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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Teasa Kay Weaver, Master-In-Equity

Unpublished Opinion No. 2024-UP-052 (S.C. Ct. App. filed February 14, 2024)
Trial Court Case No.: 2016-CP-46-00820

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 Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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**PETITION FOR
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Pursuant to Rule 242, SCACR, Petitioner John Edward Vergeldt (hereafter “John”) hereby petitions the Supreme Court or any two justices thereof, for a writ of certiorari to the Court of Appeals to rehear and reconsider issues ruled upon in the Court of Appeals’ decision in this matter, issued on February 14, 2024, which affirmed the master-in-equity’s order granting Vicki Vergeldt, individually and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust a money judgment (hereafter “Vicki”) against John. Petitioner sought rehearing before the Court of Appeals, which was denied by order dated April 11, 2024.

CERTIFICATE OF COUNSEL

Counsel for Petitions certifies that the Petition for Rehearing by the Court of Appeals was made and finally ruled on by the Court of Appeals on April 11, 2024.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in ruling that John did not present or preserve issues regarding the preclusive effect of Judge Kimball's order in the 2014 case, which precluded consideration of the issues on appeal in the instant case? The Court of Appeals ruling contravenes prior Supreme Court precedent regarding issue preservation.

STATEMENT OF THE CASE

John Vergeldt, Jr. deceased, created a trust with numerous amendments executed prior to his death. His revocable trust was created on September 27, 1978 and at the time of the Eighth amendment in 2009, he restated and amended his trust entirely. (R.p.3;¹ pp. 80 -133). The beneficiaries of his trust were his son, Petitioner John Edward Vergeldt, and daughters Patti Vergeldt Downey and Vicki Lynn Vergeldt. (R. p. 4). A Ninth amendment was executed in 2010, (R. pp. 136-138) and a Tenth amendment in 2011. (R. pp. 140-144). The Tenth amendment added a "no contest" clause to the trust specifically excluding as a beneficiary of the trust any person who "objects in any manner to any action taken or proposed to be taken in good faith by the Successor Trustee. . .". (R. p. 144).

The testator died on July 9, 2013. At the time of his death, Petitioner John E. Vergeldt was the co-trustee of the decedent's trust. In his later years, testator's physical agility deteriorated, but his mental acuity was not compromised until late fall of 2012, and in March 2013, Petitioner John E. Vergeldt filed a petition in York County seeking appointment of a guardian for his father. *Id.*

¹ Order of Judge Kimball filed August 31, 2015 in Case No. 2014-CP-46-1956 ("the 2014 case").

“Due to opposition by Vicki, that proceeding was not completed prior to [decedent]’s death.” *Id.* At the time of his death, decedent was living in South Carolina with Petitioner. (R. p. 5).

As found by Judge Kimball in his 2015 order, the siblings “have a poor and strained relationship. Their communications foster acrimony and suspicion.” *Id.* Vicki demanded accountings and claimed John failed to provide them. Vicki initiated an action on February 28, 2014 (“the 2014 action”) seeking limited and purely equitable relief, *i.e.*, asking the Court to determine John’s obligations under the trust since decedent’s death. In his final order, Judge Kimball repeatedly stressed the limited nature of the relief Vicki sought in the 2014 action: “Her prayer only seeks an interpretation of the applicable Michigan statutes and the often-amended Trust agreement.” *Id.*

Vicki’s complaint in the 2014 action and Judge Kimball’s final order in the 2014 included reference to all ten (10) of the trust amendments made by decedent prior to his death. (R. pp. 67-78; pp. 277-292; R. pp. 3 -11). In his final ruling, Judge Kimball struggled to answer only the claims that Vicki that asserted, because they were so limited, and, in actuality, should have included the claims she subsequently asserted in the 2016 action and amendment to the 2016 amendment.

. . . I find that in the posture of Vicki’s prayer for relief, she has not directly challenged John’s actions as Successor Trustee. Her prayer only seeks an interpretation of the applicable Michigan statutes and the often-amended Trust agreement. . . No declaration concerning probable cause of the Successor Trustee’s performance of his duties, as such issue is not presented in this action. . .

(R. pp 10-11).

Vicki filed a motion to reconsider Judge Kimball’s order, but did not appeal it. (R. pp. 392-395. Specifically included in her motion to reconsider, Vicki challenged Judge Kimball’s

express finding that John owned no duty to any beneficiary “until Mr. Vergeldt’s death.”² (R. p. 303; *see also* R. p. 9; Judge Kimball’s order). Judge Kimball’s order, therefore, became the law of the case. *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 1551 (2009), *also citing Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding a family court judge could not overrule the prior unappealed order of another family court judge because it became the law of the case.)

Almost two years later, Vicki filed a second action in Probate Court in York county, in her individual capacity, again seeking only equitable relief, but this time she requested the removal of John as Successor Trustee and she argued the same issue she had raised in the Motion to Reconsider in the 2014, *i.e.*, whether John owed her any duty prior to decedent’s death (R. p. 409, ¶ 15). Case No. 2016-CP-46-0820 (“the 2016 case”). John’s answer raised multiple defenses, including waiver, estoppel, laches and unclean hands and a counterclaim for abuse of process, based on the prior litigation, which was not appealed. (R. pp. 396-404; pp. 620-624, ¶¶ 12-15, 22, 23, 36). Specifically, John pleaded that the 2014 case:

[T]erminated in [John’s] favor, as it resulted in an Order declaring that [John] owed no duties as Successor Trustee of the trust until May 6, 2013, the date the Court concluded the Settlor became mentally incapacitated. . . The Court’s order in the [2014 case] determined that [John] owed no such duties. . . [Vicki] did not appeal the Order.

(R. 401, ¶¶ 52-53).

The 2016 action again sought only equitable relief, *i.e.*, removal of John as successor trustee and injunctive relief. (R. pp. 405-494). Three years later, Vicki’s counsel moved to amend

² Vicki argued in her Motion to Reconsider that “Defendant [John] can be held responsible to her, as a remainder beneficiary of the Trust, for any acts or omissions during [decedent’s] life which damaged her remainder interest in the trust.” (R. p. 393).

the 2016 action to assert a claim for damages. (R. p. 521-523).³ Over John's objection, the trial judge granted the motion, and on June 20, 2019, the 2016 action was amended to include a claim for damages against John. (R. pp. 26-30).

During trial of the 2016 action, John argued:

Judge Kimball ruled that my father became incapacitated and that he was, in fact, in charge of all of his finances until May 6th. . . 2013. So anything prior to that, it's already been ruled, my father was in charge of. So a lot of things that [Vicki's] lawyer are things from 2008 or 2009.

(R. p. 719, lines 14-20).

The expert presented by Vicki in the trial of the 2016 testified she went "as far as 2008 if I felt that was necessary; originally it was like 2009 through December 31, 2016 and I think the litigation was going on then." (R. p. 733, line 24 – p. 734, line 6). The expert's report went back to include time periods when the deceased was still alive. (R. p. 741 line 10 – 17; p. 743, line 3 – 23). The expert included analysis of a CD opened in August of 2008 for \$50,000.00, which was not included in the time frame which for which Judge Kimball has found John to be responsible. (R. p. 745, lines 12-19).⁴ The expert testified John "would have benefited from hiring a bookkeeper or an accountant to keep his information for him" and it would have cheaper than having hired her to reconstruct the accounts. (R, p. 750, lines 13-25).⁵ It was on that basis that

³ The motion to amend followed a motion by John to dismiss the action, which asserted that since John had resigned as Successor Trustee, there was no relief left to be granted. (R. pp. 515-516). Only then, six years after the death of the decedent and five years after Judge Kimball's order establishing the law of the case did Vicki assert a claim for damages against John. (R. pp. 3-11; pp. 26-30).

⁴ Mr. Vergeldt attempted to object to the expert's testimony on several occasions, but on each occasion he was chastised by the trial judge and told he would be required to limit his questioning to cross-examination. (R. p. 736, lines 9-17; p. 741, line 18 - p. 742, line 18)

⁵ As pointed out, much of the criticism of the expert related to payments made to caregivers, which included the time period before decedent died, and had been specifically ruled by Judge Kimball that John owed no fiduciary duty. (R. p. 742, line 21 – p. 746, line 23).

she testified that John “breached his duties under the trust agreement.”) (R. p. 751, lines 13- p. 752, line 7).

During cross, John attempted to point out the time period for which Judge Kimball had ruled he owed a fiduciary duty, but he was again cut off by the Court. (R. p. 757, line 1 – p. 758 line 20) (the expert testified she had considered records back to 2008). The expert confirmed her examination went back to 2008, a period of time for which John was not responsible per Judge Kimball’s order. (R. p. 760, lines 19- p. 761 line 17).

The trial judge ruled in the final order in the 2016 action (R. pp. 31-42) that John owed a fiduciary duty to Vicki well before the decedent passed away and awarded judgment in favor of Vicki against John, which was in direct contravention with Judge Kimball’s order in the 2014 action (R. pp. 3-11), which was unappealed and was therefore the law of the case.

John filed a Motion to Reconsider (R. pp. 631 – 633) and an Amended Motion to Reconsider (R. pp. 635 – 638), both of which raised multiple issues including issue preclusion based on the unappealed order in the 2014 matter. The motions to reconsider also asserted error in the 2020 order allowing an amendment to include a prayer for damages, based again on the finality of the order in the 2014 action. *Id.* Following a hearing, John’s petitions were denied. (R. pp. 46-65). The trial judge erroneously found, on rehearing, that issue preclusion and *res judicata* did not bar Vicki’s claim for damages. Among other things, the trial judge ruled that the issues were not raised in John’s answer. (R. pp. 40-50). This was clear error. As noted above, all these issues were raised in John’s answer. (R. pp. 396-404; pp. 620-624, ¶¶ 12-15, 22, 23, 36). Additionally, except when the trial judge prevented him from making objections, John objected at

trial to consideration of issues that were precluded by Judge Kimball's order in the 2014 matter. (R. p. 719, lines 14-20).

COURT OF APPEALS

On appeal, John asserted in Issue I that the trial judge had erred in allowing Vicki to amend the 2016 complaint to seek damages, when the issue was precluded by Judge Kimball's earlier order in the 2014 order. (Appellant's Final Brief pp. 16-21). After oral argument, the Court of Appeals found that the issues regarding issue preclusion were not preserved. *Vergeldt v. Vergeldt*, Unpublished Opinion No. 2024-UP-052 (Filed February 14, 2024). On rehearing, the Court of Appeals mistakenly ruled that John first raised the issue in his petition for rehearing. As demonstrated above, John has repeatedly and consistently argued during the 2016 litigation that Judge Kimball's order determined that his fiduciary duty to Vicki did not begin until the decedent died, and that John owed no fiduciary duty to Vicki until that time. At no point has John abandoned this argument.

John filed a petition for rehearing in which he pointed out that he sufficiently raised these related issues, even though he did not expressly use the words "issue preclusion" or "res judicata", citing existing Court of Appeals precedent. (Petition for Rehearing filed February 29, 2024). The Court of Appeals requested a return, which was filed on March 15, 2024, and John replied on March 20, 2024, pointing out additional specific pages to the Record on Appeal where the issue was preserved during trial. (R. pp. 1081-1082). The Petition for Rehearing was denied without comment. (Order denying rehearing dated April 11, 2024).

ARGUMENT

This Court has spoken repeatedly and explicitly on the requirements for preserving issues on appeal. *Blanding v. Long Beach Mortgage Co.*, 379 S.C. 206, 665 S.E.2d 608 (2008). "It is

well settled that an issue cannot be raised for the first time on appeal but must have been raised and ruled on by the trial judge” *Id.* While the trial judge overlooked and did not address John’s raising of the issue in his pleadings, during the litigation of the instant case, John repeatedly raised the issue of the effect of Judge Kimball’s order in the 2014 case as barring Vicki’s claim for damages against him in the instant case. *See* specific citations to the record included in the Statement of the Case.

In the Notice of Appeal, John not only appealed the trial judge’s final order and order denying rehearing in the instant case, he also expressly appealed the order that allowed the amendment of the 2016 action to include a prayer for damages. (R. pp. 658-708; Notice of Appeal filed August 2, 2021, which included an appeal of the trial court’s order dated June 19, 2019 and was an interlocutory order not appealable at that time, but is now appealed pursuant to Rule 54(b) and S.C. Code Ann. § 14-3-330(1)).

“The right of appeal arises from and is controlled by statutory law.” *Ex pargé: Capital U-Drive-It Inc.*, 369 SC 1, 6, 630 S.E.2d 464, 467 (2006). Section 14-3-330(1) expressly permits an appeal of an order which would have been interlocutory, and not immediately appealable, when issued, but when joined in appeal from a final judgment, is properly presented on appeal. The Court of Appeals violated § 14-3-330 when it refused to address the issue preclusion and *res judicata* effect of Judge Kimball’s order in the 2014 case, when it was *specifically* appealed as a separate order on appeal. Indeed, the Court of Appeals’ decision ignores the separate appeal, which was argued part-and-parcel of Issue One on appeal, as set forth in John’s brief on appeal.

Vicki argues that dicta in Judge Kimball’s order somehow preserved to her the right to bring a later action to seek damages. It is true that Judge Kimball’s order states: “I make no finding

relating to the liability of any part or the lack thereof, as no claim is stated for breach of any duty, and no relief is sought from the Court to compel the trustee to perform any duties that may be required.” (R. p. 4). Judge Kimball pointed out repeatedly the deficiencies in Vicki’s 2014 pleading, noting that he did not rule upon numerous issues because they were not raised by the pleadings: (1) liability of any party or lack thereof; (2) whether John correctly applied Paragraph Five of the Trust agreement; (3) no challenge was made to the actions of the trust or probable cause to bring this action; and (4) “the propriety of John’s management of trust assets and affairs prior to becoming Successor Trustee.” (R. p. 4; pp. 8-10).

Indeed, under the Rules of Civil Procedure, it could be argued that Vicki’s failure to bring a claim for damages in the 2014 lawsuit precluded any subsequent claim for damages that she had already allegedly sustained when the 2014 action was brought, since decedent was already deceased when the first action was filed. *Lebovitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987). *See also Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 S.E.2d 459 (2012) (Hearn, J, dissenting and concurring).

The Court of Appeals’ refusal to recognize that John preserved the issue regarding the preclusive effect of Judge Kimball’s ruling in the 2014 case, where Judge Kimball went out of his way to expressly state what he was not ruling on, created a different standard of review on appeal limited to John.

This Court does not refuse to address issues under a phantom claim of failure to preserve and the Court of Appeals’ decision in this case is inconsistent with multiple prior decisions of this Court. *See Eades v. Palmetto Cardiovascular and Thoracic PA*, 422 S.C. 196, 810 S.E.2d 848 (2018) (finding that an issue is preserved for appellate review and addressing the merits of the

issue on appeal); *see also Historic Charleston Holdings LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009) (deciding an issue that is preserved for appellate review is in the interest of judicial economy), citing *I'On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d. 716, 724 (2000). Even if Judge Kimball intended to reserve to Vicki the ability to file a second action seeking damages, he had no authority to do so, nor did Vicki request that relief.

John respectfully asserts that the Court of Appeals erred in failing to agree that he preserved (repeatedly) the issue of the preclusive effect of Judge Kimball's order in the 2014 action where, arguably under Rule 18, SCRPC, Vicki could have asserted a claim for damages. Vicki certainly could have asserted a claim for damages in this action when it was filed, but she waited almost three (3) years to move to amend and did so only after John's counsel moved for dismissal of the action and judgment on the pleadings.

CONCLUSION

John respectfully requests that this Honorable Court grant the writ of certiorari, dispense with further briefing, and reverse the decision of the Court of Appeals, with direction to address the issue it found unpreserved. It is undisputed that John preserved this issue at every point that he could. It should not be necessary to brief this issue again. The appellate record is sufficiently complete so that the Court of Appeals can decide this issue if it will look at it on the merits. Indeed, the Court of Appeals has offered no explanation for not doing so.

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Respectfully submitted,

s/ Desa Ballard

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