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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr. Circuit Court Judge

Common Pleas Case No. 2022-CP-23-01064

(Rehearing Denied January 30, 2025)
Appellate Case No. 2022-000731

IN THE MATTER OF:
Estate of Florence Petrak Mensch,

STERLING RAYMOND MENSCH, III,
individually as former Personal
Representative of the Estate of Florence
Petrak Mensch and in his former
capacity as Agent under a Power of
Attorney for Florence Petrak Mensch,

Appellant,

v.

SHAUNA M. WADDELL, individually
and as Personal Representative of the
Estate of Florence Petrak Mensch and
JOHN R. MENSCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Undersigned counsel certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals on January 30, 2025.

QUESTIONS PRESENTED

1. Does appellate jurisdiction exist where the Probate Court has not yet entered a final, appealable order?
2. If the Probate Court entered a final, appealable order, did the Circuit Court err in holding that Mr. Mensch did not timely appeal that order, even though he timely filed a post-trial motion that tolled the time to appeal?
3. Did the Probate Court have subject-matter jurisdiction to award damages for alleged misconduct that occurred prior to Florence Petrak Mensch's death, when no statute authorizes such jurisdiction?

STATEMENT OF THE CASE

I. Proceedings in the Probate Court

Florence Petrak Mensch died on April 26, 2018. [R. 65-104].

On January 23, 2019, Appellant Sterling Raymond Mensch, III, filed an application for admission of the decedent's Will and Codicil to the Probate Court. [R. 1-9].

On May 15, 2019, Shauna M. Waddell and John R. Mensch filed a Petition against Mr. Mensch. [R. 1-9]. After Mr. Mensch had been removed as Personal Representative of the

Estate of Florence Petrak Mensch, an amended Petition was filed against Mr. Mensch by Shauna M. Waddell, individually and as Personal Representative of the Estate of Florence Petrak Mensch; and John R. Mensch against Appellant Mensch, alleging improper management of the Decedent's assets both before and after her death. [R. 1-9; R. 65-104]. Mr. Mensch denied the claims. [R. 105-116].

Following a summary judgment hearing held on March 17, 2021, the Probate Court entered partial summary judgment on liability as to some claims, in favor of Ms. Waddell and John Mensch. [R. 1-9]. Specifically, the Probate Court entered summary judgment as to liability for breach of fiduciary duty, violation of the Uniform Power of Attorney Act, and conversion. [*Id.*].

The Probate Court held a hearing on the remaining claims, which concluded on September 17, 2021. [R. 10-23].

Via an order filed on January 26, 2022, the Probate Court awarded \$984,763.00 in damages to Ms. Waddell as Personal Representative of the Estate of Florence Mensch on the causes of action for breach of fiduciary duty, violation of the Uniform Power of Attorney Act, and conversion. [R. 10-23]. The Probate Court dismissed all other causes of action. [*Id.* at 11].

On February 2, 2022, Appellant made a motion to alter or amend under Rule 59, SCRCF, which read in pertinent part as follows:

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE PROBATE COURT

C.A. No.: 2018-ES-02854

FILED

FEB 02 2022

GREENVILLE COUNTY
PROBATE COURT

Estate of Florence Petrak Mensch,)
)
 John R. Mench and Shauna M. Waddell)
 Individually and as Personal Representative)
 Of the Estate Florence Petrak Mensch)
 And John R. Mensch)
)
 Petitioner,)
 v.)
)
 Sterling Raymond Mensch, III, Individually)
 As Personal Representative of the Estate of)
 Florence Petrak Mensch and in the former)
 Capacity as Agent under a Power of)
 Attorney for Florence Petrak Mensch)
)
 Respondent.)
 _____)

MOTION TO ALTER OR AMEND

Respondent, Sterling Raymond Mensch, III, Individually as Personal Representative of the Estate of Florence Petrak Mensch and in the former Capacity as Agent under a Power of Attorney for Florence Petrak Mensch (“Respondent”), through his undersigned counsel, move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages.

WHEREFORE, Respondent respectfully requests this Court to alter or amend its January 26, 2022, Order.

[R. 7008].

Without a hearing and without a return to Mr. Mensch’s motion even filed, the Probate Court filed an Order on February 17, 2022, stating that Appellant failed to comply with SCRCP 7(b)(1) and denying the motion to alter or amend “[a]fter careful review of the final Order in its entirety.” [R. 24].

On February 23, 2022, Mr. Mensch served a notice of intent to appeal to the Circuit Court. [R. 9251].

II. Proceedings in the Circuit Court

On February 25, 2022, Respondent moved to dismiss the appeal as untimely. [R. 7011-7013]. Following a hearing, the Circuit Court granted that motion. [R. 28-35]. Its formal order of dismissal was electronically filed on May 17, 2022. [*Id.*].

Mr. Mensch served his notice of appeal on May 27, 2022. [R. 9271-9230].

III. The Court of Appeals' Decision

Via an unpublished memorandum decision, the Court of Appeals affirmed. A petition for rehearing was filed and denied on January 30, 2025.

ADDITIONAL FACTS

I. Probate Court Findings and Conclusions

Included among the Probate Court's findings and conclusions are the following, which are relevant to this appeal:

A. Misappropriation of Funds During the Decedent's Lifetime

In 2010, Decedent named the Appellant Mensch as her agent under her durable power of attorney (“POA”), which continued in effect until her death in 2018. [R. 10-23]. The Probate Court found that Mr. Mensch, during the Decedent’s lifetime, had made 239

improper transfers from the Decedent's financial accounts into his own. [R. 10-23]. Those transfers totaled \$820,382.00. [*Id.*].

B. Other Misconduct

On April 18, 2007, the Decedent purchased a home located in Greenville, South Carolina. The Decedent never intended to live at the property but intended that Mr. Mensch purchase the home at a later date. [R. 10-23]. Mr. Mensch lived in this home for twelve years and subsequently moved out of the home in September of 2020. [*Id.*]. The Estate paid \$10,000.00 for cleaning and repairs to the property so that it was presentable for potential buyers. [R. 10-23].

From 2010 to 2018, Mr. Mensch failed to file tax returns for the Decedent. [R. 10-23]. Additionally, he allowed the Decedent's pension to continue to auto deposit after her death. [R. 10-23]. After Respondent Waddell was appointed as Personal Representative of the Estate in place of Mr. Mensch, she filed an appeal with the Internal Revenue Service over a portion of tax penalties. [R. 10-23]. That appeal remains pending.

C. Award of Damages

The Probate Court calculated the \$984,763.00 in damages and fees owed to the Estate as follows:

- \$546,921.00: misappropriated funds (after credit to Mr. Mensch for the 1/3 portion of the \$820,382 that he would have inherited had the funds not been misappropriated)
- \$24,559.00: failure to itemize Decedent's tax return

- \$40,314.00: 2018 taxes penalties and interest
- \$13,820: other tax penalties and interest
- \$163,420: avoidable income tax due by Mr. Mensch taking more than the required minimum distributions from individual retirement accounts
- \$30,157.00: pension overpayment
- \$10,000.00: cost to estate and clean and repair of Tarleton Way
- \$28,000.00: annual exclusion gift to himself in 2015 and 2016
- \$127,572.00: attorney's fees and costs¹

As to the \$40,314.00 in taxes, penalties, and interests, the Probate Court stated as follows: “This amount is on appeal with the IRS. [Mr. Mensch] is allowed to reduce the total judgment should this amount change as a result of the appeal.” [R. 10-23].

II. The Circuit Court's Order of Dismissal

In its order dismissing the appeal, the Circuit Court provided two reasons why it thought that the Probate Court had entered a final order below that began the clock for an appeal. First, the Circuit Judge found that nothing would be left for the Probate Court to do once the IRS appeal concluded, as the Order already addressed the possibility of a credit. [R. 28-35]. Second, although jurisdictional, the Circuit Court held that because the issue was not raised and ruled upon in the Probate Court, it could not be asserted for the first time on appeal. [R. 28-35].

¹ The Probate Court reduced the requested fee award by \$6,380, which it held were for non-compensable items. [R. 10-23]

As for its reasoning that the appeal was too late, the Circuit Court held that the motion to alter or amend did not give fair notice of the grounds and that the Probate Court could not deal with it fairly. [R. 28-35]. Accordingly, it held that the motion could not toll the time to appeal, thus rendering untimely the notice of intent to appeal to the Circuit Court. [*Id.*].

III. The Court of Appeals' Decision

The Court of Appeals affirmed. It held that the Probate Court had entered a final judgment that triggered the deadline to appeal. According to the Court of Appeals, Mr. Mensch's motion to alter or amend did not toll that deadline to appeal. Finally, the Court of Appeals determined that the Probate Court had subject-matter jurisdiction over the claims for predeath misconduct.

STANDARD OF REVIEW

All issues presented here are jurisdictional ones and thus are subject to the same standard of review. "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties " *Anderson v. Anderson*, 299 S.C. 110, 115 (1989). Accordingly, it can be raised "at any stage of the proceeding," including for the first time on appeal. *Eaddy v. Eaddy*, 283 S.C. 582, 584 (1984). Whether jurisdiction exists "is a question of law for the court...." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104 (Ct. App. 1993) (citation omitted).

ARGUMENT

I. Appellate Jurisdiction Does Not Exist Where the Probate Court Has Not Yet Entered a Final, Appealable Order.

With all due respect to the Court of Appeals, it erred in holding that the Probate Court's order below was "final," a prerequisite to appellate jurisdiction over actions filed in the Probate Court, S.C. Code § 62-1-308(a). Under this Court's precedents, finality is strictly construed. Among other things, an order is not final for the purposes of appeal if the lower court has decided "the applicable law while leaving open questions of fact...." *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335 (1993) (citation omitted).

Open questions of fact remained here, precluding finality. Mr. Mensch is to be liable unless, as a matter of fact, the Internal Revenue Service does not eventually reduce or eliminate the taxes and penalties owing. Not only is it possible for the parties to disagree as to what the Internal Revenue Service ultimately decides—disagreements which the Probate Court would have to resolve—Mr. Mensch surely has a right to be heard over the reasons why any penalty is ultimately withheld with the Internal Revenue Service. Imagine, for example, a scenario in which the penalty is upheld because the Personal Representative withdrew the administrative appeal, missed a filing deadline, or unreasonably failed to seek further view from an adverse ruling from the Internal Revenue Service to the U.S. Tax Court. The sheriff—who must execute final judgments—is not qualified to decide whether an equitable credit would be appropriate. More may yet be required of the Probate Judge; the judgment is not yet final.

II. If the Probate Court Entered a Final Order, Mr. Mensch Timely Appealed Because His Motion to Alter or Amend Tolded the Time to Appeal.

The Court of Appeals likewise erred in holding that Mr. Mensch's motion for reconsideration before the Probate Court did not toll the deadline for appeal.

“The time for appeal for all parties shall be stayed by a timely motion [to alter or amend] and shall run from the receipt of written notice of entry of the order granting or denying such motions.” R. 59(f), SCRCPP. No one disputes that Mr. Mensch timely filed a motion requesting that the Probate Court “alter or amend the Order granting Petitioner damages.” [ROA 7008]. The Court of Appeals held that that motion was, however, void for failing to satisfy the particularity requirement for written motions under R. 7(b)(1), SCRCPP (requiring that written motions “state with particularity the grounds therefor”).

Even under this Court's existing precedent, Mr. Mensch's motion should have tolled the time for appeal even though it failed to comply with R. 7(b)(1), SCRCPP. In *Camp v. Camp*, 386 S.C. 571 (2010), this Court held that a motion to alter or amend that fails to comply with the particularity requirements can still toll the time for appeal. There, the appellant had “not only failed to specify the grounds for the motion for reconsideration, but failed to identify the relief was sought.” *Id.* at 577 (Waller, J., dissenting). But because the trial court held a hearing where the grounds were elucidated and the trial court stated that it denied the motion based upon those arguments, this Court held that “neither party was prejudiced” by the failure of particularity and the trial court was able to “deal with it fairly.” *Id.* at 575. Consequently, this Court determined that the ends of justice would not

be served by “an overly technical” application of R. 7(b)(1), SCRPC in such a circumstance, and the motion tolled the time for appeal. *Id.*

Here, although prejudice and unfairness by the lower court are the focus of the *Camp* analysis, the Court of Appeals here identified neither in this Record, much less correctly so. Because the motion was denied, the Respondent was obviously not prejudiced. Indeed, the Respondent did not even have to incur fees to write an opposition brief; the motion was denied out of hand. And while the Probate Court found no grounds to alter its ruling, it did conduct a “[c]areful review” of the Order in response to the motion. [R. 24]. No unfairness was thus present. If *Camp* is to remain good law, Mr. Mensch’s motion should have been found to have tolled the time to appeal.

This Court may, however, wish to modify the rule in *Camp* to one that is easier to apply, a valuable goal when dealing with jurisdictional issues. *See generally Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (“[A]dministrative simplicity is a major virtue in a jurisdictional statute.” (citation omitted)). Because South Carolina courts, unlike the federal courts, do not recognize plain error, motions to alter or amend are an important part of state procedural practice: “A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. S.C. DOT*, 361 S.C. 9, 24 (2004) (original emphasis). Consequently, this Court held as a bright-line rule that a party can file a post-trial motion, even if it merely rehashes oral arguments that already been ruled upon, because “civil procedure and appellate rules should not be

written or interpreted to create a trap for the unwary lawyer or party....” *Id.* at 25. Requiring a litigant to decide *ex ante* whether an appellate court would deem a post-trial motion to have been merely duplicative of an oral motion “would place a party between the proverbial rock and a hard place.” *Id.* (footnote omitted).

Litigants are currently faced with the same rock-and-a-hard-place choice with respect to the particularity requirement under R. 7(b)(1), SCRCP. They do not know for sure whether a motion is particularized enough to stop the appellate clock until after the trial court has ruled on the motion, usually well after the deadline for an appeal whose deadline was not otherwise tolled. A more straightforward rule would be that any motion purporting to be a motion to alter or amend tolls the appeal deadline. Any violation of the particularity requirement may be a basis to deny the motion, with or without a hearing. *See* R. 59(f), SCRCP (vesting the trial judge with the discretion to decide the motion “without oral argument”). But a failure to comply with the particularity requirement should still toll the time for appeal and thus not preclude the party from raising on appeal any issues that were already adequately preserved.

In short, whether under the existing *Camp* framework or under the bright-line rule proposed here that would be better for the bench and bar, this Court should find that the Court Appeals erred in holding that the motion to alter or amend did not toll the time for appeal.

III. The Probate Court Lacked Subject-Matter Jurisdiction to Award Damages for any Misconduct Prior to Florence Petrak Mensch's Death.

This Petition also presents a novel question of law never addressed in any published authority from either this Court or the Court of Appeals: whether the Probate Court or the Circuit Court has jurisdiction to award damages for pre-death misconduct involving a power of attorney. The unpublished opinion below held that the Probate Court does have such jurisdiction, but that conclusion was wrong.

Under our constitution, the Circuit Court is the state’s general trial court with original jurisdiction in all civil cases except those cases in which exclusive jurisdiction lies in an inferior court. S.C. Const. art. V, § 11. Because “the probate court is not a constitutional court..., the extent of the probate court's jurisdiction is defined by our legislature.” *Judy v. Judy*, 393 S.C. 160, 169 (2011) (citations omitted).

Relevant here—but never addressed in the Opinion below—is the following jurisdictional provision: The “[probate] court’s jurisdiction over matters involving... the survival statute is concurrent with that of the circuit court and *extends only to the approval of settlements... and to the allocation of settlement proceeds among the parties involved in the estate.*” S.C. Code § 62-1-302(b) (emphasis added)).

The survivorship statute, S.C. Code § 15-5-90, overturned the common-law rule that “a personal right of action dies with the person,” *Page v. Lewis*, 203 S.C. 190, 193 (1943), including actions brought in tort and for statutory cause of action, *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 261 (1941) (“Under the common law there was no survival of actions in tort.”); *Claussen v. Brothers*, 148 S.C. 1, 4 (1928) (“[T]his right of

action, being of purely statutory origin, abates upon the death of the wrongdoer, unless some statutory authority is found for its survival.”). Instead of abating an action upon the death of the injured party, the survivorship statute decrees that “[c]auses of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person....” S.C. Code § 15-5-90.

Because almost all the damages awarded against Mr. Mensch were for alleged wrongful acts that occurred prior to the death of the Decedent in 2018, [R. 10-23],² the causes of action involving them depended upon the application of the survivorship statute, otherwise the causes of action would have abated.

For its part, the Court of Appeals determined that jurisdiction existed under the South Carolina’s Uniform Power of Attorney Act, which states that “[t]he probate court has concurrent jurisdiction with the circuit courts of this State over all subject matter related to the creation, exercise, construction, and termination of powers of attorney governed by the provisions of this article.” S.C. Code § 62-8-401. But that statute does not expressly supersede the jurisdiction-stripping provision of S.C. Code § 62-1-302(b), which expressly requires adjudication of claims subject to the survivorship statute to be filed in the Circuit

² Those damages that depended upon the survivorship statute were for predeath conversion of funds (\$546,921 after the 1/3 credit against the \$820,382), failing to have itemized the Decedent's tax returns (\$24,559), tax penalties (\$13,820), avoidable income tax (\$163,420), and annual gift-tax exclusion during the Decedent's lifetime (\$28,000).

Court.³ Given separation-of-powers concerns, grants of jurisdiction must be strictly construed. *See generally Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094-95 (10th Cir. 2005) (“It is well-established that statutes conferring jurisdiction upon the federal courts...are to be narrowly construed in light of our constitutional role as limited tribunals. Thus, if there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, we are compelled to adopt a reasonable, narrow construction.” (citations omitted)). The Court of Appeals, however, took the opposite approach, expansively construing S.C. Code § 62-8-401.

While there is a forum to award damages from any predeath misconduct, that forum was not the Probate Court. For the benefit of the bench and bar, and to respect the General Assembly’s jurisdictional prerogative over the limits of jurisdiction for the Probate Court, this Court should grant this Petition and reverse the judgment below.

CONCLUSION

This Court should grant this Petition and reverse the judgment of the Court of Appeals.

Dated this 3rd day of March, 2025

Respectfully submitted,

³ Had this action been filed in the Circuit Court, as required, the finality problem with respect to the outstanding tax liability, addressed in Issue 1, would not have delayed appellate review of the grant of summary judgment on the other items. *See* S.C. Code § 14-3-330(1) (allowing interlocutory review of “[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas”).

STERLING RAYMOND MENSCH, III

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