

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Jun 11 2024

S.C. SUPREME COURT

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APPEAL FROM YORK COUNTY  
TEASA KAY WEAVER, MASTER IN EQUITY

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Appellate Case No.: 2024-000775  
Unpublished Opinion No. 2024-UP-052 (S.C. Ct.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.

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RETURN TO PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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Pursuant to Rule 242(f) SCACR, Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Vicki”) herein files this Return to Petition for a Writ of Certiorari to the Court of Appeals in response to the Petition for a Writ of Certiorari to the Court of Appeals (“Petition”) filed by Petitioner John Edward Vergeldt (“John”) on May 13, 2024.

**QUESTIONS PRESENTED**

Vicki does not take issue with John’s Question No. 1 subject to the below arguments and the conclusions made.

## COUNTER-STATEMENT OF THE CASE

John Vergeldt, Jr. (“Settlor”), deceased, is John and Vicki’s father who created the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Trust”). The Trust was last amended in its entirety in 2009 by the Eight Amendment and Restatement of the John Vergeldt, Jr., Revocable Living Trust dated September 27, 1978. (R. pp. 3-11). At the time, John, Vicki, and their sister, Patti, were the beneficiaries. Id. The Trust was amended a ninth time in 2010 and a tenth time in 2010. Id. The Tenth Amendment to Trust Agreement contains a “No Contest” Clause that contains the language referenced by John and goes on to state “Therefore, the precondition of subparagraph (A) above shall not apply to a challenge or contest if there is probable cause for asserting the challenge or contest. As used in this subparagraph, probable cause shall exist if at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.” (R. pp. 1267-1272).

Settlor died on July 9, 2013, and, at the time of his death, John was serving as Co-Trustee of the Trust and thereafter as Successor Trustee until his resignation effective April 30, 2019. (R. pp. 517-520). Prior to Settlor’s passing, John filed a petition with the York County Probate Court seeking appointment as Settlor’s guardian which Vicki opposed and was not completed prior to Settlor’s passing. (R. pp. 3-11).

Soon thereafter, Vicki demanded various financial records from John related to the Trust which was denied and which resulted in Vicki filing an action in the York County Probate Court seeking declaratory relief related to John’s duties as Co-Trustee and Successor Trustee to provide financial records and accountings her. (R. pp. 66-167). The action was removed to the York

County Court of Common Pleas, given Case No.: 2014-CP-46-1956 (“2014 Case”), and subsequently referred to the Honorable S. Jackson Kimball, as Master in Equity for York County. (R. 3-11) The 2014 Case resulted in Judge Kimball issuing an Order filed August 31, 2015 (“2014 Order”) that found Vicki and John have a poor and strained relationship, that their communications foster suspicion and acrimony, and that John was required to provide Vicki with financial records and accountings for the time period in which he served as Successor Trustee. Id. The 2014 Order, based on the relief Vicki sought, was limited to the determination of her rights to receive financial records and accountings and determined, “No declaration concerning probable cause to challenge the Successor Trustee’s performance of his duty is made, as such the issue is not presented in this action. Such determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee.” (emphasis added) (R. p. 11). Judge Kimball also found, “No finding or conclusion in this order shall be deemed to be a determination of compliance, or non-compliance, with applicable law, or the terms of the Trust agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust agreement.” Id. In other words, the 2014 Case, as pled by Vicki and litigated between the parties, was narrowly tailored and limited to the question of John’s duties to provide financial records and accountings. Id. The 2014 Order could not be clearer that Judge Kimball intended to and did leave the door open for Vicki to seek additional relief once (and if) John provided the accountings and financial information Judge Kimball determined he was required to provide. While Vicki filed a Motion to Reconsider, John appears to have taken no action and accepted findings, conclusions, and determinations in the 2014 Order “as is”<sup>1</sup>. (R. 392-395)

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<sup>1</sup> In the Petition, John makes some statement concerning the 2014 Order being the law of the case as it relates to John duties to Vicki. While this may be true in the sense that Judge Kimball’s Order may be the law of the case, which is

After John failed and refused to provide Vicki with financial accountings and records, she filed the underlying action in the York County Probate Court in 2015 which followed a similar track as the 2014 case. (R. pp. 31-42). It was removed to the York County Court of Common Pleas, given C/A No.: 2016-CP-46-00820, and referred to Judge Kimball. Id. In her Petition for Removal of Trustee and Related Relief filed March 16, 2016, Vicki sought the release of accounting and financial records that Judge Kimball already ordered that John was required to provide and sought his removal as Successor Trustee. (R. pp. 405-495). John answered and asserted various counterclaims (R. pp. 396-404). Important to this appeal is John did not raise the defense of *res judicata*. Id.

During discovery in the underlying case and due to John's continued failure and refusal to provide financial records and accountings during discovery, John and Vicki agreed to appoint Kathleen Palinski as the Limited Special Trustee for purposes of obtaining financial records and to perform an accounting, which took approximately a year and a half to complete. (R. pp. 13-19). Ms. Palinski, with John's consent, was authorized to obtain financial records back to 2008 if she believed same to be necessary. Id.

Vicki sought and was granted leave to amend her pleadings by Form 4 Order filed June 13, 2019 to assert causes of action for damages arising from causes of action related to breaches of fiduciary duty, unjust enrichment, and others against John based upon Ms. Palinski's work. (R. p. 23-26). Not long before Vicki was granted leave to amend her pleadings to assert damages, John resigned his position as Successor Trustee as noted above leaving Vicki to take his place. (R. -pp.

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not necessarily on appeal, John is similarly bound by findings, conclusions, and directives set forth in the 2014 Order, including those in which Judge Kimball recognized Vicki was not challenging John's actions based on lack of information. The fact John did not seek to take further action as Vicki did is telling as to his acceptance of the 2014 Order.

517-520). John filed an answer to Vicki's amended pleadings that failed to raise many of the defenses identified in his initial answer. (R. pp. 619-630).

At the trial of the case, John argued on several occasions that the 2014 Order determined that Judge Kimball ruled that Settlor became incapacitated on or around May 6, 2013 and that he owed Vicki no duties prior that date. (R. pp. 719, lines 14-20). As referenced above, this was and continues to be a misunderstanding and/or misrepresentation of the 2014 Order. The trial court subsequently found John, while Co-Trustee and Successor Trustee of the Trust breached his fiduciary duties by making unequal distributions of trust assets to himself, Vicki, and Patti and enriching himself while serving as Co-Trustee and Successor Trustee, and, as a result, Vicki, individually, and as Successor Trustee of the Trust, was entitled to damages in the amount of the Judgment that is the subject of the appeal. Id.

John filed a Motion to Reconsider and Amended Motion to Reconsider in which he, for the first time, raised the issues of *re judicata* and issue preclusion based on the 2014 Order. (R. pp. 631-639). Neither of these affirmative defenses were raised in his responsive pleadings or to the trial court. (R. pp. 396-404, pp. 619-630). To the extent John raised issues surrounding the 2014 Order to the trial court at the final hearing, they were based on his misunderstanding of Judge Kimball's rulings and/or ignored the change in circumstance resulting from his resignation. They similarly were related to his ultimate liability and not raising the affirmative defense of *res judicata*.

After a hearing, the trial court denied John's Motion to Reconsider and Amended Motion to Reconsider on the grounds that he failed to raise the defenses he was then seeking to assert, and, to the extent he did, the 2014 Order did not bar Vicki's claim for damages based on the 2014 Order and the findings contained therein. (R. 46-65). The trial court specifically grounded its decision on the principle that a party may bring a claim for damages after seeking declaratory relief. Id.

## COURT OF APPEALS

John presented two issues to the Court of Appeals. The first issue related to the application of *res judicata* and the second issue related to the standard of proof applied by the trial court. However, a review of the Record on Appeal and the briefs submitted reveals the issues John believes were preserved (ie: the defenses of *res judicata* and issue preclusion (which wasn't raised to the Court of Appeals) were not raised prior to the Motion to Reconsider and/or Amended Motion to Reconsider and were therefore waived. The Court of Appeals determined the issue of *res judicata* was not preserved for review and the trial court applied correct standard of proof in an unpublished opinion filed February 14, 2024. Vergeldt v. Vergeldt, Op. No. 2024-UP-052 (S.C. Court App. filed February 14, 2024).

After a Petition for Rehearing was filed on February 29, 2024, a Return to the Petition for Rehearing was filed March 15, 2024, and a reply was filed March 20, 2024, the Petition for Rehearing was denied on April 11, 2024.

## ARGUMENT

### **I. John has not addressed the reasons or character of reasons why a Writ of Certiorari should be granted.**

Under Rule 242 (b), SCRCP,

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of the reasons will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is dissent in the decision of the Court of Appeals.

- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of appeals conflicts with a decision of the United States Supreme Court.

In his Petition, John claims that the Court of Appeal's ruling contravenes prior Supreme Court precedent regarding issue preservation; however, Question Presented No. 1 does not state under how or under what theory Judge Kimball's 2014 Order has preclusive effect and/or it attempts to expand the express rulings in the 2014 Order as noted above. Instead, John cites allegations in his Answer and Counterclaim filed March 7, 2016 related to his counterclaim of malicious prosecution; however, these allegations were not preserved or restated in his Response to Amended Petition for Removal as Trustee and Other Related Relief filed August 17, 2019 and are therefore waived. Similarly, none of the affirmative defenses raised by John in his initial responsive pleading or thereafter indicate he was raising the defense of *res judicata* or issue preclusion as argued below. Further, the Petition contains no analysis or other explanation of how the other reasons or character of reasons why the Petition should be granted.

As a result, the Petition should be dismissed.

**II. The Petition fails to demonstrate why the ruling by the Court of Appeals was improper.**

**A. John fails to show how the Court of Appeals erred affirming the Final Order in this matter.**

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review....Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.” Similarly, “[i]t is settled that ‘[a]n issue may not be raised for the first time in a motion to reconsider.’” Repko v. County of Georgetown, 424 S.C. 494, 502, 818 S.E. 2d 743, 747 (2018)

(citing Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E. 2d 567, 570 (2009)). Relatedly, “In replying to a preceding pleading, a party shall set forth affirmatively the defenses...*res judicata*...and any other matter constituting an avoidance or affirmative defense.” Rule 8(c), SCRC. “Generally, a failure to plead an affirmative defense is deemed a waiver of the right to assert it.” Plyler v. Burns, 373 S.C. 637, 647 S.E. 2d 188 (2007). *Res Judicata* is an affirmative defense that must be pled at trial in order to be pursued on appeal. RIM Associates v. Blackwell, 539 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004).

In this matter, a review of John’s pleadings reveal that he did not raise the issue of *res judicata* or issue preclusion prior to or at the trial of this matter, and, as a result, the Court of Appeals was correct in its decision same were not preserved for appeal. There is simply no defense or allegation raised in his Answer and Counterclaim filed March 7, 2016 or his Response to Amended Petition for Removal of Trustee and Related Relief and Request for Damages and Disinheritance of Plaintiff filed August 21, 2019 that could be construed to raise it. (R. pp. 396-404, pp. 619-630). Any reference made by John in his responsive pleadings and at the trial of this matter to the 2014 Order are, again, a misrepresentation and conflation of the duty to provide accountings and financial records with the overall duties John owed Vicki, the Settlor, and the Trust during the time for which he served as Co-Trustee and/or Successor Trustee. John, at the trial and thereafter, also ignored the change in circumstances and position between himself and Vicki brought about by his resignation as Successor Trustee. As a result, it was proper for the Court of Appeals to determine the defenses of *res judicata* and/or issue preclusion were not preserved for appeal.

Even if they had been raised, *res judicata* or issue preclusion would have provided no defense considering the 2014 Order determined when and to what extent John owed Vicki a duty

to provide accountings and financial records while Vicki was only a beneficiary. The relief Vicki sought and received in the 2014 Order did not relate to John's other fiduciary duties and breaches thereof. This is the reason for Judge Kimball ordering,

No declaration concerning probable cause to challenge the Successor Trustees' performance of his duties is made, as such issue is not presented in this action. Such determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee...No finding or conclusion in this order shall be deemed to be a determination of compliance or non-compliance with applicable law or the terms of the Trust agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust agreement. (R. p. 11).

In other words, Judge Kimball recognized the scope of the relief sought and the effect a declaratory judgment has on the ability of a party to bring a subsequent claim for damages. See Robison v. Asbill, 328 S.C. 450, 453, 429 S.E. 2d 400, 401 (1997) ("But '[a] declaratory judgment is not res judicata as to matters not at issue and not passed upon.'....The doctrine 'is only a bar to matters which were actually litigated, not those that might have been litigated....Nor is it an absolute bar to subsequent proceedings where the parties are seeking other remedies, even though based on claims that could have been asserted in the original action. When plaintiff in the earlier declaratory judgment action sought only declaratory relief, the plaintiff may later be permitted to seek additional, coercive relief based on the same claim.") (internal citations omitted).

As a result, the Court of Appeals did not err in affirming the Final Order in this matter.

**B. John's's argument related to the Court of Appeals violation of S.C. Code Ann. § 14-3-330 is without merit and not grounds for a Writ of Certiorari**

John also argues the Court of Appeals erred by violating S.C. Code Ann. §14-3-30(1) in failing to consider the order that allowed the amendment of the 2016 action to include a prayer for damages. However, the Opinion of the Court of Appeals specifically addressed same. In particular, it determined, "On appeal, John argues the circuit court erred by (1) allowing Vicki

Vergeldt to amend her petition to seek damages because damages were barred by res judicata...” Vergeldt v. Vergeldt, Op. No. 2024-UP-052 (S.C. Court App. filed February 14, 2024). In its Opinion, the Court of Appeals correctly held “John's argument that the doctrine of res judicata barred Vicki from amending her petition for his removal as successor trustee and other related relief was not preserved for appellate review because John first raised the argument in his motion for reconsideration.” Id.

As a result, the Petition should be dismissed.

**C. The Petition’s argument that the 2014 Order pointed out deficiencies in Respondent’s pleading and that Judge Kimball was without authority to reserve a claim to Respondent is without merit.**

As discussed above, the 2014 Case was solely related to Vicki’s request for declaratory judgment and a determination of John’s duties to provide financial records and accountings to Vicki in light of his failure and refusal to recognize he owed any duties to Vicki. It was only after John and Vicki’s rights were determined that Vicki could proceed with the underlying action and could only seek damages after Ms. Palinski performed her work. Judge Kimball’s recognition of this fact in the 2014 Order is not pointing out deficiencies in Vicki’s pleadings, and his rulings do not have preclusive effect on Vicki’s claim for damages. It is directly in line with South Carolina law. See Robison v. Asbill, 328 S.C. 450, 453, 429 S.E. 2d 400, 401 (1997); Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 512 S.E. 2d 106 (1999); Catawba Indian Nation v. State, 407 S.C. 526, 756 S.E. 2d 900 (2014). Similarly, by stating what he was not ruling on, Judge Kimball did not create a different standard of appeal limited to John, or, at a minimum, John does not state or explain what the purported standard of review on appeal to be and how it applies.

In a similar vein, John argues Vicki could have asserted a claim for damages in the 2014 Case as well as earlier in the underlying case. This argument is without merit, or, at a minimum, ignores Judge Kimballs Order in the 2014 Case, specifically those findings stating,

During the time John handled Mr. Vergeldt's affairs, and after Mr. Vergeldt's death, he provided a modicum of information concerning the status of the Trust to Vicki and Patti. It is apparent that the parties have a poor and strained relationship. Their communications foster acrimony and suspicion. In the course of dealing with Mr. Vergeldt's affairs, Vicki has questioned John's handling of Mr. Vergeldt's affairs and demanded accountings. John has responded by minimal communications and unnecessary assertions of authority that have contributed to Vicki's questioning of John's handling of Mr. Vergeldt's affairs and Successor Trustee. (R. p. 005)

As applied to this matter, the fact that John's continued failure to provide records and accountings in this matter (in apparent violation of the 2014 Order) caused Ms. Palinski to become involved make it clear Vicki did not and could not have sought a claim for damages sooner as she did not have the information needed to know if a claim for damages existed. Also, any argument that Vicki was required to bring a claim for damages in the 2014 Case under Rule 18, SCRC, was not raised to and ruled upon by the trial court or the Court of Appeals and was therefore waived. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E. 2d 731 (1998); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526, S.E. 2d 716, 724 (2000).

**D. The Court of Appeals decision is not the result of a phantom claim of failure to preserve**

The Petition also argues that the Court of Appeals decision is based on a phantom claim of failure to preserve and its decision is inconsistent with multiple prior decisions of the Supreme Court; however, the Petition does not provide analysis or state why its decision is inconsistent with multiple prior decisions of this Court other than to make conclusory statements that the issues raised were preserved; however, as discussed above, they are not.

As this Court is aware, “[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on these issues, and thus provide the Supreme Court with a platform for meaningful appellate review.” Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E. 2d 640, 465 (2011) At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. Wilde Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1988). “Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue...Nonetheless, 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.” Herron, 395 S.C. at 465 (2011). Every ground for appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” Id. “Issue preservation rules ‘prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card, and, via a reversal, give him another opportunity to prove his case.’” Id.

In this matter, and as discussed in depth in the Respondent’s Final Brief, John did not raise *res judicata*, issue preclusion or other similar defense in his responsive pleadings, and they were waived as a result. See Rule 8, SCRPC; RIM Associates v. Blackwell, 539 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004). To the extent John raised any issues at the trial court level, they were not clear as John did not articulate same with reasonable clarity and appeared to argue that Judge Kimball found him to be without fault or liability in matters concerning the Trust prior to May 6, 2013 (which is inaccurate). John’s apparent denial of liability cannot be argued to have been distinctly stated such that it could have been understood by the trial judge as raising *res judicata* or other preclusive defense. The first time these theories were raised with any specificity was in the Motion for Reconsideration and/or the Amended Motion for Reconsideration.

As a result, the Court of Appeals did not rely on a phantom claim of failure to preserve. John simply did not preserve the issues of which he now claims. Accordingly, the Petition should be denied.

**CONCLUSION**

Based on the above as well as the Record on Appeal, the Petition should be denied and/or the decision of the Court of Appeals affirmed.

Respectfully Submitted,

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