

Mar 20 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

**REPLY TO RETURN TO
PETITION FOR REHEARING**

Appellant John Edward Vergeldt (hereinafter “Appellant”) replying to the response of the Respondent (hereinafter “Vicki”), respectfully shows the Court as follows:

1. As previously argued, the record reflects that Appellant raised the issue of *res judicata* before the trial court prior to filing a Motion for Reconsideration. (See R. pp. 619-622, ¶¶ 13-24; R. p. 719, lines 14-20). Therefore, the Court of Appeals erred in finding that Appellant raised the issue for the first time in his Motion for Reconsideration. While Appellant did not use the specific legal term “*res judicata*,” which is not required to preserve the issue,¹ it’s clear from the record that Appellant objected to Vicki’s claim for

¹ See *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011).

damages based on the final order issued by Judge Kimball in the original lawsuit. In that order, Judge Kimball found that Appellant was not responsible for any mishandling of the trust assets prior to his father's death in 2013 and owed no duty to Vicki prior to Appellant becoming Successor Trustee. During the trial in this matter, there was a discussion on the record in which the Court requested that Vicki's counsel explain why Appellant's actions as co-trustee, prior to the death of the Settlor, should be included or addressed in the Court's order in light of Judge Kimball's findings in the final order from the 2014 litigation. (R. pp. 1078-1085). Following argument from Vicki's counsel, Appellant specifically objected, "I beg to differ with counsel. I believe what Judge Kimball said was that I'm totally absolved and non-responsible—not responsible for anything that happened to the trust prior to the day that [Judge Kimball] determined my father was incapacitated, which was May 6th of 2013." (R. pp. 1081-1082, lines 22-25, 1-2). Appellant further stated that it was his understanding that liability for "anything prior to May 6th of 2013...would rest on my father's shoulders." (R. p. 1082, lines 13-14). Furthermore, it was not up to Appellant to raise the issue of *res judicata* in the second action, even though he did. Rather, it was incumbent on Vicki to request damages in the first action or be forever barred. The doctrine of *res judicata* prohibited an amendment to Judge Kimball's order to permit a claim for damages under any theory, because any claim for damages was ripe and should have been resolved in the first action.

It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not against be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.

The rule will also apply even though the subsequent action is upon a different cause of action and involves different subject matter, claim or demand, than the earlier action. In such cases, it is likewise immaterial that the two actions have a different scope or are based on different ground, or are tried on different theories, or are instituted for different purposes and seek different relief.

Laughon v. O'Braitis, 360 S.C. 520, 527-528, 602 S.E.2d 108 (Ct. App. 2004) (emphasis in original).

The original action was between the same parties and related to the same subject matter as the instant action on appeal. Therefore, a second action seeking damages “might have been litigated in a prior action.” *Equivest Financial v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438 (Ct. App. 2018). At any time, Vicki could have sought to amend to include a claim for damages in the first action. Rule 18(a), SCRCP permits “[a] party asserting a cause of action as an original claim...[to] join, either as independent or as alternate claims, as many claims, legal, or equitable, as he has against the opposing party.” Vicki’s claim for damages could have and should have been included in the first action. The first action presented an opportunity to adjudicate all equitable and legal claims that existed at that time, including Vicki’s claim for damages. As such, the Court of Appeals erred in finding that Appellant’s argument that the doctrine of res judicata barred Vicki from amending her petition to seek damages was not preserved for appellate review.

2. As argued previously in Appellant’s briefing and Petition for Rehearing, the Court of Appeals erred in finding that the master-in-equity did not fail to apply the heightened standard of proof as required by the Trust agreement. The master’s order failed to recognize or apply the burden of proof dictated by the Settlor in the Tenth Amendment, and there is

no evidence in the record that establishes that Appellant acted in bad faith or with reckless disregard to support a finding of liability against Appellant in his capacity as Successor Trustee under the terms of the Trust agreement. Appellant respectfully maintains that the Court erred in finding that the master applied the correct standard of proof and stands on the arguments previously set forth in Appellant's Petition for Rehearing regarding this issue.

For the reasons set forth above, Appellant John Vergeldt respectfully requests that this Court grant this Petition for Rehearing and reverse the decision of the trial court.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard (S.C. Bar No.498)

Harvey M. Watson III (S.C. Bar No. 74053)

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ATTORNEYS FOR APPELLANT

March 20, 2024

RECEIVED

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ... Respondent,

v.

John Edward Vergeldt, ... Appellant.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on March 20, 2024, I served a copy of the **Reply to Return to Petition for Rehearing** in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

Taylor Peace, Esquire
Harrell, Martin & Peace, P.A.
tpeace@hmp-law.com


Beth Cogan, Paralegal

March 20, 2024
West Columbia, South Carolina

Beth Cogan

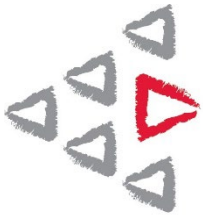
From: Beth Cogan
Sent: Wednesday, March 20, 2024 4:04 PM
To: tpeace@hmp-law.com; Tracy Slice Moore
Cc: Desa Ballard; Haley Hubbard
Subject: (Vergeldt v. Vergeldt, Appellate Case No.: 2021-000816) Ltr to COA encl Reply to Return to the Petition for Rehearing
Attachments: 2024 03 20 Ltr to COA encl Reply to Return to Petition for Rehearing.pdf; 2024 03 20 Reply to Response to Petition for Rehearing.pdf; 2024 03 20 POS Reply to Return to Petition for Rehearing.pdf

Good afternoon,

Please see the attached Reply to Return to the Petition for Rehearing for the above-referenced matter that is being filed today with the Court of Appeals.

Kindest Regards,
-Beth

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March 20, 2024

Via Electronic Mail (ctappfilings@sccourts.org)

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
Mar 20 2024
SC Court of Appeals

Re: *Vicki Vergeldt v. John Vergeldt*
Appellate Case No: 2021-000816

Dear Ms. Kitchings:

Please find enclosed for filing a **Reply to Return to Petition for Rehearing** in the above-referenced matter. By copy of this letter and as evidenced by the Proof of Service, this filing has been served upon counsel for the Respondents in this action. If you have any questions, please do not hesitate to contact my office.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard
desab@desaballard.com

Enclosures

cc: Via Email
Taylor Peace, Esquire
John Vergeldt