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Feb 29 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.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant John Edward Vergeldt hereby petitions the Court for rehearing of its Opinion filed February 14, 2024.

1. 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, and further erred in concluding that Appellant raised the issue of res judicata for the first time in his Motion for Reconsideration when the record indicates that Appellant raised this issue before the trial court. In order to be preserved for appellate review, "an issue must be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (citing *Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). However, "a party is not required to use the exact name of a

legal doctrine in order to preserve the issue." *Id*. (citing *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)). "The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Id*. In *State v. Russell*, this Court found an issue to be preserved even though the defendant did not use the exact term "corpus delicti" in his request for a directed verdict. 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). Similarly in the instant matter, while Appellant did not use the term "*res judicata*," he did expressly assert to the trial court that the issues raised in Vicki's Amended Petition had already been addressed and ruled on in prior litigation from 2014. (R. pp. 619-622, ¶¶ 13-24). Appellant specifically objected on the record, "So anything prior to that, it's already been ruled, my father was in charge of. So a lot of things [Vicki's counsel] brought up are things from 2008 or 2009." (R. p. 719, lines 14-20) (Emphasis added). Res judicata bars a second suit where there is "(1) identity of parties; (2) identity of subject matter, and (3) adjudication of the issue in the first suit." *Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011). The record before the Court demonstrates that Appellant objected to Vicki's attempts to recover damages from Appellant when the final order from the 2014 litigation explicitly excluded Vicki's claim for damages and absolved Appellant from any mishandling of the trust assets prior to his father's death in 2013. Appellant also pleaded that the 2014 litigation and the final order resulting from that litigation were a defense to Vicki's Amended Petition. (R. pp. 620-624 ¶¶ 12-15, 22, 23, 36). Accordingly, the Court of Appeals erred in finding that Appellant raised the issue of *res judicata* for the first time in his Motion for Reconsideration and this issue should be addressed on the merits on appeal.

2. The Court of Appeals erred in concluding that the master-in-equity did not fail to apply the correct standard of proof as required by the Trust agreement. On review of a case tried by a master-in-equity, While the Court is not required to disregard the findings of the master-in-equity, "the Court is permitted to determine facts in accordance with the Court's own view of the preponderance of the evidence." *Smith v. Barr*, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct. App. 2007). Upon review of the Record on Appeal, there is more than sufficient evidence to establish that the master-in-equity failed to recognize or apply the heightened standard of proof required by the Tenth Amendment to the Trust agreement as dictated by the settlor. The Tenth Amendment provides, "An individual Successor Trustee's liability is limited to an act or omission committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries." (R. pp. 1266-1267). As set forth in Appellant's briefing, it appears that the Tenth Amendment is consistent with settlor's understanding of the family dynamic and relationship between Appellant and Vicki that he established a heightened burden of proof to determine whether the Trustee could be held liable for acts or omissions related to the administration of the Trust. See *Epworth Children's Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005) ("The primary consideration in construing a trust is to discern the settlor's intent."). It's likely that the settlor, Appellant and Vicki's father, included the Tenth Amendment in the Trust agreement to prevent the very outcome which occurred in this matter. Despite this provision and heightened standard of proof, the master-in-equity specifically found Appellant liable in his capacity as Successor Trustee when there was no evidence in the record that any failures in the administration of the Trust after Appellant became Successor Trustee were made in bad faith or reckless indifference to the purpose of the

trust of the interests of the beneficiaries. (R. pp. 35-39). Following the hearing on Appellant's Motion for Reconsideration, the master found that Appellant "has cited not case or statutory law requiring a higher standard of proof, so the court finds and concludes that the applicable standard of proof is indeed the preponderance of evidence standard." This finding was clear error when the language of the trust, which set forth the standard of proof, was controlling. Accordingly, the Court of Appeals erred in finding that the master-in-equity applied the correct standard of proof.

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)
Haley Hubbard (S.C. Bar No. 103195)
BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANT

February 29, 2024

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v.

John Edward Vergeldt, ... Appellant.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on February 29, 2024, I served a copy of the **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

Beth Cogan, Paralegal

February 29, 2024
West Columbia, South Carolina

Beth Cogan

From: Beth Cogan
Sent: Thursday, February 29, 2024 4:55 PM
To: tpeace@hmp-law.com; Tracy Slice Moore
Cc: Haley Hubbard; Desa Ballard
Subject: (Vergeldt v. Vergeldt 2021-000816) Ltr to COA encl Petition for Rehearing
Attachments: 2024 02 29 Ltr to COA encl Petition for Rehearing.pdf; 2024 02 29 Petition for Rehearing.pdf; 2024 02 29 POS Petition for Rehearing.pdf

Taylor and Tracy,
Please see the attached Petition for Rehearing for the above-referenced matter that is being filed today with the Court of Appeals.

Kindest Regards,
-Beth

Beth Cogan, Paralegal
Ballard & Watson, Attorneys at Law
226 State Street
West Columbia, South Carolina 29169
803.796.9299
803.796.1066 Facsimile
beth@desaballard.com
www.desaballard.com

Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M Watson III
Haley Hubbard

226 State Street West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

February 29, 2024

Via Electronic Mail (ctappfilings@sccourts.org)
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

Dear Ms. Kitchings:

Please find enclosed for filing a **Petition for Rehearing** in the above-referenced matter. Pursuant to paragraph (c) of the Supreme Court's administrative order dated May 6, 2022 ("Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules") a check for the filing fee is being forwarded separately via US mail.

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