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Mar 15 2024
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
TEASA KAY WEAVER, MASTER IN EQUITY

Appellate Case No. 2021-000816
Lower Case No. 2016-CP-46-000820

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

v.

John Edward Vergeldt.....Respondent/Appellant.

RETURN TO PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR and as requested, Respondent Vicki Lynn Vergeldt, individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 ("Respondent"), submits this Return to Petition for Rehearing and states as follows:

1. The Court of Appeals properly ruled Appellant John Edward Vergeldt ("Appellant") was barred from arguing *res judicata* prohibited Respondent from amending her petition to assert damages as the same was not preserved for appellate review since it was not raised to and ruled upon by the trial court. See S.C. Dep't of Transp. V. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E. 2d 903, 907 (2007) (explaining that to be preserved for review, an issue must have been "(1) raised and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity"

(quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002))). As previously argued, Appellant failed to plead *res judicata* in his Answer and Counterclaim as well as in his Response to the Amended Petition for Removal of Trustee and Related Relief. (R. pp. 396-404; 619-629). While Appellant claims he raised *res judicata* by virtue of mentioning the 08.31.2015 Order issued in the first litigation between the parties at the trial of this case and in his responsive pleadings, he mischaracterizes the findings and conclusions of the trial court in said order[1]. (R. pp. 3-11; 719, lns 14-20). Specifically, Appellant claims the trial judge found Appellant was not liable for actions in a previous case for which the master-in-equity found him liable. Id.; (R. pp. 31-45). These statements cannot be construed to raise a defense previously waived under Rule 8(c), SCRCP. Rule 8(c), SCRCP; RIM Associates v. Blackwell, 359 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004). Similarly, it cannot be argued these statements and/or responsive pleadings were specific enough to inform the trial court that it was being raised. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, it must have been raised to and ruled upon by the trial judge to be preserved for review.....Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector"). As a result, the first time the defense of *res judicata* was raised with any particularity was in the Motion for Reconsideration and Amended Motion for Reconsideration (R. p. 631-639). Accordingly, it was improper for the trial court to consider the defense of *res judicata* on the Motion for Reconsideration, and it would have been improper for the Court of Appeals to consider same. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller Construction Co., LLC v. P.C. Construction of Greenwood, 418

[1] Specifically, Appellant's responsive pleadings, generally, contain his denials and admissions that records concerning the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 ("Trust") had been previously provided to Respondent. The turnover of these records was the result of the previous three (3) years of litigation between the parties.

S.C. 186, 791 S.E. 2d 321 (Ct. App. 2016). Assuming *arguendo* that the issue of *res judicata* was properly raised, the same is not applicable in this matter. "Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of prior action between those parties." Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007). Under the doctrine of res judicata, '[a] litigant is barred from raising issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011). (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999)). In order for res judicata to operate as a bar to a lawsuit, the following elements need to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issues in the former suit. Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999). "Because the determination of whether res judicata precludes a subsequent suit cannot be reduced to a formulaic process, we decline to adopt or attempt to define a single standard." Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011) (internal citations omitted). "However, simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subjects of the two actions where the cause of action is not simply the form of the action in which a claim is asserted, but rather the cause of action is the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon." Id. Res judicata does not bar a second action for damages and other relief where it follows a first action that seeks a declaratory judgment. See Robison v. Asbill, 328 S.C. 450, 492 S.E. 2d 400 (Ct. App. 1997). As applied to this matter, the issue of damages related to Appellant's actions as co-trustee and/or successor trustee was not raised in the first litigation, which consisted of declaratory relief, nor was it ruled upon. In fact, the issue of liability

and damages was specifically excluded (R. 3-11). As a result, there was no identity of the subject matter nor was the issue adjudicated between the first litigation between the parties and the present one. Similarly, since the first litigation and during the present one, Appellant resigned his position as successor trustee vesting Respondent with said powers as successor trustee altering the position of the parties. *Res judiciata* did not prohibit the Master-in-Equity from allowing amending the pleadings to assert damages as a result.

2. The Court of Appeals correctly found that Master-in-Equity applied the correct standard of proof. As previously argued and briefed, Appellant, did not set forth a specific standard of review for the Court to apply in this matter; however, the Court of Appeals properly determined that it could determine facts in accordance with its own view of the preponderance of the evidence. See Smith v. Barr, 375 S.C. 157, 160, 650 S.E. 2d 486, 488 (Ct. App. 2007). The Court of Appeals also properly determined that the primary consideration in construing a trust is to discern the settlor's intent which is to be determined from the language of the trust instrument if it is perfectly plain and capable of legal construction. Bowles v. Bradley, 319, 377, 461, S.E. 2d 811, 813 (1995) ("The primary consideration in construing a trust is to discern the settlor's intent."); Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 658, 640 S.E. 2d 480, 485 (Ct. App. 2006) ("In ascertaining the settlors intent if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument."). In such an event, the language determines the force and effect of the instrument. Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 658 (Ct. App. 2006). As applied to this matter, Respondent did not raise any ambiguity in the Tenth Amendment to the Trust during the course of this matter, so it is improper for Appellant to raise the same on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998) Even if it had been properly raised, the record reflects that neither party presented

settlor's intent to create a higher standard of proof by virtue of the language of the Tenth Amendment of the Trust based on family dynamic and, as a result the argument made by Appellant related thereto amounts to speculation[2]. Accordingly, the language of the Tenth Amendment must be considered to limit liability to actions taken by a co-trustee and/or successor trustee to those taken in bad faith and reckless indifference to the purposes of the Trust as set forth in the Tenth Amendment. This would result in a finding and/or conclusion rather than the application of a higher standard of proof. As a result, it was not error for the Court of Appeals to make this determination as to the standard of proof and the record is replete with evidence of Appellant acting in bad faith and in reckless indifference to the purposes of the Trust and Respondent's interest in same.

For the foregoing reasons, the Petition for Rehearing should be denied and the Court of Appeal's decision in this matter affirmed.

HARRELL, MARTIN & PEACE, P.A.

By: _____

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March 15, 2024
Chapin, South Carolina

[2] However, it is interesting that Respondent's testimony indicated the relationship between her siblings was cooperative due to everyone's concerns about their father, the settlor, until Respondent began questioning Appellant's actions. (R. 794-800).

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PROOF OF SERVICE

I, Tracy Slice Moore, an employee with the firm of Harrell, Martin & Peace, P.A., do hereby certify that on March 15, 2024, I served a copy of the Return to Petition for Rehearing of Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust Dated September 27, 1978 in the above captioned case on the following individuals by electronic mail and regular first class mail using their email address and mailing address listed in the Attorney Information System, addressed as follows:

Desa Ballard
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226 State Street
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By: _____
Tracy Slice Moore, Paralegal

March 15, 2024
Chapin, South Carolina

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March 15, 2024

VIA EMAIL to: ctappfilings@sccourts.org
AND REGULAR, FIRST-CLASS MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Vicki Lynn Vergeldt, et al. v. John Edward Vergeldt
Appellate Case No.: 2021-000816
Our File No: 3490.00001/TAP

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Return to the Petition for Rehearing of Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust Dated September 27, 1978 for the above referenced case. As evidenced by the enclosed Proof of Service (with one copy of filing), these documents have been served electronically upon counsel for Appellant as well as by regular first-class mail.

Thank you for your time and attention in this matter. If you have any questions, please do not hesitate to contact our office at the phone number below.

Sincerely,

HARRELL, MARTIN & PEACE, P.A.

Taylor A. Peace, Esq.

Enclosures
cc: Desa Ballard, Esq (*w/ enclosures*)

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