed property including the source of funds used to purchase the Claimed Property. Question 11 follows up this question as it relates to the source of funds by asking about the Defendant's income. No response has ever been provided as to the source of funds. See Plaintiff's First Motion to Compel Exhibit 2, p. 5-6. In response to Question 11, the statement is made that the "Defendant is self-employed since 1987. Last tax return was filed in 1992." Plaintiff's First Motion to Compel, Exhibit 2, p. 7. It is beyond credulity to believe that a person that has no income, has no job, does not file tax returns, and has no physical address where he lives, has somehow accumulated any "valuable property" as alleged in response to the Motion for Summary Judgment.

Because of the lack of specifics, the Plaintiff filed a motion to compel (the "First Motion to Compel"). In fact, the Plaintiff has had to file three (3) separate motions to compel. Each time, the Defendant was given more time to respond to the discovery responses. Included in the response to Plaintiff's Opposition to the Defendant's Motion to Amend the Restraining Order, is a copy of the final supplemental response to the Plaintiff's Interrogatories. Still, the Defendant provides no responses to establish ownership of any of the personal property and a complete lack

of information as to the sources of his alleged income. Simply, the Defendant still refuses to provide any information about his alleged income or the basis of any claim to personal property.

In the initial case, the Defendant sought to obtain an inventory of the personal property located on the Real Property. The Plaintiff opposed the motion to obtain an inventory as it would be too costly and would violate the preliminary injunction. The Circuit Court modified the Order to allow for such an inventory. In the Order, the Defendant was given the opportunity to have a third party access the property, obtain whatever inventory of personal property that he desired including an inventory of whatever documents that he wanted that he believed would assist him in this case. The Defendant did not take advantage of this opportunity, did not obtain any inventory, and did not even have a third party access the property. This Order was not sufficient enough for the Defendant and he sought a further modification by Judge Spence of the Preliminary Injunction to allow him to assist the third party. Judge Spence then modified the Consent Restraining Order. Again, the Defendant is given the opportunity to have an independent third party (an "ITP") inventory the property and obtain access to the property. Again, the Defendant failed to take advantage of this opportunity as provided by the Court.

As it relates to the facts relating to the Motion for Summary Judgment, the initial case, 2018-CP-32-00913, was dismissed by consent on February 27, 2020 pursuant to Rule 40(j). Mr. Shealy passed on December 30, 2020. Mr. Shealy's death certificate was included as an exhibit to the Plaintiff's Motion for Summary Judgment as is an agreement between the personal representatives and Dominion with regard to continued access to the Real Property through August 31, 2022. Thus, the timeline for the Motion for Summary Judgment is:

February 27, 2020 – Initial Case Dismissed

December 30, 2020 – Wilson Shealy, Sr. passes

January 15, 2021 – Probate Estate is opened.

February 25, 2021 – Case 2021-CP-32-00633 is opened and the Initial Case.

March 21, 2022 - The Plaintiff files Motion for Summary Judgment ("Motion for Summary Judgment") cites SC Code Section 62-3-803(a)(1) that provides a complete bar against any claim against the Plaintiff one year after his death.

ISSUES ON APPEAL

Whether the Trial Court properly held the voluntarily dismissed counterclaims and third-party complaint of David Shealy seeking a monetary award from the Estate of Wilson Shealy, Sr. were time barred?

Whether the Trial Court properly found that David Shealy failed to present the genuine existence of a triable issue of fact regarding his counterclaims and third-party complaint?

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, the court on appeal applies the same standard which governs the trial court under Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Laurens Emerg. Med. Specialists v. M.S. Bailey & Sons Bankers, 35*5 S.C. 104, 108, 584 S.E.2d 375, 377 (2003). In determining whether any triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 455-56, 578 S.E.2d 711, 714 (2003).

ARGUMENT

I. THE TRIAL COURT PROPERLY RULED DAVID SHEALY'S CLAIMS AGAINST HIS DECEASED FATHER WERE TIME BARRED.

The Trial Court rightly held that Appellant's claims against his Deceased Father were barred under S.C. Code Ann. § 62-3-803. The Appellant erroneously asserts that his claims seeking a monetary award against his Deceased Father were not only pending at the time of his death, but also were disputes concerning title. Respectfully, these assertions should be ignored. South Carolina law has consistently held that the striking of Appellant's claims pursuant to Rule 40(j) have an effect equivalent to their dismissal. *See Goodwin v. Landquest Dev., L.L.C.*, 414 S.C. 623, 779 S.E.2d 826 (2015). Similarly, seeking a monetary award against an estate does not constitute disputes "regarding title of a decedent or protected person to *specific assets*" under South Carolina law. *See In re Howard*, 315 S.C. 356, 364, 434 S.E.2d 254, 259 (1993). Thus, this Court should affirm the ruling of the Trial Court.

In South Carolina, all claims against an estate, whether due or to become due, absolute or contingent, founded on contract or other legal basis must be brought within one year of the decedent's death or eight months after the first publication of notice. S.C. Code Ann. § 62-3-803. This statutory bar is not all encompassing. With respect to the estate of decedents and protected persons, the term claims "includes liabilities of the decedent […] whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent." *Id.* § 62-1-201. The Probate Code expressly excludes disputes regarding the title of a decedent to specific assets alleged to be included in the estate. *Id.* . *See also In re Howard*, 315 S.C. 356, 434 S.E.2d 254. "'[C]laims' includes such debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the ***recovery of money***." *Beach First Nat'l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C.

194, 203-04, 754 S.E.2d 875, 880 (2014)(citing 34 C.J.S. Executors & Administrators § 548 (Supp. 2013) (emphasis added) (footnotes omitted). "Stated another way, the term includes every species of liability that the personal representative can be called on to pay out of the general funds of the estate." Id.

Not only does the Appellant misconstrue South Carolina law regarding the impact of the dismissal of his actions prior to the Appellant's Deceased Father passing, he erroneously demands that this court read the exceptions to the Nonclaim Statute so as to effectively have the exception swallow the rule. Respectfully, this Court should find, with the trial court, that the plain and ordinary meaning of the words of the Nonclaim Statute, and South Carolina precedent interpreting the Nonclaim Statute, that the Appellant's claims against his Deceased Father are barred.

A. The Appellant's Claims Were Not Pending at the Time of Plaintiff's Death Under South Carolina Law

The Trial Court rightly held that Appellant's claims against Appellant's Deceased Father were barred under S.C. Code Ann § 62-3-803. Under South Carolina's Nonclaim Statute, claims "pending at the time of the decedent's death" are not barred by nature of failing to properly present them in accordance with the Statute. Specifically, Section 62-3-804 states:

> (4) Notwithstanding any other provision of this section, no presentation of a claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent's death.

SC Code Ann. §62-3-804(4) (Law. Co-op. 1976). This exception, however, requires that there be a proceeding "pending at the time of the decedent's death." In this case, contrary to the assertions of the Appellant, there was no pending action. Thus, Appellant's claims were rightly held as barred.

The relevant facts on this issue are not in dispute. The Appellants claims brought in the initial case, Civil Action No. 2018-CP-32-00913, were dismissed by consent on February 27, 2020, pursuant to S.C. R. Civ. P. 40(j). The Appellant's Deceased Father passed on December 30, 2020, ten months later. The case was restored under the civil action number 2021-CP-32-00633 two months thereafter, on February 25, 2021. Thus, at the time of the passing of his Deceased Father, Appellant's claims were not pending.

The Appellant erroneously asserts that the effect of the striking of his claims was not equivalent to a dismissal, but instead left the claims "in a state of undetermined proceeding." See Initial Brief of Appellant Ps. 10-11. The Appellant argues that South Carolina law *should* provide that striking a proceeding somehow leaves the proceeding as "unsettled," "awaiting an occurrence," or as a "period of continuance," and, thus, "pending" for purposes of the Nonclaim Statute. *Id.* . In support of this reading, the Appellant asserts that the intent of the Nonclaim Statute is "to prevent stale claims from being brought over a year after a decedent's death." South Carolina jurisprudence stands in direct contrast to these assertions.

South Carolina courts discussing the issue of the effect of striking the claims appear to be unanimous and a summary of the case law was eloquently presented by the Supreme Court in *Goodwin*, 414 S.C. at 630-32, 779 S.E.2d at 830-31. In *Goodwin*, the Supreme Court states:

> While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed. In the notes to the 1994 amendments to the S.C. R. Civ. P. 40(j) is described as "substantially revis[ing] the procedure for dismissing a case previously found in Rule 40(c)(3)." Rule 40, SCRCP Notes, Notes to 1994 Amendments (emphasis added). The notes go on to state, "Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken . . . . Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored . . . ." Id.; *see also Maxwell v. Genez*, 356 S.C. 617, 621 (2003) (relying on the notes in interpreting Rule 40(j)).

Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal. See *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); *Nucor Steel v. S.C. Pub. Serv. Com*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992) ("[W]here possible, all provisions of a statute must be given full force and effect.").

There is also an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed. We adopted our Rules of Civil Procedure in 1985. See Rule 86(a), SCRCP ("These rules shall take effect on July 1, 1985."). Before then, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. *See Small v. Mungo*, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970) (holding the inability of counsel "to contact plaintiff and his witnesses and be ready for trial" and "the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause . . . and a ground for dismissal of the action"). When the supreme court decided *Small*, former Circuit Court Rule 81 was in effect. The rule provided, "When a case is reached on the Common Pleas trial roster and is called for trial, . . . if counsel are not ready to go forward with the case it shall be placed . . . at the foot of the Calendar." S.C. Code Ann. vol. 22, Circuit Court Rule 81 (Supp. 1984) (repealed 1985). In 1985, former Rule 40(c)(3), SCRCP, took effect. Similar to the procedure described in *Small*, Rule 40(c)(3) applied only if the parties were not prepared to proceed when the case was called for trial. However, the rule allowed the circuit court to "strike" the action. The rule provided:

When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward the court shall strike the action from the calendar (file book) with leave to restore, unless continuance is granted for good cause shown.

Rule 40(c)(3), SCRCP (West 1994) (repealed 1995).

The rule did not use the word "dismissed," but tracking the language of former Circuit Court Rule 81, it did require a restored case to "be placed at the foot of the calendar (file book) and a new case number assigned." Rule 40(c)(3); see Rule 40(c)(3), Notes ("This Rule 40 is substantially a compendium of present Circuit Court Rules . . . ."). Our law treated the striking of a case pursuant to Rule 40(c)(3) as the equivalent of a dismissal, and our courts required the plaintiff to comply with the statute of limitations upon restoring the case. *See Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 122, 125 n.1, 528 S.E.2d 80, 81, 82 n.1 (2000) (stating in a case "struck . . . from the trial roster . . . pursuant to former

> Rule 40(c)(3), SCRCP" that "the statute of limitations clearly expired" before the motion to restore was filed).

Goodwin, 414 S.C. at 630-32, 779 S.E.2d at 830-31 (footnote omitted). The Appellant's contention that the striking of his claims in a state of undetermined proceeding runs contrary to established South Carolina law. The effect of the claims being struck had the effect of a dismissal. Thus, they cannot be said to have been pending.

Contrary to the position of the Appellant, the actual purpose of the statute supports this reading. The purpose of a Nonclaim Statute is not solely to prevent stale claims from being brought, as the Appellant asserts. This, in fact, is the primary purpose for statutes of limitation. South Carolina courts have roundly rejected an equivalency of the Nonclaim Statute and statutes of limitation. *See Beach First Nat'l Bank v. Gurnham* (*In re Estate of Gurnham*), 407 S.C. 194, 206, 754 S.E.2d 875, 881 (2014) ("While nonclaim statutes limit the time in which a claim may be filed or an action brought, they are separate and distinct from statutes of limitation, and are broader in their operation"). Instead, South Carolina courts and courts around the country have stated the absolute bar implemented in a nonclaim statute to be of a fundamentally different purpose. *Id. See also Boyd v. Sandling*, 210 N.C. App. 455, 460, 708 S.E.2d 311, 314 (2011) ("enacted . . . to provide faster and less costly procedures for administering estates,[…] allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate, […] and [promote] the early and final resolution of claims by barring those not presented within the identified period of time."); *Breen v. Phelps*, 186 Conn. 86, 101, 439 A.2d 1066 (1982) (purpose of nonclaim statute is to inform administrator of claims that may have to be paid out of estate and thereby to permit speedy settlement of estates); *Brooks v. Fed. Land Bank*, 106 Fla. 412, 422, 143 So. 749, 753 (1932) ("[A statute of nonclaim] constitutes part of the procedure of the court, the orderly, expeditious, and exact settlement of the

estates of decedents, and constitutes part of the procedure which courts must observe in the settlement of estates of deceased persons, and, where no exemption from the provisions of a statute exist, the court is powerless to create one. If such were not the case, the settlement of an estate might be deferred indefinitely and heirs and legatees, the rightful owners of the property of the estate, or beneficiaries of the will of the decedent, kept out of the enjoyment of their possessions and deprived of the benefits secured to them by the laws of the state for such unreasonable time as to practically deprive them of their property."); *In re Estate of Daigle*, 634 P.2d 71, 76 (Colo. 1981) ("one of the basic purposes of the Colorado Probate Code: 'to promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors"); *Cummings v. Lewis*, No. 6948-VCP, 2013 Del. Ch. LEXIS 149, at *12 (Ch. June 17, 2013) ("the purpose of the 'non-claim' statute, 12 Del. C. § 2102, is to 'compel claimants with demands against a decedent's estate […] to present their claims within the specified time […] so that the decedent's estate can be settled within a reasonable time.' The 'prompt distribution of the assets of the estate is the ultimate goal.' […] Therefore, the legislative purpose behind Section 2102 is distinguishable from a general statute of limitations that merely seeks to avoid stale claims.") (citations omitted); *Feuerhelm*, 215 Neb. 872, 875, 341 N.W.2d 342, 345 (1983) ("Mere notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under § 30-2486. If notice were accorded the stature of a claim, the resultant state of flux and uncertainty would frustrate and avoid the purpose and objectives of the nonclaim statute."); *In re Estate of Madden*, 241 Kan. 414, 423, 736 P.2d 940, 946-47 (1987) ("A primary purpose is the speedy settlement of the estates of deceased persons in the interest of creditors, heirs, legatees, and devisees, and to render certain the titles to real estate. A speedy administration of the estate is for the benefit of creditors,

who have the priority of right") (citations omitted); *Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 385, 744 A.2d 549, 554 (2000) ("It has been repeatedly held by this Court that [the nonclaim statute and the 1920 Act] create a statutory bar as distinguished from a mere period of limitations which may be waived. […] The purpose of these sections is to prevent a creditor with a controverted claim from unduly prolonging the settlement of the decedent's estate.") (citations omitted); *Olson v. Estate of Rustad*, 2013 ND 83, ¶ 24, 831 N.W.2d 369, 380 (2013) ("Because the purpose of the statute is the early and final settlement of estates, an exception [...] would destroy the object of the nonclaim statute by prolonging the administration of estates indefinitely.") (citations omitted); *Ader v. Estate of Felger*, 240 Ariz. 32, 41, 375 P.3d 97, 106 (2016) ("Limiting the claims to be brought in a tardy proceeding is consistent with the purpose of Arizona's probate code—it puts the burden on a creditor to keep informed of the status of a debtor and to promptly pursue his or her claims if the debtor dies."); *Motley v. Battle*, 368 So. 2d 20, 22 (Ala. 1979) ("The whole theory of the statute is to create a defense broader in its operation than the statute of limitations, not only barring remedies, but extinguishing debts and liabilities … one of the most important statutes to be found in our statute book, -a statute founded on the wisest public policy, affording protection to the living and the dead; a statute, which gives repose to society, quiets litigation, removes temptations to fraud and perjury, secures titles, and preserves domestic peace") (citation omitted); and *Mo. Highway & Transp. Com. v. Myers*, 785 S.W.2d 70, 73 (Mo. 1990) ("The general purpose of the nonclaim statutes is to provide relief against uncertainty, facilitating prompt settlement of decedents' estates.") (citation omitted).

Having this Court hold that claims that were struck were somehow "pending" and "in a state of undetermined proceeding" for purposes of the Nonclaim Statute runs contrary to the purpose of such statutes as stated by courts throughout the country. Rather than having a

comprehensive list of all claims with the Probate Court, the Appellant would have this Court add all claims that "might" be pending if only struck according to Rule 40(j). A list that could conceivably include actions "pending" anywhere in the country. Further, such a reading would allow for claims that were struck in accordance with Rule 40(j) and never restored to be exempt from that class of claims directly affected by the Nonclaim Statute. Such a reading does not provide an early and final settlement of estates, but rather unduly prolongs it. Therefore, the Court should find the Appellant's argument unpersuasive and uphold the finding of the Trial Court. The 2018 case was effectively dismissed and thus, it was not "pending at the time of the decedent's death."

B. The Appellant's Claims Do Not Concern Title to Specific Assets

The Appellant erroneously asserts that his claims seeking a monetary award against his Deceased Father's Estate should be construed as disputes concerning title. As previously stated, in South Carolina, all claims against an estate, whether due or to become due, absolute or contingent, founded on contract or other legal basis must be brought within one year of the decedent's death or eight months after the first publication of notice. S.C. Code Ann. § 62-3-803. The term claims "includes liabilities of the decedent […] whether arising in contract, in tort, or otherwise." S.C. Code Ann. § 62-1-201. "'[C]laims' includes such debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the ***recovery of money***." *Beach First Nat'l Bank*, 407 S.C. at 203-04, 754 S.E.2d at 880. "Stated another way, the term includes every species of liability that the personal representative can be called on to pay out of the general funds of the estate." *Id.* The Trial Court rightly held that the Appellant's claims were all tort claims seeking a monetary award and the

recovery of money. Claims specifically included in the Nonclaim Statute. Thus, the Trial Court's Order should be affirmed.

The Probate Code in South Carolina is designed with certain distinctive rules with how to treat individuals with disputes regarding specific property of the estate of the decedent. Matters regarding the determination of property in which a decedent has an interest have been specifically included by the Probate Code as matters over which the probate court has exclusive original jurisdiction and which must originally be brought in the probate court, even if they are subsequently subject to removal by either party or the court, by its own motion. See S.C. Code Ann. § 62-1-302. Further, the limitations of S.C. Code Ann. § 62-3-803 do not apply to proceedings to enforce mortgages, pledges, or other liens upon property of the estate. The General Assembly has created certain rights or avenues for creditors holding a security interest in property of the estate for recovery against the property. Under the first avenue, the secured creditor may pursue foreclosure proceedings on the security for the mortgage without presenting a claim against the estate and, thus, may do so outside the time limits of the nonclaim statute. See S.C. Code Ann. § 62-3-104. Alternatively, the secured creditor may seek to recover directly from the assets of the estate, which then requires the claim to be presented in the probate court within the time limits of the nonclaim statute. Id. However, if the creditor chooses the first avenue and the foreclosure proceedings fail to yield the full amount of the security, the creditor must have presented a claim on the security in probate court within the time limits prescribed by the nonclaim statute. Id. *See also Beach First Nat'l Bank*, 407 S.C. 194, 754 S.E.2d 875. Thus, claims against specific property are awarded special privileges, but once the claim is converted to a claim against the general funds of the estate, those privileges are lost. Again, this comports with the general purpose of the Probate Code to promote a speedy and efficient system for

settling the estate of the decedent and making distribution to his successors of property that is rightfully theirs.

Here, however, the Appellant asks this Court to treat any creditors of the estate asserting claims to the general funds of the estate the same as those asserting claims as to specific property of the estate as long as their claims tangentially relate to property of the estate. The Appellant asserts that his claims are properly defined as "title disputes." See Initial Brief of Appellant Ps. 11-13. A review of the pleadings, however, demonstrates the opposite. Appellant brought four causes of action against his Deceased Father's Estate: (1) conversion of personal property and funds; (2) civil conspiracy; (3) breach of fiduciary duty; and (4) negligence. Nowhere in his pleadings, however, did the Appellant allege some future right to property of the estate apart from claims for a monetary award. Prior to his father's passing, the Appellant voluntarily abandoned any claims against specific property of his Deceased Father's Estate, instead seeking a monetary award. Thus, similar to secured creditors left with a deficiency, the ultimate effect of the Appellant's claims against his Deceased Father's Estate will have no impact on the distribution of the property included in the estate, apart from the general funds. Such claims do not fall within the distinguished matters the Probate Code considered those "regarding title of a decedent or protected person to specific assets." S.C. Code Ann. § 62-1-201.

The *Supreme Court of Me. in Estate of Leavitt*, 1999 ME 102, 733 A.2d 348 (Me. 1999), found similar arguments as those asserted here by the Appellant as unpersuasive. In *Leavitt*, at 348, an employee of the decedent filed an untimely claim under Maine's version of the Uniform Probate Code against the estate of his employer, contending that he owned equitable title to the deceased's flower shop because the deceased had promised him the shop during his 32 years of employment there. The court rejected the employee's argument that his claim should be

interpreted as a dispute regarding title exempted from the definition of "claims" under the statutory equivalent of S.C. Code Ann. § 62-1-201 rather than as a contract claim against the decedent's estate. Id. at 350. The court reasoned:

> Wadsworth's claim cannot reasonably be construed as a title dispute regarding a piece of property; it is a claim that Leavitt breached his promise to devise the flower shop to Wadsworth in return for his years of employment. Such a claim falls squarely within section 1-201(4) and is subject to the time restrictions of the Code […] Creative labeling cannot exempt a "claim" from the requirements of the Probate Code.

Id. See also *Steen & Berg Co. v. Berg (In re Estate of Berg)*, 2006 ND 86, P15 (Nd 2006) ("merely casting a claim in terms of title to property is insufficient to avoid the time limitations of the nonclaim statute if the gist of the claim sounds in tort or in contract"). Here, the Appellant's attempts to recast his claims as anything other than claims against the general funds of the estate as "regarding title" would allow for artful pleading to make mere mention of some specific property so as to avoid the effect of South Carolina's Nonclaim Statute. Again, artful pleading should not have such an effect. Thus, the circuit court's ruling should be affirmed.

II. THE TRIAL COURT PROPERLY RULED DAVID SHEALY FAILED TO PRESENT A GENUINE ISSUE OF ANY MATERIAL FACT REGARDING HIS COUNTERCLAIMS AGAINST HIS SIBLINGS

The Appellant's ever evolving claims for conversion, civil conspiracy, and negligence regarding an ever-changing list of personal property were rightly dismissed by the Trial Court. None of the evolving theories presented by Appellant are sufficient under South Carolina law. Appellant has failed in his latest iteration of his claims to present genuine issues of fact. Therefore, the trial court's order should be affirmed.

A. The Trial Court Rightly held that the Appellant failed to present sufficient evidence of Conversion.

The trial court appropriately ruled that Appellant failed to present any specific facts establishing a genuine issue for trial. The Appellant is not permitted to simply rest on allegations where, as here, the majority of the allegations are conclusory in nature. *Dawkins*, 354 S.C. 58, 580 S.E.2d 433; see Rule 56(e), SCRCP ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth **specific facts** showing that there is a genuine issue for trial.")(emphasis added). Rule 56(e) requires that affidavits: "[1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP. "[U]ltimate or conclusory facts and conclusions of law, as well as statements made on … 'information and belief,'" do not meet the standards of Rule 56 and "cannot be utilized on a summary-judgment motion." *Dawkins*, 354 S.C. at 68, 580 S.E.2d at 438 (citing Wright, *Miller & Kane* § 2738).

The Appellant erroneously asserts that an affidavit identifying property is sufficient evidence to demonstrate a claim of conversion. In South Carolina, however, "[c]onversion is the 'unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights.'" *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 158, 691 S.E.2d 473, 479 (2010) (quoting *Moore v. Weinberg*, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009)). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." *Regions Bank v. Schmauch*, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (2003). Thus, the Appellant must provide evidence that (1) he owned or had a right to possess certain pieces of personal property; (2) Appellants Siblings gained control and possession of the property or wrongfully prevented the plaintiff from using the property; and (3) Appellants Siblings did this without his permission. The Appellant's reliance upon an ever-

evolving and vague list of property, along with general statements upon information and belief, fail to present specific facts supporting the three elements required under South Carolina law and, therefore, was rightly dismissed by the trial court.

The trial court rightly saw through the sham affidavit of Appellant in granting summary judgment as to his conversion claims. While "the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party, […] it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (2014) (citations omitted). A trial court may exclude an affidavit when it was submitted "to contradict that party's own prior sworn statement" in "an attempt to create a sham issue of material fact." *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). When delineating between a sham affidavit and a correcting or clarifying affidavit, the Court looks to the following considerations:

> (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

Id. . Here, the Appellant submitted multiple conflicting sworn statements with regard to what property he was alleging was not only his personal property, but property converted by the Appellant's Siblings.

The sworn statements of the Appellant might generally be described as presenting the following factual assertion: "I left my stuff at my dad's place, there was a lot of stuff, and I am pretty sure some of my stuff is missing." The Trial Court rightly found these assertions wanting

for purposes of refuting the motions for summary judgment. The sworn statements of the Appellant included several classes of personal property, he alleged was located at his Deceased Father's property, but only some of it was converted by his Deceased Father, his Siblings, or some combination of the same. These included: (a) motor vehicles and motor vehicle parts; (b) boats and boat parts; (c) storage tanks; (d) trailers; (e) cargo containers; (f) consumer goods, including furniture, dishware, grills, and clothing; (g) tools; (h) aircraft parts; (i) sheds/barns; (j) firearms and ammunition; and (k) construction materials. Within these classes of property, Appellant originally listed some 80 pieces of property in his verified answer and third-party complaint. Of these, around 47 of them were motor vehicles. In his verified Answer and Third-Party Complaint, Appellant states that the specific property listed in his exhibit was **consensually** stored at his Deceased Father's property. See Appellant's Amended Answer and Third-Party Complaint ¶¶ 11; and 21-22. Later, Appellant generally alleges that Respondent's had "taken, removed, damaged or destroyed [Appellant's] property," and had "sold and destroyed a significant amount of [Appellant's] personal property." See Appellant's Amended Answer and Third-Party Complaint ¶¶ 24-34. The Appellant took absolutely no effort to identify any of the more than 80 items of personal property that were specifically taken, removed, damaged, destroyed, or sold. Similarly, no evidence of ownership was presented. *See Tollison v. Reaves*, 277 S.C. 443, 445, 289 S.E.2d 163, 164 (1982) (Supreme Court considered evidence of ownership to include the vehicle being titled in their name, payments for the purchase of the vehicle and any subsequent monthly payments, payments for the insurance, or that they are the sole driver of the vehicle).

In response to the Respondents' motions for summary judgement, Appellant filed another affidavit that contained significant discrepancies with the first. As a general matter, the

list of property suddenly included more than 400 items of personal property. Many of the vehicles listed suddenly were listed for their parts rather than for the vehicle itself. Similarly, some of the vehicles are identified with different model years. Some of the items from the original list are all together missing from the second. Further, the second list includes items of personal property specifically described as not being located on Appellant's Deceased Father's property. In contrast to the Appellant's Answer and Third-Party Complaint, the affidavit did list one specific piece of property that was specifically sold by his Deceased Father. It also attached several copies of titles to vehicles, though none of these vehicles were specifically alleged to have been converted. Instead, of listing any other property that was specifically converted, Appellant states that he is "informed and believe[s] that after excluding [him] from the real property and separating [him] from [his] personal property without [his] permission or consent, the [Respondents] began systematic disposal of [his] personal property without [his] consent." See Affidavit in Opposition to Respondents' Motion for Summary Judgment ¶ 7. And that "[w]hile [he is] still reviewing the pictures and auction catalog [listed in exhibit E], [Appellant] know[s] that some of the items shown are [his.]" See Affidavit in Opposition to Respondents' Motion for Summary Judgment ¶ 11.

The only justification propounded by Appellant for the discrepancies in the list and the gross over-generalizing was his inability to enter upon the real property of his Deceased Father as a result of a **Consent** Order for Restraining Order and Preliminary Injunction entered by the trial court precluding his entering upon the property.[1] Importantly, Appellant was given a

[1] After being presented with evidence concerning Appellant's unlawful entry upon the land, removal of property, and threats against Appellant's Siblings lives, the trial court entered a Consent Order for Restraining Order and Preliminary Injunction prohibiting Appellant from

multitude of opportunities to personally or through an agent enter his Deceased Father's property in order to perform an inspection for purposes of determining the full breadth of an inventory. See Orders entered on October 23, 2019 and November 8, 2019. Appellant took none of these opportunities prior to the hearing on the motion for summary judgment. The Appellant was unable to articulate any other justification for the variance to the trial court. No reasonable reading of Appellant's affidavit would allow for an interpretation that all of his personal property was converted by way of excluding him from his property. The trial court was well aware of the order precluding him from entering the property without prior court approval to have been consented to by Appellant. The trial court was well aware of the many attempts to provide time for the Appellant or his agents to enter the property for purposes of inventorying it. The only reasonable reading of the sworn statements of the Appellant is: "I left my stuff at my dad's place, there was a lot of stuff, and I am pretty sure some of my stuff is missing." Thus, the trial court was within its right to disregard any evidence presented in the sham affidavit filed just three days prior to the hearing on the motion.

Additionally, nothing in the record demonstrates what personal property of the Appellants, if any, the Respondents assumed the control without authorization. Instead, Appellant asserts the most general allegation against the Respondents collectively. The affidavit is riddled with statements that Appellant is "informed and believe[s]" that certain property was sold by one, some, or all of the Respondents or that his property is listed to be sold at some future date. Further, the affidavit asserts that Appellant's Siblings agreed to "coordinate and work

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entering the property, but also allowing Appellant to subsequently submit an inventory of personal property he claimed was his own and believed was located on his Deceased Father's property. See Order entered on July 23, 2018

together to remove any Personal Property" belonging to the Appellant without any statement as to whether some action was taken in furtherance of this promise. See Affidavit in Opposition to Respondents' Motion for Summary Judgment ¶¶ 12-13. The claim of conversion necessarily fails because no evidence of how or which Respondent exercised control over what assets or whether it was done in their individual capacities. Instead, the affidavit of Appellant includes the very conclusory facts and conclusions of law, as well as statements made on … 'information and belief,' that the South Carolina Supreme Court has ruled is inappropriate for a motion for summary judgment. *Dawkins*, 354 S.C. 58, 580 S.E.2d 433.

The only specific allegations that may be gleaned from the sparse evidence presented in the Appellant's affidavits deal with the alleged sale of a backhoe and trailer by his Deceased Father. As previously addressed and as found by the trial court, this claim was barred by the Nonclaim statute. No other specific evidence was before the trial court regarding claims for conversion against the Respondents. Thus, the trial court properly granted summary judgment as to the Appellants conversion claims.

B. The Trial Court Rightly held that the Appellant failed to present sufficient evidence of Civil Conspiracy.

Similarly, the trial court rightly granted summary judgment as to Appellant's claim of civil conspiracy. "A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (1989). "The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from

an overt act done pursuant to a common design." *Cricket Cove Ventures, L.L.C. v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (2010).

The record contains no evidence, only general speculation, that any of the parties conspired with each other for the purpose of harming Appellant. Just as with his claim for conversion, Appellant relies upon generic and speculative statements concerning any conspiracy between the parties. In his brief, Appellant points to allegations that his personal property was moved or sold. There is no mention of who specifically moved or sold them or how his Siblings joined together to accomplish the alleged acts, simply that "upon information and belief" they occurred. Such unsubstantiated allegations are not enough to support a claim for civil conspiracy. *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95 (dismissal is appropriate when the civil conspiracy "cause of action 'does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy'") (quoting *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981)).

In this case, the Appellant's amended counterclaims fails to allege any separate overt acts in furtherance of the conspiracy. "In a civil conspiracy claim, one must plead additional facts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Hackworth v. Greywood at Hammett, L.L.C.*, 682 S.E.2d 871, 875 (S.C. Ct. App. 2009). Stated another way, "[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607, 612 (1981) (quoting 15A C.J.S. *Conspiracy* § 33, at 718), *overruled on other grounds by Paradis*, 861 S.E.2d 779, 779-80 (explaining that the court

in Todd, 278 S.E.2d at 607, "correctly concluded the civil conspiracy claim failed as a matter of law" where the "only wrongful acts alleged were those for which damages had already been sought" and "the plaintiff's repetition of the same acts as the prior claims was insufficient to salvage the claim"); *see also Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15, 21 (2000) ("Because [the third party plaintiff] . . . merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional facts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action.").

Several inappropriate arguments must be summarily addressed before moving on. First, the Appellant passingly and casually asserts that if the Appellant "is allowed to complete discovery, additional overt acts are likely to be discovered." See Appellants Initial Brief P. 17. The argument that summary judgment was premature and additional discovery was needed was not properly raised before the trial court, nor could it rightly be raised after years of Appellants intentional avoidance of discovery, and, therefore, any consideration of this assertion by this Court would be inappropriate. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *see also John Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320, 548 S.E.2d 854, 857 (2001) (finding Rule 56(f), SCRCP "requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery"); *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) ("If Appellant believed he did not have sufficient time, Appellant should have promptly filed a motion seeking additional discovery time."). Second, the Appellant states that the injunction entered by the trial court by way of consent motion of the parties constituted an unlawful and overt act of his Siblings conspiring to injure him. See

Appellants Initial Brief P. 17. Again, this Court would be right in ignoring this assertion. Such an allegation necessarily carries with it the implication that the trial court and the Appellant, himself, conspired with his Siblings in effectuating the wrongful and overt act of having an injunction placed on the Appellant.

C. The Trial Court Rightly held that the Appellant failed to present sufficient evidence of Negligence.

Finally, this Court should affirm the decision of the trial court granting summary judgment as to Appellant's claim for negligence. In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). The Appellant fails to present evidence supporting a single element of a negligence claim. Thus, the claim was properly dismissed by the trial court.

The Appellant erroneously asserts two grounds for how his Siblings owed him a duty of care. The first ground is predicated upon the assertion that a constructive bailment was created when, in the words of the Appellant, his Siblings "lawfully acquired possession of [his] personal property." See Appellant's Initial Brief p. 18. This assertion fails in several respects and should, therefore, be disregarded.

> A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust.
>
> […]
>
> Bailments are generally classified as being for (1) the sole benefit of the bailor; (2) the sole benefit of the bailee; or (3) the mutual benefit of both.

> […]
>
> Although a bailment is ordinarily created by the agreement of the parties, the agreement of the parties may be implied or constructive, and the bailment may arise by operation of law. Such a constructive bailment arises when one person has lawfully acquired possession of another's personal property, other than by virtue of a bailment contract, and holds it under such circumstances that the law imposes on the recipient of the property the obligation to keep it safely and redeliver it to the owner.

Hadfield v. Gilchrist, 343 S.C. 88, 94, 538 S.E.2d 268, 272 (2000) (citations omitted). The Appellant's brief fails to point to either (1) what lawful method any of the Respondents obtained the Appellant's personal property; (2) what agreement between the parties established this bailment, if any; (3) the specific purpose of the bailment; or (4) how the bailment in any way benefited Appellant's Siblings. A thorough review of the Appellant's other pleadings would similarly fail to even reference such a bailment, let alone the factors necessary for one to be created. The only supporting statement in Appellant's brief regarding the bailment is: "[i]n this case, taking constructive possession of David Shealy's personal property was for the Third Party Defendants-Respondents' benefit to inventory and sell the property." Appellant's Initial Brief p. 18. The statement fails to provide any specificity as to any of the required factors for the creation of a bailment relationship. The statement seems to acknowledge that Appellant's Siblings did not take actual possession of the personal property. As previously discussed, Appellant's sworn testimony was that he consensually stored his property with his Deceased Father, not with his Siblings. See Appellant's Amended Answer and Third-Party Complaint ¶¶ 11; and 21-22. The Appellant repeatedly swears that he never agreed to allow his Siblings to take the property. See Appellant's Amended Answer and Third-Party Complaint ¶¶ 24-25. And, finally, the Appellant fails to point to how his Siblings benefitted from an alleged agreement to inventory and move or

sell Appellant's junk. The trial court, rightly, ignored the confusing argument of Appellant with relation to how such a duty was established.

The second ground erroneously asserted by Appellant is predicated upon the assertion that the Appellant's Siblings undertook a duty of care to the Appellant prior to February of 2020 by way of an alleged agreement between the Appellant's Siblings and Dominion Energy on February 17, 2022, almost exactly two years later, whereby Appellant's Siblings allegedly agreed to index and inventory the personal property located at the Appellant's Deceased Father's home. See Appellant's Initial Brief p. 18. This second argument is even more confusing than the first. Counsel for Respondent was unable to find a single instance wherein courts in South Carolina found a duty was created by an agreement entered into several years after the fact. But this is the very argument Appellant makes to support a finding that the trial court erred in granting summary judgment as to his claim for negligence against his Siblings. Respectfully, no fiduciary relationship existed between the Appellant and his Siblings. *See Cumbee v. Cumbee* (*In re Estate of Cumbee*), 333 S.C. 664, 672, 511 S.E.2d 390, 394 (1999) ("A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence"). No evidence for the same can be found in the pleadings. A contract entered into several years after the alleged breach of said duty cannot create such a relationship. Thus, the trial court rightly granted summary judgment as to the claim for negligence.

Similarly, the Appellant fails to explain how his Siblings breached a duty by a negligent act or omission. The duties alleged were either (1) a duty to keep Appellant's property safely and redeliver it to him or (2) secure and maintain the property. The Appellant mentions nowhere in his brief what specific acts or omissions breached one of these duties. The Appellant is not

permitted to rest upon a generic allegation that the duty was breached or, as is the case here, a promise that "he will discover signs of neglect" at some time in the future if given the opportunity. Rather, specific evidence of the breach must be presented.

Finally, the Appellant is unable to allege what damage resulted of a breach of these duties. The pleadings fail to explicitly state a single piece of property that was not secured, maintained, or redelivered under the alleged duties of the Respondents. Instead, the Appellant again asserts that he suffered from the "loss of his personal property and most likely its diminished condition." See Initial Brief of Appellant p. 19. Respectfully, this does not meet the standards of evidence of harm resulting from an alleged act of negligence. Thus, the trial court's grant of summary judgment as to the Appellant's claims for negligence should be affirmed.

CONCLUSION

The Trial Court rightly held that Appellant's claims against his Deceased Father were barred under S.C. Code Ann § 62-3-803. The Appellant erroneously asserts that his claims seeking a monetary award against his Deceased Father were not only pending at the time of his death, but also were disputes concerning title. Respectfully, these assertions should be ignored. Similarly, the Appellant's ever evolving claims for conversion, civil conspiracy, and negligence regarding an ever-changing list of personal property lacked any evidence in support of the necessary elements and none of the evolving theories presented by Appellant are sufficient under South Carolina law. Appellant has failed in his latest iteration of his claims to present genuine issues of fact. Thus, this Court should, respectfully, affirm the ruling of the Trial Court.

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