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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

Appellate Case No. 2025-000386

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.

RESPONSE TO MOTION FOR FEES AND COSTS

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s/ Tyler E. McLeod
Tyler E. McLeod (101309)
Knox L. Haynsworth, III (010275)
106 Williams Street
Greenville, South Carolina 29601
Telephone: (864) 271-7424 ext. 105
Facsimile: (864) 271-3192
tmcleod@bmemhlaw.com
Attorney for Respondent

BACKGROUND

Litigation between family members in this matter began years ago when Appellant, Sterling Mensch, III, pursuant to a power of attorney granted to him by his mother, Florence Mensch, began to steal from her. Appellant's siblings, Respondents Shauna M. Waddell and John R. Mensch filed a petition against him on May 15, 2019 and had Appellant removed as personal representative of their mother's estate. After a four-day trial in probate court, an order was issued on January 26, 2022 awarding $984,763.00 in damages against Sterling Mensch, III.

ARGUMENT

1. **Appellant should not be entitled to fees and costs after both the Circuit Court and the Court of Appeals ruled for Respondents before the South Carolina Supreme Court issued the decision in the case of *Swing vs. Swing*, clarifying when a Rule 59(e) motion tolls the time to appeal.**

Oral arguments were held in the South Carolina Court of Appeals on September 24, 2024. The Court of Appeals filed their decision on November 13, 2024 in which they affirmed the Circuit Court's decision dismissing the appeal as untimely because the Rule 59(e) motion was defective under Rule 7(b)(1) and, thus, did not stay the deadline to appeal. The Respondents won in probate court, circuit court and at the court of appeals. After the court of appeals issued their decision on November 13, 2024, the South Carolina Supreme Court issued the decision of *Swing v. Swing* on March 12, 2025. 445 S.C. 340, 914 S.E.2d 158 (2025). The Supreme Court reversed the Court of Appeals on the basis of their ruling in *Swing v. Swing* which was decided *after* the Court of Appeals issued their opinion. "Thus, even a procedurally improper motion stays the time for the notice of appeal if it is served within ten days, unless the situation fits one of two limited exceptions. As we specifically noted in *Swing*, Rule 59(e) motions that are procedurally improper under Rule 7(b)(1) are not among the exceptions." *Mensch v. Waddell*, Op. No. 2025-MO-037 (S.C.Sup.Ct. filed July 2, 2025). Given that the South Carolina Supreme Court decision in this case was based

on newly decided, or at least newly clarified, law, the Appellant should not be entitled to fees and costs.

2. **The claim for attorneys fees and costs by Appellant is particularly unconscionable given the fact that Appellant has not paid a single cent of the $984,763.00 that he stole first from his mother, then from his mother's estate, and was ordered to pay on January 26, 2022.**

Granting fees and costs to Appellant would amount to a slap in the face to Respondents who had their entire inheritance stolen from them by Respondent. Respondents are still having to pay attorneys' fees to respond to frivolous appeals and the Estate owes substantial amounts to the IRS due to Sterling Mensch's liquidation of Decedent's retirement account. Rather than attempt to do the right thing and pay any amount back to the Respondents, Appellant continues to tie the case up with frivolous appeals in an attempt to avoid fairly and adequately compensating his mother's estate for his misdeeds. In fact, the order from the probate court states that "[t]hese are just the damages that Petitioners have been able to discover from [Appellant] who has lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations." Prob. Ct. Order p. 12. The actual damages to Florence Mensch's Estate were $273,460.50 higher than the judgment amount, which represents Appellant's one-third (1/3) share under the Will of Florence Mensch. Appellant actually received his inheritance under the Will while Respondents have dealt with extensive litigation in an attempt to collect any inheritance.

More concerningly, shortly before the trial of this matter it was discovered that Appellant liquidated his T. Rowe Price account of $267,105.00 between April 1, 2021 and June 30, 2021. Counsel for Respondents filed a Preliminary Injunction/Temporary Restraining Order at which time Counsel for Appellant responded via email to Judge Faulkner which is attached hereto and

incorporated herein as Exhibit A. In that email, Appellant's Counsel stated that "Moreover, despite Petitioner's most recent unfounded allegations, the funds allegedly used by Respondent, which gave rise to Petitioner's most recent filing, are in fact sitting safely within the IOLTA account of the Law Offices of Truluck Thomason, LLC." With the knowledge that Appellant's funds were in the IOLTA account of Truluck Thomason, Judge Faulkner issued the January 26, 2022 final order imposing a constructive trust over all of Appellant's non-exempt property "of whatever type, **wherever located, and however titled.** This remedy is appropriate as a result of his deceitful, devious, willful, wanton and careless actions set forth above." Prob. Ct. Order p. 13 (emphasis added). Constructive trusts are raised whenever necessary to prevent injustice, such as in this case where funds that rightfully belong to Respondents are sitting in Truluck Thomason's IOLTA account per the email attached hereto and incorporated herein as Exhibit A.

3. **The entire appeal was set for a hearing in circuit court, and therefore Respondents correctly requested that Appellant prepare a complete and full record on appeal.**

Appellant appealed the probate court order to the circuit court, at which point Respondents filed a motion to dismiss. Upon appeal from probate court to circuit court, a hearing in circuit court is set automatically on the merits of the appeal. Given that Respondents were unable to know whether only the motion to dismiss was being heard or if the entire appeal was going to be heard, their designation of the matter included materials needed for the entire appeal. While the record is voluminous, Appellant was appealing issues such as the damages award, constructive trust, and attorneys' fees award. In order to review those awards, the appellate court would need the full record on appeal.

4. **Costs should only be allowed as ordered by the Supreme Court pursuant to Rule 242(j)(1), SCACR.**

"We grant Mensch's petition for a writ of certiorari only as to whether the appeal to circuit court was timely, dispense with briefing, reverse the court of appeals **on that issue,** and remand to

the circuit court." *Mensch v. Waddell*, Op. No. 2025-MO-037 (S.C.Sup.Ct. filed July 2, 2025) (emphasis added). Given that the effect of the decision of the Supreme Court was reversing the lower court in part, rather than reversing the judgment of the lower court or tribunal, costs "shall be allowed only as ordered by the Supreme Court." Rule 242(j)(1), SCACR. The judgment on appeal has not been reversed as Appellant contends and as required by Rule 222, SCACR. Rather, the Supreme Court reversed on the issue of whether or not the appeal was timely and remanded for consideration of the merits of the appeal. Therefore, the Supreme Court may, but is not required to, order costs.

5. Even if Appellants were entitled to costs on appeal, they would not be entitled to costs under both SCACR 222 and SCACR 242.

As discussed immediately above, Rule 242, SCACR, is applicable to this case. The appeal has neither been dismissed nor affirmed, so Rule 222, SCACR is inapplicable to this case. Appellants certainly would not and should not be entitled to recover double under both rules.

a. Costs under Rule 242, SCACR

Appellant incorrectly argues for costs pursuant to Rule 222, SCACR. Rule 222, SCACR, is not applicable because the appeal has not been dismissed and the judgment on the appeal has not been affirmed. The costs allowed under Rule 242(j), SCACR, when a writ of certiorari has been granted are: (1) the filing fee paid, (2) the cost of printing the Appendix, (3) the cost of printing the party's brief(s), and (4) the additional attorney's fee amount set by the Supreme Court of $2,500.00. Rule 242(j), SCACR. Principles of law and equity should prohibit any recover of fees by the Appellant, however, even if the Appellant were entitled to some amount of fees and costs it would be significantly less than the claimed amount of $22,999.67 which Appellant's counsel swore to under oath.

b. Paralegal services for preparing the record on appeal are not an allowed cost under the SCACR and should not be allowed.

Rule 242(j)(2) explicitly states that "[t]he allowance of additional costs will generally not be allowed except in the most extraordinary circumstances." Rule 242(j)(2), SCACR. Paralegal services for preparing the record on appeal are not an allowed cost and should not be allowed as an additional cost. There is no "most extraordinary circumstance" present in this case or argued by the Appellant.

c. Although Counsel for Appellant swore so under oath, Appellant did not pay a filing fee twice and should not recover the filing fee or the attorneys fees amount twice.

Again, if ordered by the Court, Appellant is only entitled to recover under Rule 242, SCACR, not Rule 222, SCACR. Appellants attempts to "double dip" and recover a single filing fee in the amount of $250.00 twice and the allowable attorney's fees in the amount of $2,500.00 twice is not only dishonest, but particularly alarming given the context of this case.

d. Attorneys fees and costs should not be awarded in this case due to the behavior of the Appellant.

Appellant should not be rewarded in the context of his behavior in this case and the failure to repay any of the damages awarded against him. In this case, Appellant was power of attorney for Florence Mensch and then personal representative for the Estate of Florence Mensch and abused the fiduciary relationship to completely drain her assets. "He engaged in repeated action of civil theft for 8 years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, etc." Prob. Ct. Order p. 13.

CONCLUSION

The family of Florence Mensch has attempted for years now to recover from Sterling Raymond Mensch, III the clear and devasting financial harm caused by his actions. Appellant has

at every opportunity attempted to obscure and drag out the judicial process sought by the Estate to remedy the damages caused. To award any costs and fees against Respondents would be a colossal injustice and is certainly not deserved by Appellant who, in the words of the trial judge, "lied to the Court, lied to his siblings, lied by omission to GE Pension and BOA, failed to cooperate with his first attorney, refused to obey Court Orders, failed to cooperate in discovery, and failed to produce documentary evidence or witnesses to support his written allegations." Prob. Ct. Order p. 12. As a result, the trial judge imposed a constructive trust over all of Appellant's non-exempt property and stated that "[t]his remedy is appropriate as a result of his deceitful, devious, willful, wanton and careless actions set forth above." Prob. Ct. Order p. 13. To award any fees and costs to Appellant would be a slap in the face to Respondents and a miscarriage of justice.

Respectfully submitted,

BROWN, MASSEY, EVANS,
McLEOD & HAYNSWORTH, LLC

s/ Tyler E. McLeod
Tyler E. McLeod (101309)
106 Williams Street
Greenville, South Carolina 29601
Telephone: (864) 271-7424 ext. 105
Facsimile: (864) 271-3192
tmcleod@bmemhlaw.com
Attorney for Respondents