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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge

Case No. 2019-CP-28-00680
Appellate Case No. 2022-001789

Randy Bowers ..... Appellant,

v.

The Estate of Claude E. Campbell by and through Sonja Campbell Parker and Barry Campbell, Thomas Clayter Campbell, The Estate of Colbert Harold Campbell by and through Francis Campbell, Vivian C. Gardner and the Estate of Charles E. Campbell by and through Maxine Watts Campbell, all individually and as representatives ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an appeal of the Circuit Court's grant of directed verdict to Respondents on November 17, 2022. (11/21/22 Order 1 of 2).

Appellant filed this case on June 28, 2019, alleging four causes of action: fraud, negligent misrepresentation, negligence, and civil conspiracy. (Complaint) That lawsuit was amended twice. (1st Am. Compl); (2d Am. Compl.). The second amendment was filed on November 10, 2020, to add an equitable claim of constructive trust. Appellant's claims are generally premised on an allegation that he, an illegitimate child of Thomas Edward Campbell ("T.E. Campbell"), was omitted from Campbell's intestate estate. (2d Am. Compl. ¶¶ 4-5) Respondents are children, widows of children, or grandchildren of T.E. Campbell. (*Id.* ¶¶ 2-3). Appellant claims Respondents are liable for wrongdoing because they had "knowledge" Appellant "was a son of [Thomas Edward Campbell], but "did not notify [him] of his rights to participate in the Estate of the decedent." (*Id.* ¶ 5).

Respondents filed a motion to dismiss on July 26, 2019, which was denied by a Form 4 Order dated September 25, 2019, that granted Plaintiff leave to amend. (7/26/19 Motion to Dismiss); (9/25/19 Order). Respondents filed a motion for summary judgment on September 3, 2020. (9/3/20 1st Motion for Summary Judgement). That motion, which addressed the timeliness and subject matter jurisdiction, was denied by the Honorable Casey Manning by a proposed order from Appellant's counsel that said there was a question of fact under the discovery rule and that the circuit court had jurisdiction to hear this action because it concerned a claim to real estate held by the Respondents. (11/10/20 Order). Respondents filed a second motion for summary judgment on April 30, 2021; that motion said that Appellant's claims failed on their merits because there was not record evidence giving rise to a triable issue on the elements of any of Appellant's claims. (4/30/21 2d Motion for Summary Judgment).

This case was first called to trial on May 18, 2021, before the Honorable Allison R. Lee. After a jury was seated, but before opening statements, Judge Lee ruled from the bench that Respondents were entitled to summary judgment based on "a deficiency in evidence to be able to support the claims that have been raised by the plaintiff" and stated she would thereafter "issue a written order." (5/18/21 Transcript pp. 3:12-14, 13:14-19). On April 22, 2022, Judge Lee issued a Form 4 Order that said, "In preparing a written order pursuant to SCRCP Rule 58, further review reveals genuine issues of material fact in the evidence on the causes of action brought by Plaintiff." (4/22/22 Order). The Form 4 Order did not say what evidence gave rise to issues of fact or what the issues of fact were.

This case was then called to trial on November 15, 2022, before the Honorable Debra R. McCaslin. On November 16, 2022, Respondents moved for directed verdict at the end of Appellant's case-in-chief and it was granted as to the claims for fraud (Trial Transcript Day 2 p. 86:15-23), negligent misrepresentation (*Id.* pp. 87:12-88:15), and civil conspiracy (*Id.* pp. 98:7-98:19). (*See*, Day 2 Transcript pp. 68:23-100:4). The remaining issues after that ruling were negligence, constructive trust, and the statute of limitations. That afternoon, after the close of all the evidence, Respondents renewed their motion for directed verdict. (Day 2 Transcript pp. 148:1-163:6). The next morning, November 17, 2022, the Court granted Respondents' renewed motion for a directed verdict finding (1) there was no legal duty to support a negligence claim (Trial Transcript Day 3 pp.4:19-5:4); (2) the statute of limitations had run (*Id.* pp. 5:5-7:11); and that, Appellant was not entitled to a constructive trust (*Id.* pp. 7:12-8:19).

That order from the bench was formalized in a subsequent Form 4 Order. (11/21/22 Order 1 of 2). Appellant then filed a motion to reconsider which was denied by the Court on November 29, 2022. (11/29/22 Order). This appeal followed.

STATEMENT OF THE FACTS

T.E. Campbell was married to Iola Goff Campbell from December 2, 1928, until their divorce on May 5, 1964. (Pl. Ex. 1 Master's Report Dated 5/5/1964). They had five children together: Claude, Clayter, Colbert, Vivian, and Charles.

Appellant, born in 1957 to Tyna Bowers, testified that T.E. Campbell revealed to him that he was his biological father in or around 1963. (Trial Transcript Day 1. p. 110:19-24); (Def. Ex. 1: Birth Cert of Randy Bowers). Reece Bowers, who was listed as Appellant's father on his birth certificate, confirmed to Appellant that he was not his biological father when Appellant was around seven or eight years old and again when he was 13 years old. (Day 1 Transcript pp. 112:17-115:3). Appellant has been told by people throughout his life that he was T.E. Campbell's son including high school coaches, teachers, and local politicians. (Day 1 Transcript p. 116:8-20).

T.E. Campbell was murdered in 1982 when he was walking home from work. (Day 1 Transcript p. 118:2-8); *See also* (*Id.* p. 54:2-7).

He died intestate. (Day 1 Transcript p. 118:17-19). Claude Campbell (who died in 2015) was appointed administrator over the estate and Robert Sheheen, Esq. managed the estate as counsel to the Campbell Family. (Trial Transcript Day 2 p. 64:4-9). According to Bob Sheheen, neither he nor any of the Campbell Family children/heirs at law, to his knowledge, knew Appellant was T.E. Campbell's child when the estate was probated. (Day 2 Transcript pp. 103:21-104:1). The heirs at law and next of kin listed on the Petition for Administration for the estate of T.E. Campbell, filed June 12, 1982, included only the children of Iola Goff Campbell and T.E. Campbell: Claude E. Campbell, Clayter T. Campbell, Colbert Harold Cambell, Vivian C. Gardner, and Charles E. Campbell. (Pl. Ex. 2: Probate Documents). A citation for the petition for probate was published in a local newspaper for at least a month in advance of August 22, 1983. (*Id.*).

Appellant found out that T.E. Campbell died on the day that he died. (Day 1 Transcript p. 116:2-8). Appellant was 25 years old at the time. (Day 1 Transcript p. 118:11-12); (Def. Ex. 1: Birth Cert of Randy Bowers). Appellant, by that point in his life, was a high school graduate and had attended Francis Marion College. (Day 1 Transcript p. 116:21-24). Appellant held an important job in the local community where he managed the Lugoff-Elgin Water Authority (*Id.* pp. 59:19-60:1; 117:4-118:1).

Appellant knew T.E. Campbell died intestate, and Appellant knew that he intended to provide for him when he died. (Day 1 Transcript p. 118:17-25). Appellant testified that he "thought [he] would" receive something when T. E. Campbell died. (*Id.* p. 122:7-10).

Appellant was friends with local lawyers at the time T.E. Campbell died. (*Id.* p. 118:15-16). Appellant was even represented by a local lawyer in a divorce proceeding in 1984. (*Id.* p. 121:25-122:6).

Appellant did not monitor the proceedings relating to T.E. Campbell's estate. (*Id.* p. 120:18-21). Appellant, when asked, at trial, if he did anything about his exclusion from T.E. Campbell's estate when it was pending before the probate Court, testified:

> Q: Did you do anything about it back then?
> A: No, I didn't.
> Q: And why not?
> A: Because I was terrified and scared of the Campbells, as I said earlier.

(*Id.* at p. 122:11-15). In his deposition, when asked why he did nothing for nearly four decades, Appellant testified "I just didn't." (*Id.* at pp. 122:16-123:5); (Court's Exhibit 1: Dep. of Randy Bowers at p. 29:5-6).

Appellant took no action in response to his omission from T.E. Campbell's estate until filing this case in 2019. (Day 1 Transcript p. 124:4-7). Three of the five direct recipients of T.E. Campbell's

intestate estate were deceased by the time he filed this lawsuit. (*See*, Amended Complaint Caption[1]). Of the individuals named in this lawsuit, and what specifically Appellant claims they did wrong to him? Appellant testified as follows:

> Q: Is there any specific wrong that you claim Barry [Campbell] or Sonja [Parker] did to you in this case?
> A: No.
>
> . . .
>
> Q: So do you know if Clayter [Campbell] had any role in your exclusion or inclusion from the estate?
> A: Yeah. No, he did not.
> Q: Same question with Colbert. Do you know if he had any role in your inclusion or exclusion from the estate?
> A: He did not.
> Q: Do you agree that Colbert died in 2004, or do you know that Colbert died in 2004?
> A: Yes, I did.
> Q: Let's talk about his wife, Francis, who is also named in this lawsuit. Do you know if she had anything to do with this estate being processed?
> A: No, I don't.
>
> . . .
>
> Q: And Ms. Vivian [Campbell Gardner] -- do you know if she had any role with your inclusion or exclusion from this estate?
> A: She did not.
> Q: Charles Campbell. Do you know if he had anything to do with your inclusion or exclusion from this estate?
> A: No.
>
> . . .
>
> Q: And Charles died in 2017; is that correct?
> A: Yes.
> Q: So let's talk about Charles's wife, Maxine. Do you know if she had anything to do whatsoever with Thomas Edward Campbell's estate?
> A: She did not.

[1] The caption names three closed estates: "The Estate of Claude E. Campbell by and through Sonja Campbell Parker and Barry Campbell", "The Estate of Colbert Harold Campbell by and through Francis Campbell", and The Estate of Charles E. Campbell by and through Maxine Watts Campbell."

(Day 1 Transcript pp. 128:10-12; 129:2-14, 19-24; 130:4-11). Appellant testified he believed Claude Campbell, who died in 2015, knew he was T.E. Campbell's son because he had "told a bunch of people that I was his brother." (Day 1 Transcript p. 130:12-21).

Appellant said he waited until 2019 to file this case because an obituary for Charles E. Campbell that was written in 2017 by his widow Maxine, and that said he was Charles Campbell's brother, was the "concrete evidence" he needed to assert a claim:

> Q: What's your reason for waiting until 2019 to file this lawsuit then?
> A: Because of this obituary was the only concrete evidence that I had that this family had -- had acknowledged me as being part of their family.
>
> . . .
>
> Q: Would it surprise you to know that Maxine Campbell was the person who wrote that obituary?
> A: I know because I work at the funeral home.
> Q: And Maxine Campbell didn't have anything to do with the estate of T.E. Campbell; is that correct?
> A: That is correct, other than having a direct receivership through her husband.
> Q: And Maxine Campbell wasn't around when you were growing up; is that correct?
> A: Around what?
> Q: Around when you were growing up; is that correct?
> A: No. I never met Maxine until I was in my 30s, maybe 40s. I never met Maxine.

(Day 1 Transcript pp. 142:19-143:14). Maxine Campbell testified that Appellant asked her to list him in her deceased husband's obituary:

> Q. Okay. Did he ask you if you would list him in the obituary?
> A. Later on when he come back to talk to me.
> Q. Tell me about that.
> A. But wait a minute --
> Q. Go ahead.
> A. First, when he was leaving the house, he got into the hallway of the living room, and he said he just wanted to be recognized. And then when he was going out the door, the garage door, my son was outside, and he says, "I just want to be recognized and I don't want no money. I just want to be recognized."
> Q. He was meaning he wanted to be recognized as Charles Edward Campbell's brother?
> A. Yes, sir.

(Trial Transcript Day 2: pp. 114:22-115:11). Two years earlier, and two days after the death of Claude Campbell, Appellant texted Sonja Campbell Parker saying he was "deflated" because he "read Claude's obituary and was not included." (Trial Transcript Day 1: p. 137:6-18); (Def. Ex. 5: 2/20/15 Text Message).

STANDARD OF REVIEW

This is an appeal of a post-trial directed verdict and the denial of a motion to reconsider/motion for a new trial.

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). An appellate court will reverse the trial court "only when there is no evidence to support the ruling below." *Id.*; see *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997). Further, The appellate court "will not disturb a trial court's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law." *Id. citing*, *S.C. Dep't of Highways & Pub. Transp. v. E.S.I. Invs.*, 332 S.C. 490, 496, 505 S.E.2d 593, 596 (1998).

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT THE STATUTE OF LIMITATIONS HAD RUN ON THIS 2019 LAWSUIT ABOUT APPELLANT'S EXCLUSION FROM AN INTESTATE ESTATE THAT OPENED IN 1982 AND DISCHARGED IN 1984.

The discovery rule provides that "the three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered." *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004); S.C. Code Ann. § 15-3-530. "The clock starts ticking on the date the injured party either knows or should have known by the exercise of

reasonable diligence that a cause of action arises from the wrongful conduct." *Martin*, 593 S.E.2d at 627. "The fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain a cause of action to enforce it." *Matthews v. City of Greenwood*, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991).

Appellant's tort claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530.

Appellant knew T.E. Campbell was his biological father before 1982 based on his testimony about what he was told by various reliable sources throughout his life including: T.E. Campbell (Day 1 Transcript p. 110:19-24), Reece Bowers (*Id.* at pp. 112:17-115:3); and high school coaches, teachers, and local politicians (*Id.* at p. 116:8-20). Appellant learned T.E. Campbell died on the day he died. (Day 1 Transcript p. 116:2-8). Appellant believed he was supposed to receive something from T.E. Campbell's estate when he died. (Day 1 Transcript pp. 118:17-25; 122:7-10).

Yet, Appellant did nothing to assert his alleged rights until he filed this lawsuit in 2019. In his deposition, when asked "why?" Appellant testified: "I just didn't." (Day 1 Transcript pp. 122:16-123:5); (Court's Exhibit 1: Dep. of Randy Bowers at p. 29:5-6). At trial, Appellant said he did nothing "[b]ecause [he] was terrified and scared of the Campbells." (Day 1 Transcript p. 122:15).

Now, on appeal, Appellant's counsel writes that the reason Appellant did not take action was that "countless public statements and treatment by his siblings reasonably left him with the belief that such a showing was impossible." (Appellant Brief p. 4).[2] Appellant's Counsel next writes that "only then" when Charles Campbell's obituary, written by his widow Maxine Campbell, was published Appellant "realized that, under oath, his brothers and sister, in 1982, would have been obligated to

[2] Appellant did not testify to this rationale in the portion of the record cited by his Appellate counsel or elsewhere in the record. (Appellant Brief p. 4) (*misstating*, Day 1 Transcript p. 86:7-18).

testify to the same." (Appellant Brief p. 5).[3] Appellant's argument is that the statute of limitations can be tolled based on assumptions that adverse litigants will lie under oath and that other non-adverse witnesses (including Reece Bowers—his birth certificate father) would either not corroborate his testimony or not be treated as credible.[4] That is not how the discovery rule works.

Appellant's newest excuse for doing nothing from 1982 until 2019 is that he needed Charles Campbell's obituary to state a claim, is not a sufficient basis to toll the statute of limitations. The discovery rule says the statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered" not when a litigant thinks they have *concrete evidence* to pursue a claim. *See*, *Martin*, 593 S.E.2d at 627; *see also*, *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981) ("The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed."); *and, Barraza v. Barraza,* No. A099918, 2003 WL 21350557, at *7 (Cal. Ct. App. June 11, 2003) (unpublished) ("In the circumstances, plaintiff had notice of facts sufficient to provide him with constructive notice and to impose a duty to inquire further into his purported inheritance. His failure to do so precludes him from invoking the belated discovery rule or from relying upon the extrinsic fraud exception to the statute of limitations.*")* .

Judge McCaslin summed this up well:

> In fact, what bothers the Court is this reliance on the obit. We don't wait until you have a case to bring. That's not the law and not the statute of limitation[s].
>
> . . .
>
> The plaintiff knew all the information he needed in 1984 or '82 when his father passed away. He testified also that that he's known his biological father for practically his

[3] The testimony Appellant's Counsel cites to for this proposition does not reflect what counsel suggests. (Appellant Brief p. 5) (*misstating*, Day 1 Transcript p. 100:19-101:8).

[4] Appellant testified that another witness, not related to him or the Campbell family, Harold Goff told him in 2015 (greater than three years before this lawsuit was filed) that he was aware he was T.E. Campbell's son.

> entire life and he learned again of his father's death the day it happened. And then the Court takes note also that when Mr. [T].E. Campbell passed away, the plaintiff was 25 years old, college educated. He should have known or should have known to file a cause of action then.
>
> The claim of the 2017 obituary he claims should start the clock. The Court doesn't see it that way. That didn't reveal any new information. None. You know, it was portrayed to the Court that that was more of the strength of their case, but it hadn't changed any facts. He already knew it. He already knew it.

(Trial Transcript Day 3: pp. 6:10-7:11). The statute of limitations on Appellant's tort claims ran during the Reagan Administration. This action was properly dismissed as a matter of law.

II. THE TRIAL JUDGE RIGHTLY FOUND THAT THERE WAS NO EVIDENCE UPON WHICH APPELLANT COULD STATE ANY OF HIS CLAIMS.

The Trial Court found that, aside from its ruling that the statute of limitations had run, there were independent reasons of law and/or lack of evidence upon which Appellant's five causes of action failed.

A. The trial court correctly ruled that Appellant's fraud claim failed as a matter of law.

Fraud has nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993).

There is no evidence of any representation made by Respondents to the Appellant. Much less a false representation that the Appellant relied on and was harmed by. Appellant was asked if Respondents did anything to cause him to be excluded from T.E. Campbell's estate and he testified, with the exception of Claude Campbell, that they "did not." (Day 1 Transcript pp. 128:10-12; 129:2-

14, 19-24; 130:4-11). On Claude Campbell (who had been deceased for 4 + years by the time this lawsuit was filed) Appellant said he knew Appellant "was his brother" because "[h]e told a bunch of people that." (Day 1 Transcript p. 130:12-21). That unspecific statement about the knowledge held by an individual who was deceased by the time this lawsuit was filed does not amount to the elements of fraud.

Appellant's counsel says on brief, without citing to the record, that "Mr. Campbell's Legitimate Children and their relatives made several significant false public statements before the Appellant, namely that he was not their sibling but that they firmly knew such to be the case." There is nothing in the record to support this statement on brief. Further, even if it were, how could Appellant establish the sixth element of fraud, ignorance of falsity, given he testified he knew from his early childhood that he was T.E. Campbell's son? (Trial Transcript Day 1 p. 110:19-24).

The Trial Court properly dismissed the fraud claim following a lengthy colloquy with counsel over whether developments in US Supreme Court and South Carolina case law about the ability of illegitimate children to receive from their father's estates created a duty for the Respondents to reopen their father's estate. (Trial Transcript Day 2 pp. 83:5-86:23). That case law is discussed in greater detail in the additional sustaining grounds below. Irrespective of that discussion of case law, which comes down in Respondents' favor, there is no evidence in this record of fraud. Whatsoever.

B. The trial court correctly determined that Appellant's negligent misrepresentation claim should be dismissed as a matter of law.

Appellant's negligent misrepresentation claim fails for similar reasons as his fraud claim. Appellant had to show:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). There was no testimony that Appellant relied on any false statements from Respondents:

> What did he rely on? What is it that these defendants told him that he relied on for a negligent misrepresentation claim? That's my problem with that claim. Just like fraud, you know, the fraud is another representation, falsity, reckless disregard of its truth, an intent that the representation is acted upon, the reliance of its truth, and the proximate injury. I do not believe, from the testimony I've heard on either one of these counts -- certainly it does not meet clear and convincing evidence on the fraud, period, and I'm going to dismiss or grant your DV motion. Negligent misrepresentation. I don't believe it meets the facts -- the elements. The facts don't meet the elements, not that what was testified. I'm dismissing that claim.

(Day 2 Transcript pp. 87:24-88:14).

Appellant argues on this claim that Respondents made a false representation to the "courts." (Appellant Brief p. 12). The first element of negligent misrepresentation requires the misrepresentation be made "to the plaintiff."[5] *Quail Hill, LLC*, 692 S.E.2d at 508.

Setting that threshold factual problem aside, there is no legal basis asserted in Appellant's brief to say Respondents "owed a duty of care" "to the [Appellant]." *Id.*

C. The trial court correctly held that Appellant's negligence claim failed as a matter of law.

Appellant does not independently address the dismissal of his negligence claim, but instead mentions "negligence" only in the header of his negligent misrepresentation argument. (Appellant Brief p. 10). The content of that argument is solely concerned with Negligent Misrepresentation (*Id.* at pp. 10-12). Therefore, this claim is not sufficiently appealed. "An unappealed ruling is the law of the case and requires affirmance." *Dreher v. S.C. Dep't of Health & Env't Control*, 412 S.C. 244, 249–50, 772 S.E.2d 505, 508 (2015); *quoting, Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 573, 743

[5] Respondents did not make a misrepresentation to the Court. There is no competent record evidence Respondent's knew they had an illegitimate brother when their father's estate was probated and, even if they had, the sole representation to the Probate Court in the record called for a list of "heir[s] at law." Appellant was not an "heir at law" under the law in South Carolina in 1982. (Pl. Ex. 2 Probate Records).

S.E.2d 778, 785 (2013). "[U]nappealed findings—whether correct or not—become the law of the case." *Id.*

Nonetheless, the Trial Court properly dismissed the negligence claim on directed verdict; because, as a threshold matter, there is no legal basis for asserting a duty here.

"Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Ellis v. Niles,* 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). There was no statute, contract, relationship, or other circumstance in 1982 that gave rise to a legally cognizable duty here.

"Ordinarily, the common law imposes no duty on a person to act." *Id.* 374 S.E.2d at 913 (Ct. App. 1988). "It follows that a person usually incurs no liability for failure to take steps to benefit others or to protect them from harm not created by his own wrongful act." *Id.*

This is an unusual case; nonetheless courts in California have addressed the existence of a duty on facts like this and determined no duty exists. "An heir, devisee or legatee has been held to be under no duty to notify another heir, devisee or legatee of the death of the decedent, or of the probate proceedings." *Stevens v. Torregano*, 192 Cal. App. 2d 105, 123, 13 Cal. Rptr. 604, 616–17 (Ct. App. 1961). "[I]n cases where the *identity and existence* of a *potential* heir is unknown, the law is also clear that the petitioner need not give notice—though that rule is pretty obvious if one thinks about it." *Est. of Carter*, 111 Cal. App. 4th 1139, 1149, 4 Cal. Rptr. 3d 490, 498 (2003), *as modified on denial of reh'g* (Oct. 3, 2003); c*iting*, *Lynch v. Rooney* 112 Cal. 279, 44 P. 565(1896) (daughter of sister of intestate decedent mistakenly thought in good faith that decedent's brother in Ireland was already dead).

The court granted a directed verdict on Appellant's negligence claim because no duty exists here; her ruling was correct:

> You know, there's always a fiduciary duty of a PR. I don't find any duty that the people that are sitting in front of me had in 1982 to fill out any form for him. He had knowledge. Or to mail out any notice. It seems like notice was a big thing. He was on notice when he knew his biological father passed away and he knew it on the day that he passed. And in negligence you've got to have a duty and I don't see it.

(Trial Transcript Day 3 p. 4:19-5:1).

D. The trial court correctly ruled that Appellant's civil conspiracy claim should be dismissed as a matter of law.

The elements of civil conspiracy are misstated in Appellant's brief. The elements of civil conspiracy changed shortly before the trial of this case with the Court's decision in *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021). Now, a party asserting a civil conspiracy claim 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*, 861 S.E.2d at 780.

Appellant's counsel, without citing to the record, writes that there are "previously discussed facts concerning the action of Respondents to work together to prevent the Appellant from seeking redress concerning the inheritance." (Appellant Brief p. 13). There is no evidence in the record to support that statement made on brief. Further that statement is different from what Appellant's trial counsel argued, he claimed there was a "conspiracy of silence to just basically hope that enough time passes that he'll just go away." (Trial Transcript Day 2 p. 91:25-92:2). Appellant cannot establish the first three elements of a Civil Conspiracy with a "conspiracy of silence." The tort's first three elements require: (1) a combination of two or more, (2) to do something illegal or unlawfully, (3) through an overt act. Indeed, on the third element (overt act,) Appellant's counsel conceded at trial that the basis of the conspiracy claim is inaction: saying "None of them acted." (Day 2 Transcript 93:4).

There is no such thing as a "conspiracy of silence" under South Carolina law and inaction is not a basis upon which a conspiracy can be based. *See*, *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 10–11, 344 S.E.2d 379, 382 (Ct. App. 1986), *overruled on other grounds by Paradis*, 861 S.E.2d 774 (2021).

("The gravamen of the tort is the damage resulting to the plaintiff **from an overt act** done pursuant to the combination, not the agreement or combination per se.") (emphasis added). The Trial Court's dismissal of this claim on directed verdict should be affirmed.

E. The trial court correctly held that Appellant was not entitled to a constructive trust.

Appellant added an equitable claim for constructive trust in his Second Amended Complaint, claiming that by virtue of the other four causes of actions, Respondents obtained property that did not equitably belong to them. The law of constructive trust is:

> A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Wolfe v. Wolfe*, 215 S.C. 530, 56 S.E.2d 343 (1949); *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E.2d 168 (1943); *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917). **Constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution**. *Searson v. Webb*, 208 S.C. 453, 38 S.E.2d 654 (1946). Fraud is an essential element, although it need not be actual fraud.

Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987). There is absolutely no evidence of "fraud, bad faith, abuse of confidence, or a violation of a fiduciary duty" by any of the Respondents on this record.

A constructive trust requires a finding that Respondents engaged in wrongdoing. The trial court, properly weighing the equities, was unable to make such a finding on this record.

The Court further opined on the inequitable ramifications a constructive trust in this case would have:

> . . . But a constructive trust, he wants part of the land that these children inherited. Well, some of these children are dead. They have built homes on it. They have improved the land. That is not – the reason we have probate and we close it is so that it is over. It is final. And you can't expect these children to give up their land that they've built their homes on and improved it. That's not what the law is. It even states in the *Warren* case that when a case is closed in probate, you know, you rely on your inheritance and you don't want to rely on it to your detriment, that somebody's gonna come back 40 years later and take your property. That's exactly what *Warren* said. The court does not allow that.

(Trial Transcript Day 3 p. 7:16-8:5). In this regard, the Trial Court appears to have also correctly held that Appellant's constructive trust claim was barred by the doctrine of laches. Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums,* 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee Cty.,* 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay. *Eldridge v. Eldridge*, 398 S.C. 113, 121–22, 728 S.E.2d 24, 28 (2012). The Court correctly ruled that even Appellant's equitable claim was untimely:

> So the constructive trust, and I think I've stated that earlier in the case, I'll let the lawyers know that I will address that issue, but I'm certainly not inclined to entertain it and I'm not gonna entertain it here. You can't stick your head in the sand and wait 40 years later to build your case and then come in and sue and it's almost a way of getting around the probate rules. That's why I went back to go look at the Probate Court cases in making my decision. It should have been done then. It can't be done 40 years later. This property has passed not only to the children but I'm told some of the grandchildren. No. So, with all that said, I think I've addressed all the claims. I'm dismissing this case.

(Day 3 Transcript p. 8:6-19).

III. ADDITIONAL SUSTAINING GROUNDS EXIST FOR THE COURT TO AFFIRM THE LOWER COURT'S RULING.

"The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

A. Subject matter jurisdiction lies in the Probate Court.

Probate courts have subject-matter jurisdiction to determine paternity for the purpose of determining heirs. *Neely v. Thomasson*, 365 S.C. 345, 350, 618 S.E.2d 884, 887 (2005). The relevant statute, found in the Probate Code, provides, "To the full extent permitted by the Constitution, and except as otherwise specifically provided hereinafter, the court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents, including the contest of wills, construction of wills, and determination of heirs and successors of decedents and estates of protected persons..." S.C. Code Ann. § 62-1-302.[6] "Heirs" is defined as "those persons ... who are entitled under the statute of intestate succession to the property of a decedent." S.C. Code Ann. § 62–1–201(17) (1987).

"The probate court has "exclusive original jurisdiction over all subject matter related to ... [the] determination of heirs." *Neely v. Thomasson*, 365 S.C. 345, 351, 618 S.E.2d 884, 887 (2005) (*citing*, S.C. Code Ann. § 62-1-302). "Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994); *quoting*, *Bank of Babylon v. Quirk,* 192 Conn. 447, 472 A.2d 21, 22 (1984). "A court lacking subject matter jurisdiction, however, has no authority to act regardless of the geographical location or consent of the litigants." *Dove v. Gold Kist, Inc.,* 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994).

Appellant never should have been able to bring this action (an action to determine paternity, dressed as a tort lawsuit) in the Circuit Court to begin with. Had this action been filed in the Probate Court it would have been foreclosed by the strict timelines set forth in the Statute of Heirs. S.C. Code Ann. § 62-2-109.

[6] The probate code took effect "July 1, 1987"; however, its procedural provisions "apply to any proceedings . . . regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code." S.C. Code Ann. § 62-1-100.

This argument was raised and rejected below where the Court decided the case as alleged was fraud-like, sounding in tort. (Trial Transcript Day 2 pp. 96:2-97:9). The Respondents respectfully contend that the Court misapplied S.C. Code Ann. § 62-1-302 which, as relevant says: "[t]o the full extent permitted by the Constitution, and except as otherwise specifically provided hereinafter, the [Probate] court has exclusive original jurisdiction over all subject matter related to: (1) estates of decedents [] and determination of heirs and successors of decedents[.]"

B. The factors for retroactive application of *Wilson v. Jones*, recognizing illegitimate children could inherit from their father's estates, are not met here.

The Court discussed and entertained arguments at great length relating to developments in probate law with respect to the ability of illegitimate children to receive from their father's intestate estates but did not reach a direct ruling on this issue in this case. (*See*, Trial Transcript Day 3: pp. 3:2-4:1).

When T.E. Campbell died in 1982 illegitimate children, in South Carolina, could only inherit from their mother's side. That means Appellant would not have been entitled to receive a share of T.E. Campbell's estate no matter what Respondents did or did not do:

> In South Carolina, where a person has the right to die intestate and during his life, he is charged with full knowledge of who will succeed to his property if he dies intestate, the assumption exists that, if he dies intestate, he is satisfied with the will the law of the state made for him. []. Had James Brown inquired into the law of descent and distribution in 1974, he would have been informed that, pursuant to *Labine v. Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), illegitimate children would not inherit from their fathers' estates.

Wilson v. Jones, 281 S.C. 230, 233, 314 S.E.2d 341, 343 (1984); *citing*, to *Labine v. Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971).

In 1977, the Supreme Court held a statute in Illinois which said illegitimate children could only inherit from their mother's estates, violated the Equal Protection Clause. *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). A similar statute in South Carolina was struck down in 1984 in the case of *Wilson v. Jones*. 314 S.E.2d 341, 342-343 (1984).

Trimble can apply retroactively in South Carolina, but only in limited circumstances. In *Mitchell v. Hardwick*, 297 S.C. 48, 51, 374 S.E.2d 681, 683 (1988) the Court addressed the following issue: "whether the prospective only application enunciated in [*Wilson v. Jones*] should be modified to allow limited retroactive application where certain factors are met[?]" The Court in *Mitchell*, modified *Wilson* to allow retroactive application of the *Trimble* decision in the limited circumstances where the following conditions are met:

> (1) innocent persons will not be adversely affected because of their detrimental reliance on the old rule;
>
> (2) the paternity of the child has been conclusively established either by court order or decree issued prior to the death of the father or by an instrument signed by the father acknowledging paternity; and
>
> (3) the estate administration is subject to further resolution.

Mitchell v. Hardwick, 297 S.C. 48, 51, 374 S.E.2d 681, 683 (1988). None of these factors are met in this case. In *Pinckney v. Warren*, 344 S.C. 382, 544 S.E.2d 620 (2001), the Court applied the *Mitchell* factors and imposed strict requirement on proof of paternity.

Applying the *Mitchell* factors to this case, the Appellant fails to establish each condition: (1) innocent persons would be adversely affected if T.E. Campbell's estate were unwound; (2) the paternity of Appellant was not established prior to T.E. Campbell's death; and (3) the estate of T.E. Campbell is not subject to further resolution. Allowing Appellant to unwind the probate of his father's intestate estate would be wholly inconsistent with South Carolina law on this issue.

CONCLUSION

The Circuit Court's Order granting a directed verdict in this case was absolutely proper and should be affirmed based on the rulings of the Circuit Court and the additional sustaining grounds asserted herein.

Respectfully Submitted,

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