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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. 2022-001602

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

Respondent,

v.

David Shealy,

Appellant.

David Shealy,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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s/ J. Derrick Jackson

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING THE PERSONAL REPRESENTATIVES' MOTION FOR SUMMARY JUDGMENT BASED ON THE PROBATE NON-CLAIM STATUTE WHEN APPELLANT'S CLAIMS WERE FILED AND PENDING PRIOR TO DECEDENTS DEATH AND CONCERNED TITLE TO PROPERTY?

2. DID THE TRIAL COURT ERR IN GRANTING THIRD PARTY DEFENDANT-RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WHEN THE RECORD VIEWED IN THE LIGHT MOST FAVORABLE TO THE APPELLANT SHOWS THERE ARE GENUINE ISSUES OF MATERIAL FACT?

STATEMENT OF THE CASE

On March 13, 2018, Wilson Shealy, Sr. initiated this lawsuit against his son, the Appellant David Shealy (civil action number 2018-CP-32-00913). (R. p. 398). Wilson Shealy, Sr. alleged that David Shealy (a) breached his fiduciary duty, (b) engaged in defalcation of trust, (c) converted Wilson Shealy, Sr.'s funds, (d) sought the imposition of a constructive trust and resulting trust on any property purchased using Wilson Shealy, Sr.'s funds, and (e) sought the sale of personal property for the paying of storage fees. (R. pp. 404-406).

On July 23, 2018, the parties entered a Consent Order for Restraining Order and Preliminary Injunction against David Shealy, which prohibited David from coming on the property where Wilson Shealy, Sr. resided (the "Real Property") or otherwise contacting or being within 500 feet of Wilson Shealy, Sr. or David's siblings, Wilson Shealy, Jr., Rene Shealy Wells, and Mimi Shealy. (R. p. 53). The Consent Order further allowed David Shealy to submit a list of claimed personal property stored on the Real Property, which David filed on July 25, 2018. (R. p. 367).

After the trial court vacated an Order of Default, David Shealy filed an Answer, Counterclaim, and Third Party Complaint against Wilson Shealy, Jr., Renee Shealy Wells, and Mimi ("Third Party Defendant-Respondents") on October 2, 2018. (R. p. 353). David Shealy

alleged that his personal property (the “Personal Property”) stored on the Real Property was converted by his father and the Third Party Defendant-Respondents. (R. pp. 358-360). David Shealy included a counterclaim and cause of action against the Third Party Defendants for conversion and incorporated the July 25, 2018, list of claimed personal property as “Exhibit A.” (R. p. 363).

On September 9, 2019, David Shealy filed a motion to allow an independent inventory and accounting conducted via video, (R. p. 333), and incorporated a list of claimed personal property with a map of the items’ locations on the Real Property as “Exhibit A”, (R. p. 337). An independent inventory was never agreed to by the parties. The earlier Restraining Order and Preliminary Injunction was modified by an Order on November 8, 2019, to allow David Shealy to assist the independent third party in the inventory and accounting on the Real Property. (R. p. 31).

The parties mediated this case on November 13, 2019, without success. (R. p. 414, ¶¶ 15-25).

On February 19, 2020, David Shealy filed an Amended Answer, Counterclaims, and Third Party Complaint alleging Wilson Shealy, Sr. and the Third Party Defendant-Respondents (a) converted David Shealy’s personal property that was stored on the Real Property, (b) engaged in civil conspiracy for the purpose of causing financial damage to David Shealy, (c) breached the fiduciary duty to ensure David Shealy’s personal property was safe and redelivered to David, and (d) negligence in failing to keep safe and redeliver David’s personal property. ¹(R. pp. 322-330).

¹ David Shealy later withdrew his counterclaim and third party cause of action for breach of fiduciary duty at the August 4, 2022, hearing on summary judgment. (R. p. 13).

The trial court entered a Consent Order pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure on February 28, 2020, (R. p. 26), striking the case from the docket with the right of the parties to restore the case as provided by the Rule. Rule 40(j), SCRPC.

Wilson Shealy, Sr. passed away on December 30, 2020. (R. p. 277). Wilson Shealy, Sr.'s Estate (2021-ES-32-00073) (the "Probate Estate") was opened on January 15, 2021, and two of his children Rene Shealy Wells and Wilson Shealy, Jr. were appointed as co-personal representatives. (R. p. 270, ¶¶ 2-3).

Upon motion by the Plaintiff, this lawsuit was restored to the active docket under Rule 40(j) SCRPC by an Order dated February 25, 2021, and the trial court assigned it the new case number 2021-CP-32-00633. (R. p. 23). On March 17, 2022, Rene Shealy Wells and Wilson Shealy, Jr., as co-personal representatives of Wilson Shealy, Sr. ("Plaintiff-Respondent") were substituted as the Plaintiff. (R. p. 17).

On April 7, 2021, William Walker sought to withdraw as counsel for David Shealy. (R. p. 307). Tobias G. Ward, Jr. was substituted as counsel for David Shealy by a Consent Order on March 11, 2022. (R. p. 20).

The Plaintiff-Respondent filed a Motion for Summary Judgment as to David Shealy's claim to personal property and all counterclaims on March 21, 2022. (R. p. 269). The Third Party Defendant-Respondents filed a different Motion for Summary Judgment as to David Shealy's third party claims on April 18, 2022. (R. p. 261). On August 1, 2022, David Shealy filed Memorandums in Opposition to each Motion for Summary Judgment, (R. p. 221; R. p. 213), and a sworn affidavit, (R. p. 62). A detailed list of claimed personal property was incorporated as "Exhibit A" to the affidavit. (R. p. 69). Four other exhibits were incorporated as evidence of portions of the personal property. (R. p. 85; R. p. 87; R. p. 148; R. p. 162). A hearing on

summary judgment with the Honorable Walter J. McLeod was held on August 4, 2022. (R. p. 1). The trial court entered an Order Granting Summary Judgment as to David Shealy's counterclaims and third party claims on October 7, 2022. (R. p. 1). David Shealy timely appealed the trial court's Order, now before the Court of Appeals.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002) (citation omitted).

Since it is a drastic remedy, a summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (summary judgment is "an extreme remedy to be cautiously invoked"). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1990).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. *See Hancock v. Mid-South Mgmt.*

Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). In *Hancock*, the Court held that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Id.* at 330, 673 S.E.2d at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. *Id.* at 330-31, 673 S.E.2d at 803.

FACTS

David Shealy resided for 53 years with his father, Wilson Shealy, Sr., (R. p. 395, ¶ 5), on the Real Property that Wilson Shealy, Sr. leased from South Carolina Electric and Gas, now known as Dominion Energy (“Dominion”), (R. pp. 207-211). Before this lawsuit, David Shealy spoke with his father on a regular basis on the phone or by visiting his home. (R. p. 395, ¶ 7). Until this lawsuit, Wilson Shealy, Sr. allowed David Shealy to store his Personal Property on the Real Property, never told David he could not store his Personal Property there, and never told David he needed to pay storage fees to do so. (R. p. 325, ¶ 21). Wilson Shealy, Sr. also collected many similar items of his own personal property, including, for instance, cars, aircraft, and various scrap and antiques, which were stored on the Real Property and intermingled with David’s Personal Property. (R. pp. 69-84).

David Shealy believes this lawsuit was instigated by his siblings, the Third Party Defendant-Respondents, who had influence over his father. (R. pp. 396-397, ¶ 17; R. p. 66, ¶ 2). Wilson Shealy, Sr. appointed Wilson Shealy, Jr. and Rene Shealy Wells as his co-attorneys in a General Durable Power of Attorney executed on June 30, 2011. (R. p. 376).

Because of this lawsuit and the subsequent Restraining Order and Preliminary Injunction, David Shealy was required to vacate his home at the Real Property and leave behind most of his Personal Property. (R. pp. 333-336). The Personal Property includes numerous cars, trucks, trailers, aircraft, vehicle parts, equipment, guns and ammunition, and many personal items. (R.

pp. 69-84). Due to David Shealy's exclusion from the Real Property, it has been difficult for him to completely inventory his large collection of Personal Property. (R. pp. 333-336; R. pp. 7, line 25-p. 9, line 9; R. p. 420, ¶¶ 13-20). Many of David Shealy's records to his Personal Property were on the Real Property in his bedroom where he lived for most of his life but now cannot access. (R. p. 7, line 25-p.9, line 5). Nevertheless, David Shealy has made a good faith effort to provide the court with an inventory and accounting of his Personal Property. In following the Consent Order of July 23, 2018, David Shealy filed a list of his claimed personal property on July 25, 2018. (R. pp. 367-371). More recently, on August 1, 2020, David Shealy filed a sworn affidavit, (R. p. 66), which incorporated as exhibits a more complete list of claimed property and evidence of specific property claims, (R. pp. 69-84).

On October 23, 2019, the trial court granted David Shealy's Motion to allow an independent inventory and accounting conducted via video. (R. p. 35). The Restraining Order and Preliminary Injunction was later modified by Order on November 8, 2019, to allow David Shealy to accompany a third party to take inventory on the Real Property. (R. p. 31). However, the parties never agreed to an independent inventory of the property. David Shealy also motioned to modify the Preliminary Injunction further on July 22, 2022, in order to access the Real Property in some supervised fashion. (R. p. 11, lines 4-9). However, the court denied David's Motion. While David Shealy has been excluded from the Real Property during the lawsuit, David Shealy alleges Wilson Shealy, Sr. and the Third Party Defendant-Respondents have taken, removed, damaged, or destroyed David Shealy's Personal Property, which was lawfully stored on the property where David resided. (R. p. 325, ¶ 24).

On December 30, 2020, Wilson Shealy, Sr. passed away. (R. p. 277). On the date of Wilson Shealy, Sr.'s death, David Shealy's Personal Property remained on the Real Property as

the lawsuit was paused without final judgment, and the Preliminary Injunction stayed in place. Pursuant to Wilson Shealy, Sr.'s Last Will and Testament, (R. p. 278), all personal property in Wilson Shealy, Sr.'s possession passed into a Trust, (R. p. 287).

Also, Wilson Shealy, Sr.'s lease of the Real Property from Dominion expired upon his death. (R. p. 188). Wilson Shealy, Jr., Mimi E. Shealy, Rene Shealy, The Estate of Wilson Shealy, Sr., and the Wilson Shealy Trust (the "Shealy Parties") entered a Right of Entry ("ROE") agreement with Dominion on February 17, 2022, which has several relevant terms. (R. pp. 186-212). David Shealy was not a party to this agreement.

Under the ROE, the Shealy Parties agree to the following: "a. To secure the Personal Property. b. To maintain the Personal Property. c. To remove or allow to be removed any Personal Property that belongs to any third party." (R. p. 189). And the ROE grants the Shealy Parties permission to the following: "a. To inspect and catalog or index the Personal Property b. To appraise the value of the Personal Property. c. To conduct private and public auctions of the Personal Property. d. To allow third parties that purchase any Personal Property to remove the same from the Real Property." (R. p. 189).

The ROE specifies that, "So long as the Consent Order for Restraining Order and Preliminary Injunction issued in Civil Action Number 2018-CP-32-0913 is effective, the Shealy Parties shall coordinate and work together to remove any Personal Property belonging to David J. Shealy." (R. p. 191, ¶ 8.f.). The ROE acknowledges that Dominion's limitation on Access is not a conversion of David Shealy's personal property. (R. p. 191, ¶ 8.g.). The ROE states, "The responsibility to secure, preserve, or insure the Personal Property shall remain the sole obligation of the Obligated Parties. Civil Action Number 2018-CP-320913 shall have no impact on the responsibilities of the Shealy Parties as outlined in this Agreement." (R. p. 192, ¶ 9.). The ROE

set a deadline to secure all personal property on the premises by August 31, 2022, but that deadline has been extended. (R. p. 193, ¶ 15.b.).

The Plaintiff-Respondent filed a Motion for Summary Judgment on March 21, 2022. (R. p. 269). That Motion alleges that David Shealy's claims to any personal property and counterclaims against the Plaintiff-Respondent are barred because David did not file a claim with the Estate of Wilson Shealy, Sr. within one year of the decedent's death in compliance with S.C. Code Ann. § 62-3-803(a)(1). (R. pp. 4-7). David Shealy admits that he did not file a "claim" *with the estate*; however, for the reasons discussed herein, he did not need to, and the trial court erred in granting the Plaintiff-Respondent's Motion for Summary Judgment.

On April 18, 2022, the Third Party Defendant-Respondents filed a separate Motion for Summary Judgment challenging the sufficiency of each of the claims made in David Shealy's Third Party Complaint. (R. p. 261). As there are genuine issues of material fact regarding each claim, the trial court erred in granting summary judgment in favor of the Third Party Defendant-Respondents.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE APPELLANT'S COUNTERCLAIMS.

The trial court erred in deciding that as a matter of law David Shealy's claims to personal property and counterclaims were barred under the South Carolina Probate Code (the "Probate Code").

The Plaintiff-Respondent argues that the passing of decedent of Wilson Shealy, Sr., and the creation of the Probate Estate required David Shealy to file a claim against the estate. (R. p. 12). Plaintiff-Respondent contends that David Shealy's claims to personal property and

counterclaims are barred by § 62-3-803(a)(1) of the Probate Code (the “nonclaim statute”), (R. p. 9), which states:

All claims against the decedent’s estate which arose before the death of the decedent, including claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent’s heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following:

(1) one year after the decedent’s death.

S.C. Code Ann. § 62-3-803(a)(1) (2014). The Plaintiff-Respondent contends that under § 62-3-803(a)(1), David Shealy did not file his claims against *the estate* within one year of Wilson Shealy Sr.’s death. (R. p. 9).

However, the nonclaim statute does not bar David Shealy’s claims to personal property and counterclaims because (A) these claims were “pending” at the time of the decedent, Wilson Shealy, Sr.’s, death and (B) disputes regarding the title of assets alleged to be included in an estate are not “claims against the decedent’s estate” covered under § 62-3-803(a)(1) of the Probate Code. S.C. Code Ann. § 62-3-803(a)(1) (2014).

A. The Appellant’s claims were filed and “pending” at the time of Wilson Shealy, Sr.’s death.

David Shealy’s claims to personal property and counterclaims were “pending” at the time of Wilson Shealy, Sr.’s death and were not barred by the nonclaim statute. Section 62-3-804 of the Probate Code states:

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.” (Emphasis added).

S.C. Code Ann. § 62-3-804 (2014).

The procedural history of this case shows that David Shealy asserted his claims to personal property and counterclaims against the decedent, Wilson Shealy, Sr., in the Amended Answer, Counterclaims, and Third Party Complaint filed on February 19, 2020. (R. p. 322). At that time, Wilson Shealy, Sr. was still living and was the Plaintiff in this lawsuit. (R. p. 322). Therefore, David Shealy's claims to personal property and counterclaims were matters claimed in proceedings against the decedent which were pending at the time of the decedent's death under § 62-3-804, and a second presentation of the claim was not required under the Probate Code.

The Consent Order entered by the parties to strike this action from the docket under Rule 40(j), SCRCF expressly states, "This striking of the pleadings shall be without prejudice to the restoring of the case to the active roster." (R. p. 26). The language of the Consent Order satisfies the intent of § 62-3-804 of the Probate Code that it is not necessary to file another claim against the estate when an existing claim has already been filed against the decedent while living.

Further, whether the nonclaim statute in the Probate Code bars a claim against a decedent when the claim was asserted but stricken from the docket by SCRCF Rule 40(j) prior to the decedent's death is a novel issue in South Carolina and should not have been decided here by summary judgment.

The trial court cited *Goodwin v. Landquest Development, LLC*, (R. p. 11), which wrote, "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." 414 S.C. 623, 630-631, 779 S.E.2d 826, 830 (Ct. App. 2015). The *Goodwin* Court went on to discuss the historical foundation of Rule 40(j) by considering the notes to 1994 amendments to the South Carolina Rules of Civil Procedure and statutory history. *Id.* at 630-31,

779 S.E.2d at 830-31. However, the *Goodwin* Court’s considerations of Rule 40(j) were in dicta, as *Goodwin* concerned whether the tolling requirements of a bankruptcy statute governing extension of time to commence or continue a non-bankruptcy action after termination of stay applied to bar the restoration of the action before the Court. *Id.* at 625-626, 779 S.E.2d at 828. The Court ruled that the tolling requirements of SCRPC Rule 40(j), governing cases stricken from the docket by agreement, was not controlling. *Id.* at 630, 779 S.E.2d at 830. Without clear guidance from the South Carolina Rules of Civil Procedure about whether a case stricken from the docket by Rule 40(j) is pending or dismissed, other jurisdictions provide more persuasive interpretations of pendency. Further, this court should be guided by the intent of the statute.

Looking to other jurisdictions, Pennsylvania has held that, “Pendency, in practice, has been said to be ‘the state of an undetermined proceeding.’ 70 C.J.S., p. 420. Black’s Law Dictionary, 3rd Ed., p. 1345, defines the term as ‘the state of an action, etc., after it has been begun, and *before the final disposition of it.*” *School Dist. of Robinson Twp. v. Houghton*, 387 Pa. 236, 241, 128 A.2d 58, 60 (Pa. 1956).

In Michigan, the Supreme Court referred to Black’s Law Dictionary (6th ed.) for the following definition of “pending”:

Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or in determinacy. Thus, an action or suit is ‘pending’ from its inception until the rendition of final judgment.

Grievance Adm’r v. Fieger, 476 Mich. 231, 249, 719 N.W.2d 123, 136 (Mich. 2006).

In this case, these definitions of “pending” support a reading that David Shealy’s action was pending even though it was stricken from the active docket under Rule 40(j), as a final judgment had yet to be rendered on the claims. At the very least, this question of statutory

interpretation is not settled law in South Carolina, and the trial court erred in deciding on the question by summary judgment.

Moreover, the intent of the nonclaim statute is to prevent stale claims from being brought over a year after the decedent's death. In this case, the case was brought before the decedent's death, and the named parties include the current personal representatives who were fully aware of the Appellant's claims against the decedent.

B. The Appellant's claims to personal property and counterclaims constitute disputes regarding title and are not "claims against a decedent's estate" under § 62-3-803(a)(1).

The trial court also erred in ruling that David Shealy's claims to personal property and counterclaims are barred by the nonclaim statute, (R. p. 12), because disputes regarding the title of assets alleged to be included in an estate, such as the conversion of David Shealy's Personal Property, are not "claims against the decedent's estate" covered under § 62-3-803(a)(1) of the Probate Code.

South Carolina law is clear that disputes regarding the title of assets alleged to be included in an estate are not "claims against a decedent's estate" covered under § 62-3-803 of the Probate Code. S.C. Code Ann. § 62-3-803(a)(1) (2014). Section 62-1-201(4) expressly defines "claims" under the Probate Code to not include such disputes regarding title. Section 62-1-201(4) states:

“Claims’, in respect to estates of decedents[,] . . . includes *liabilities* of the decedent or protected person whether arising in contract, in tort, or otherwise, and *liabilities* of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include . . . demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate. (Emphases added).

S.C. Code Ann. § 62-1-201(4) (2014). David Shealy’s claims to personal property and counterclaims in tort regarding that property are thus not “claims” under the nonclaim statute or any other provision of the Probate Code.

Additionally, South Carolina courts have repeatedly affirmed that title disputes are not “claims” for the purpose of the § 62-3-803 nonclaim statute or other Probate Code provisions. *See In re Howard*, 315 S.C. 356, 434 S.E.2d 254 (1993); *see also In re Estate of Tims*, No. 2021-UP-281, 2021 WL 3076685 (S.C. Ct. App. July 21, 2021). In *In re Howard*, the South Carolina Supreme Court ruled that a dispute over the ownership of a gun was not subject to the nonclaim statute. 315 S.C. 356, 364, 434 S.E.2d 254, 259 (1993). The court wrote, “Because the estate asserts no interest in the gun, the issue of title to the gun is not subject matter related to the estate of the decedent. Accordingly, the probate court had no jurisdiction to determine that issue.” *Id.*

The court went on to say:

Had the estate asserted an interest in the gun, the result would be the same. The definition of ‘claims’ in the Probate Code expressly excludes disputes regarding title of a decedent to specific assets alleged to be included in the estate. S.C. Code Ann. § 62-1-201(4) (1986). Therefore, the dispute about title to the gun is not a ‘claim’ that could be presented to the probate court under Section 62-3-806.

Id. at 356 n. 8., 434 S.E.2d at 259 n. 8.

More recently, in *In re Estate of Tims*, a decedent’s children disagreed as to whether certain property was an asset of the estate or of a trust in favor of respondent heir. No. 2021-UP-281, 2021 WL 3076685, 1 (S.C. Ct. App. July 21, 2021). Appellant heir filed a motion for summary judgment, arguing that under the § 62-3-803 nonclaim statute, the action was time barred. *Id.* The Court of Appeals reaffirmed that “actions for specific assets are not barred because they are not actions or liabilities against Decedent's estate, but disputes over ownership of specific assets in the hands of the personal representative(s).” *Id.* at 3.

In the present case, David Shealy was not required to file his claim as it relates to disputed ownership of personal property against the Probate Estate within one year of his father's passing. The Probate Code and South Carolina courts have made clear that title disputes such as David Shealy's are not "claims" under the nonclaim statute upon which the Plaintiffs base their motion for summary judgment. The trial court erred in ruling that the nonclaim statute applied.

Since David Shealy's claims to personal property and counterclaims were "pending" at the time of Wilson Shealy, Sr.'s death and disputes as to the title of assets alleged to belong to the Probate Estate are not "claims" under the Probate Code, the trial court erred in granting summary judgment in favor of the Plaintiff-Respondent.

II. THE TRIAL COURT ERRED IN GRANTING THE THIRD PARTY DEFENDANT-RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WHEN THE RECORD VIEWED IN THE LIGHT MOST FAVORABLE TO THE APPELLANT SHOWS THERE ARE GENUINE ISSUES OF MATERIAL FACT.

The trial court also erred in granting summary judgment as to David Shealy's third party causes of action, (R. p. 13), because genuine issues of material fact exist. As mentioned in the Statement of the Case, David Shealy withdrew his claim for breach of fiduciary duty at the August 4, 2022, hearing on the underlying Summary Judgment Motions. (R. p. 13). David Shealy's remaining third party causes of action are for (a) conversion, (b) civil conspiracy, (c) and negligence. (R. pp. 325-329). For the reasons above, the nonclaim statute in the Probate Code does not bar these claims.

In the order granting summary judgment, the trial court ruled that David Shealy failed to prosecute these third party causes of action. (R. p. 13). The trial court wrote:

other than the allegations of Defendant's own third party complaint and a self-serving affidavit provided to the Court on August 1, 2022 ahead of the hearing on these Motions, the record in this action lacks any evidence supporting Defendant's allegations against the Third Party Defendants.

(R. p. 13). The trial court erred by failing to consider the Third Party Complaint, David Shealy's affidavit, or the rest of the record in the light most favorable to David Shealy as the non-moving party.

Under South Carolina law:

summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.

Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986). In determining whether any triable issues of fact exist a court must consider:

the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.

Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008) (internal citations omitted). And lastly, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In this case, the trial court reversed the standard for summary judgment by failing to consider all evidence and reasonable inferences in the light most favorable to the non-moving party. The trial court should not have dismissed as "self-serving" David Shealy's sworn affidavit of August 1, 2022, (R. p. 13), but instead considered its content and all reasonable inferences in the light most favorable to David Shealy as the non-moving party. Indeed, almost any affidavit which is offered in support of or against a motion is by definition self-serving. David Shealy's affidavit and its six exhibits, alone, provided the mere scintilla of evidence to withstand summary

judgment. Altogether, consideration of the record in the light most favorable to David Shealy reveals there are genuine issues of material fact and summary judgment was inappropriate.

A. Conversion

With respect to David Shealy's third party claim for conversion, David must show "the unauthorized assumption and exercise of the right and ownership over the goods or personal chattels of another, to the alteration of the condition or the exclusion of the owner's rights without permission or cause." *Weinberg v. Wallace*, 314 S.C. 183, 186, 442 S.E.2d 211, 212 (Ct. App. 1994).

In this case, David Shealy detailed in his affidavit of August 1, 2022, and supporting exhibits hundreds of items of his Personal Property on the Real Property to which he has an interest. These items of Personal Property include cars, trucks, trailers, aircraft, vehicle parts, equipment, guns and ammunition, and many personal items. (R. p. 69).

The trial court wrote that David Shealy "cannot reliably articulate specifically what has been converted." (R. pp. 13-14). Due to David Shealy's exclusion from the Real Property, it has been difficult for him to completely inventory each item of his Personal Property, which includes ordinary personal items and other property such as cars and aircraft which he has collected. However, David Shealy first filed a list of claimed personal property on July 25, 2018. (R. p. 367). More recently, on August 1, 2022, David Shealy filed his affidavit, which incorporated as exhibits a more complete list of claimed property and evidence of specific property claims.

In his affidavit of August 1, 2022, David Shealy describes his cars which have been sold for scrap, his guns which have been moved, and a comprehensive auction during which the Plaintiff-Respondent and Third-Party Defendant-Respondents planned to sell a substantial amount of personal property including airplanes, airplane parts and various other items, some of which are claimed by Appellant. (R. p. 66).

Specifically, David Shealy provides an extensive list of his claimed property attached as “Exhibit A” to the affidavit of August 1, 2020. (R. p. 69). David Shealy also attests to ownership of a backhoe and trailer which his father sold to Wilson Shealy, Jr. for Violet Shealy Properties LLC, and bills of sale are included as “Exhibit B”. (R. p. 85). “Exhibit C” to the affidavit is David Shealy’s vehicle ownership records with the South Carolina Department of Motor Vehicles. (R. p. 87). David Shealy states in his affidavit that he is “informed and believe[s] that several vehicles were sold by or on behalf of the Plaintiff and third-Party Defendants for scrap in May 2018.” (R. p. 67, ¶ 9). “Exhibit D” contains records and receipts from Prosperity Metal Recycling, Inc., a scrap company which accepted cars for scrap at that time. (R. p. 148). David Shealy further attests that some of his personal property was listed in an auction that the Third-Party Defendant-Respondents hired Starman Bros. Auctions to host on August 12, 2022. (R. p. 162). Lastly, the Plaintiff-Respondent and Third-Party Defendant-Respondent signed a Right of Entry Agreement with Dominion, which owns and rented the Real Property to Wilson Shealy, Sr., which requires all personal property to be removed from the Real Property or “conclusively be deemed to have been abandoned.” (R. p. 193, ¶ 15.b.). Under the ROE the Shealy Parties “shall coordinate and work together to remove any Personal Property belonging to David J. Shealy.” (R. p. 191, ¶ 8.f.). Moreover, as Dominion noted when it required a disclaimer in its agreement, (R. p. 191, ¶ 8.g.), merely excluding access by David Shealy to his property can be a conversion.

Based on David Shealy’s affidavit of August 1, 2022, the rest of the record, and all reasonable inferences, there are genuine issues of material fact as to David Shealy’s third party claim for conversion. He has clearly presented a scintilla of evidence to show the unauthorized assumption and exercise of the right and ownership over his Personal Property by the Third Party

Defendant-Respondents, to the alteration of the condition or the exclusion of David Shealy's rights without permission or cause.

The trial court erred in granting summary judgment as to the conversion claim and counterclaim.

B. Civil Conspiracy

Second, for David Shealy to recover for civil conspiracy, David must establish "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021).

As alleged in David's Amended Answer, Counterclaims, and Third Party Complaint, Wilson Shealy, Sr. and the Third Party Defendant-Respondents combined to commit unlawful acts against David. The unlawful acts were the conversion of David Shealy's property. There were several overt acts in furtherance of the conspiracy, including, as alleged in David's Affidavit, the sale of his cars for scrap, the removal of his guns, the injunction to prevent him from retrieving his property, and the auction of his personal property. (R. p. 66). If David is allowed to complete discovery, additional overt acts are likely to be discovered. Finally, David has suffered substantial financial injury in the loss or conversion of his personal property.

David Shealy has alleged sufficient facts in his pleadings and affidavit to create genuine issues of material fact as to his third party cause of action for civil conspiracy.

C. Negligence

Lastly, for David Shealy to recover for negligence, David must show (1) a duty of care owed to him by the Third-Party Defendants, (2) a breach of that duty by a negligent act or

omission, and (3) damages proximately resulting from that breach. *Shaw v. City of Charleston*, 351 S.C. 32, 40, 567 S.E.2d 530, 534 (Ct. App. 2002).

There are several sources of a duty owed by the Third Party Defendant-Respondents to David Shealy. First, by excluding David from the property and taking exclusive possession of the property, the Third-Party Defendants created a constructive bailment for their own benefit. “[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, 96, 538 S.E.2d 268, 272 (Ct. App. 2000). In *Hadfield*, the court held that a constructive bailment was created when the defendant’s towing company took possession of the plaintiff’s vehicle, which was severely vandalized while impounded in the defendant’s parking lot. *Id.* at 97, 538 S.E.2d at 273. James A. Turner, *What’s So Different About Bailment?*, 31 S.C. Law., 28 (2020) (query by the trial judge as to “whether a tow and storage ultimately resulting in monetary payment to the bailee without the perception of ascertainable benefit to the bailor might conform to this classification” as [constructive bailment for the benefit of the bailee]). In this case, taking constructive possession of David Shealy’s personal property was for the Third Party Defendants-Respondents’ benefit to inventory and sell the personal property. Therefore, they are held to a duty of great care and liable for slight negligence.

Additionally, the Third Party Defendant-Respondents voluntarily assumed the duty to secure and maintain the Real Property, and index and inventory the personal property present there. As stated in the ROE discussed in the factual background, “The responsibility to secure,

preserve, or insure the Personal Property shall remain the sole obligation of the Obligated Parties.” (R. p. 192, ¶ 9.).

There is also evidence that the Third Party Defendant-Respondent breached these duties as personal property has been moved, sold and now is being auctioned without David Shealy’s consent. (R. pp. 67-68, ¶¶ 7-11). Undoubtedly, once David Shealy is allowed on the property, he will discover signs of neglect and that his personal property has not been maintained.

Finally, David Shealy has suffered damages from the loss of his personal property and most likely its diminished condition.

Therefore, David Shealy has alleged sufficient facts in his pleadings and affidavit to create genuine issues of material fact as to his third party cause of action for negligence.

For all these reasons, the trial court erred in granting Third Party Defendants-Respondents’ Motion for Summary Judgment and its Order should be vacated and remanded to the trial court.

CONCLUSION

Based on the foregoing, the Appellant respectfully requests that the Order on Plaintiff-Respondent’s and the Third Party Defendants-Respondents’ Motions for Summary Judgment, which was filed on October 7, 2022, be reversed and the case remanded to proceed to a trial on the merits of Appellant’s claims.

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