

RECEIVED

Oct 24 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Case No. 2022-001602

Rene S. Wells and Wilson Shealy, Jr.,
as Co-Personal Representatives of
Wilson Shealy, Sr.,

Respondent,

v.

David Shealy,

Appellant.

David Shealy,

Appellant,

v.

Rene Shealy Wells, Wilson Shealy, Jr.,
and Mimi Shealy,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

TOBIAS G. WARD, JR., PA

s/ J. Derrick Jackson

Tobias G. Ward, Jr., S.C. Bar No. 5826

J. Derrick Jackson, S.C. Bar No. 15192

Post Office Box 50124

Columbia, South Carolina 29250

(803) 708-4200

Attorneys for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
REPLY TO COUNTERSTATEMENT OF THE CASE.....	1
ARGUMENTS.....	2
I. REPLY TO ARGUMENTS THAT APPELLANT’S CLAIMS WERE TIME BARRED.....	2
II. REPLY TO ARGUMENTS THAT APPELLANT FAILED TO PRESENT ANY EVIDENCE OF HIS COUNTERCLAIMS AGAINST HIS SIBLINGS.	4
A. <i>Respondents unfairly characterize Appellant’s property lists.</i>	4
B. <i>Reply to arguments against conversion.</i>	8
C. <i>Reply to arguments against civil conspiracy.</i>	9
D. <i>Reply to arguments against negligence.</i>	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

CASES

<i>Hadfield v. Gilchrist</i> , 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000).....	10
<i>Paradis v. Charleston Cnty. Sch. Dist.</i> , 433 S.C. 562, 861 S.E.2d 774 (2021)	10
<i>Todd v. South Carolina Farm Bureau Mut. Ins. Co.</i> , 276 S.C. 284, 278 S.E.2d 607 (1981)	10
<i>Weinberg v. Wallace</i> , 314 S.C. 183, 442 S.E.2d 211 (Ct. App. 1994).....	8

STATUTES

S.C. Code Ann. § 62-3-803(a)(1) (2014).....	2, 3
---	------

RULES

Rule 40(j), SCRCP	2
Rule 56(e), SCRCP	7

Appellant David Shealy, in reply to the Respondents' Brief, replies as follows:

REPLY TO COUNTERSTATEMENT OF THE CASE

The Appellant reasserts the Statement of the Case and Facts set forth in Appellant's Initial Brief.

The Respondents state as facts matters which are contested, denied by David Shealy ("David"), or have not been proven. David denies he has ever taken money from his father and denies that he ever threatened his father with harm. (R. p. 396, ¶ 17). As set forth in his Amended Answer, David alleges that he lived with, cared for, and otherwise took personal and loving care of his elderly father, the Plaintiff, for the vast majority of his adult life. (R. p. 323, ¶ 6).

Important context is missing from the Respondents' counterstatement of the case. Prior to this civil action, the Appellant David Shealy and his father, Wilson Shealy, Sr., had a close personal relationship spanning David's entire life. (R. pp. 395-397, ¶¶ 5, 7, 17). David Shealy resided on and off for over 50 years at the real property (the "Real Property") that Wilson Shealy, Sr. rented from SCE&G, now Dominion Energy ("Dominion"). (R. p. 395, ¶ 5). During those more than 50 years, David Shealy communicated regularly with his father on the phone and by visiting his home on the Real Property. (R. p. 395, ¶ 7). David Shealy and his father acquired airplanes, cars, antiques, and other items, which they both stored at the Real Property. (R. p. 324, ¶ 11; R. p. 67, ¶ 3; R. p. 401, ¶ 12). David Shealy's collection of personal property (the "Claimed Property") was intermingled with his father's own personal property kept at the Real Property. (R. pp. 333-336). The Real Property is a large tract of land, and property belonging to David Shealy and now the Estate of Wilson Shealy, Sr. is stored in a hangar, "warehouse," two barns, multiple tractor trailers, and other buildings and structures there, as well as outside. (R. pp. 69-84). Wilson Shealy, Sr. allowed David Shealy to store his personal at the Real Property, and before this civil action, Wilson Shealy, Sr. never indicated to David Shealy

that the Claimed Property could not be kept on the Real Property or that David should pay storage fees. (R. p. 325, ¶ 21). Based on David’s close personal relationship with his father and this background, David Shealy believes this civil action was instigated by his siblings, the Respondents, on behalf of his father. (R. pp. 396-397, ¶¶ 17). David’s siblings held their father’s power of attorney since 2011, yet they now claim in their lawsuit that their father placed special trust in David. (R. p. 376).

This dispute is over an extensive amount of Claimed Property, (R. pp. 69-84), which David Shealy acquired that is intermingled with other property belonging to the Estate of Wilson Shealy, Sr. on a large tract of land (R. pp. 82-84), where David Shealy resided with his father for over 50 years.

As will be discussed in the reply to the argument about the personal property “lists” David made a strategic mistake by agreeing to the July 2018 Consent Restraining Order and Injunction, (R. p. 53), which was “mutual” but had the practical effect of keeping David from accessing his personal property and records stored in the property for years while the Plaintiffs enjoyed unfettered access to the property.

ARGUMENTS

I. REPLY TO ARGUMENTS THAT APPELLANT’S CLAIMS WERE TIME BARRED.

The Appellant reasserts the arguments in its initial brief that an action which was filed prior to the decedents death and stricken by consent under Rule 40(j), SCRCP is a “pending action” not subject to the nonclaim statute, S.C. Code Ann. § 62-3-803(a)(1), and that disputes regarding the title of assets alleged to be included in an estate are not “claims against the decedent’s estate” covered under § 62-3-803(a)(1) of the Probate Code. See argument heading 1, subheadings A and B of Appellant’s Initial Brief.

Respondents place an undue emphasis in their brief on trying to show that Rule 40(j) affects a dismissal of an action; rather than the word “pending,” which is actually used in the nonclaim statute, S.C. Code Ann. §62-3-803(a)(1), and discussed in Appellant’s Brief. This creates some potential issues. For example, assume that Shealy did file his claim in probate court and also restored his case in circuit court. Shealy would potentially have the same claims pending before two different courts. Surely this is not what the nonclaim statute was intended to create.

Respondents further argue that Appellant misconstrued the purpose of the nonclaim statute as “not solely to prevent stale claims from being brought”. (Resp. Br., p. 9). The Appellant does not disagree with this, but notes the Respondents’ argument that “a primary purpose” is the speedy settlement of the estates of deceased persons in the interests of creditors, heirs, etc. (Resp. Br., p. 10) is disingenuous. Appellant notes that the Plaintiff-Respondents were the ones who restored this case to the active docket and waited two months after the deceased father passed away to restore the case. If speedy settlement were the true goal, why wait?

Respondents also resort to hyperbole arguing “a list that could conceivably include actions ‘pending’ anywhere in the country.” (Resp. Br., p.12). The Respondents were fully aware of this case and consented to it be stricken under Rule 40(j) and also were the ones who moved to restore the case after waiting for the one-year period to pass. This is not a hidden list case.

Respondents’ arguments that the Appellant’s claims do not concern title to specific assets ignore Shealy’s affidavit, (R. p. 66), the Restraining Order, (R. p. 53; R. p. 31), and the multiple property lists argued over by the parties, (R. p. 69; R. p. 337; R. p. 363; R. p. 368). It also ignores Shealy’s request to have an independent inventory of the property. (R. p. 333). Much of

Respondents' brief is dedicated to arguing Shealy has been inconsistent in his lists of personal property owned. As will be argued later, Shealy provided the best evidence he could as to title to assets of specific property without being allowed access to the property.

Furthermore, how is the court going to determine whether or not specific property has been converted without determining the title to that property? Finally, it should be noted that the Plaintiff alleged in the Complaint that David has stored personal property and seeks to sell that property and also asks this court to determine that title to "disputed property" should be in Wilson's name. (R. p. 407). If the court determines that the property is David's, does he have no recourse?

II. REPLY TO ARGUMENTS THAT APPELLANT FAILED TO PRESENT ANY EVIDENCE OF HIS COUNTERCLAIMS AGAINST HIS SIBLINGS.

A. Respondents unfairly characterize Appellant's property lists.

In this case, not only did the trial court fail to consider the record and all inferences in the light most favorable to David Shealy as the non-moving party, but further inquiry into the facts of the case is desirable to clarify application of the law.

Further inquiry into the facts is both desirable and fair in this case because of the circumstances which prevented David Shealy from producing a complete inventory and accounting of his Claimed Property before the trial court's Order for Summary Judgment. The Plaintiff included in this civil action a request "[f]or an order allowing the sale of David's Personal Property located on Wilson's Property" and "[f]or an order determining that the Disputed Property is Wilson's and should rightly be titled in Wilson's name." (R. p. 407). Only days after David Shealy received notice of this civil action and appeared in the case, David Shealy was barred from entering the Real Property and accessing his Claimed Property by the Consent Order for Restraining Order and Preliminary Injunction (the "Preliminary Injunction")

entered on July 23, 2018. (R. p. 53). As a term of the injunction, David Shealy was given an opportunity to provide a list of the Claimed Property that he was barred from accessing, which he filed with the trial court shortly thereafter on July 25, 2018 (the “First List”). (R. p. 368). However, David Shealy’s exclusion from the Real Property prevented David from providing an exhaustive inventory of his claimed property, and later prevented David from providing receipts and other evidence of his ownership of some specific Claimed Property. An identical copy of the “Claimed Property” list filed on July 25, 2018, was attached as an exhibit to David Shealy’s Third Party Complaint. (R. p. 363).

On September 9, 2019, David Shealy filed a motion to modify the Preliminary Injunction to allow an independent inventory and accounting conducted by video of the Claimed Property. (R. p. 333). David Shealy incorporated as an attachment to the motion a second list (the “Second List”) of Claimed Property together with and referencing a satellite image of the Real Property with locations of Claimed Property circled and numbered. (R. p. 337). The Second List was not an extensive list of Claimed Property, but an exhibit on David Shealy’s Motion to Allow an Independent Inventory and Accounting, showing the approximate locations of Claimed Property on the Real Property. The Second List includes numbered locations that house items of Claimed Property that would need to be inventoried and accounted for. (R. p. 337). On October 25, 2019, with trial looming, David Shealy filed a motion with Judge Spence (who entered the original restraining order) to lift or modify the restraining order to conduct an inventory to “determine what property is property of the plaintiff and what property is property of the Defendant.” (R. p. 331).

On November 9, 2019, the trial court modified its original Preliminary Injunction and provided that “a single inspection may occur at a time jointly agreeable to the Plaintiff and

Defendant.” (R. p. 33, ¶ 3). The parties never agreed to a third-party inventory and accounting. The case was taken off the active docket under Rule 40(j), SCRCRCP on February 28, 2020. (R. p. 26).

After the case was restored, on July 22, 2022, David Shealy filed a second motion to modify the Preliminary Injunction to allow him to physically enter the property during an independent inventory and accounting; the trial court denied that motion. On August 1, 2022, David Shealy filed an affidavit and attached a third, more detailed list of Claimed Property (the “Third List”) in anticipation of the upcoming hearing on summary judgment. (R. p. 69). The Third List was not a wholly new list, but instead elaborated on the numbered items in the Second List, naming specific items of property housed in the numbered locations. (R. pp. 72-81; R. pp. 337-340). The Third List included the same marked-up map from the Second List. (R. p. 82; R. p. 341).

Considering all of these facts, which prevented David Shealy or an independent third party from inventorying and accounting David’s Claimed Property, and David from providing more evidence of his ownership of the property, further inquiry in this case was desirable to clarify application of the law, and summary judgment should not have been granted as to David Shealy’s third party claims.

Additionally, David’s Shealy set forth facts sufficiently specific to support each of his third-party claims for conversion, civil conspiracy, and negligence and survive summary judgment. The Respondents argue in their brief that David Shealy had an “ever-changing list of personal property” and that David’s affidavit of August 1, 2022, attesting to ownership of Claimed Property, was insufficient in presenting “specific facts establishing a genuine issue for trial.” (Resp. Br., pp. 15-16).

Rule 56(e) requires that affidavits: “[1] shall be made on personal knowledge, [2] shall set forth facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Rule 56(e), SCRCp.

In this case, David Shealy’s statements regarding Claimed Property were made on his personal knowledge, admissible in evidence, and David was competent to testify about his statements contained in his affidavit. David Shealy’s statements and incorporated Third List of Claimed Property provided in his August 1, 2022, affidavit was not contradictory, as the Respondents claim, with his prior statements or lists of Claimed Property. As detailed above, David Shealy filed three unique lists of Claimed property with the trial court. The First List was completed quickly within days of his appearance in the action and David’s exclusion from Real Property. It was completed before David Shealy had reasonable time to compile a complete inventory and accounting of his Claimed Property or evidence supporting ownership of each specific item of property. The Second List, which was incorporated as an exhibit to the September 9, 2019, Motion to Allow an Independent Inventory and Accounting, did not contain exactly the same items of Claimed Property, but was attached to identify approximate locations where David Shealy recalled Claimed Property was located on the Real Property that would need to be visited for an independent inventory and accounting to be taken. The Third List of Claimed Property filed with David’s affidavit on August 1, 2022, was more detailed and extensive than prior lists, and filed after the parties had failed to agree to an independent inventory and accounting of the Claimed Property and after David’s second July 22, 2022, request to have the Preliminary Injunction modified was denied by the trial court. While not as detailed as a complete independent third-party inventory and accounting of the Claimed Property, the Third List of Claimed Property alleged specific facts concerning David Shealy’s ownership of personal

property that should have been properly considered in the light most favorable to the non-moving party during the hearing on summary judgment.

David Shealy's sworn statements in his affidavit and attached list of Claimed Property were not contradictory with David's prior filings with the court, as the Respondents allege in their Initial Brief, but were necessarily more detailed in the context where a proper inventory and accounting had not yet been conducted and a hearing on summary judgment was imminent. David Shealy's statements and property claims were based on personal knowledge and admissible in evidence, and David was competent to testify to them under oath, according to Rule 56(e), SCRPC.

Therefore, under Rule 56, SCRPC and South Carolina law outlined above, the trial court erred in not considering the record and all inferences in the light most favorable to David Shealy as the non-moving party, including the facts and inferences in the David Shealy's affidavit and incorporated list of Claimed Property.

For the reasons outlined in the Appellant's Initial Brief, David Shealy alleged sufficient facts in his pleadings and affidavit to create genuine issues of material fact as to his third party causes of action for conversion, civil conspiracy, and negligence.

B. Reply to arguments against conversion.

With respect to conversion, a plaintiff must show "the unauthorized assumption and exercise of the right and ownership over the goods or personal chattels of another, to the alteration of the condition or the exclusion of the owner's rights without permission or cause." *Weinberg v. Wallace*, 314 S.C. 183, 186, 442 S.E.2d 211, 212 (Ct. App. 1994). In this case, David Shealy alleged with specificity in his sworn Affidavit of August 1, 2022, (R. p. 66), and the incorporated exhibits, including the Third List of Claimed Property, (R. p. 69), along with the

Compliant and other pleadings, the Respondents' unauthorized exercise of the right and ownership over David's Claimed Property to the exclusion of David's rights without permission.

In his affidavit of August 1, 2022, David Shealy describes his cars which have been sold for scrap, his guns which have been moved, and a comprehensive auction during which the Plaintiff-Respondent and Third-Party Defendant-Respondents planned to sell a substantial amount of personal property including airplanes, airplane parts and various other items, some of which are claimed by Appellant. (R. pp. 66-68).

Specifically, David Shealy provides an extensive list of his claimed property attached as "Exhibit A" to the affidavit of August 1, 2020. (R. p. 69). David Shealy also attests to ownership of a backhoe and trailer which his father sold to Wilson Shealy, Jr. for Violet Shealy Properties LLC, and bills of sale are included as "Exhibit B". (R. p. 85). "Exhibit C" to the affidavit is David Shealy's vehicle ownership records with the South Carolina Department of Motor Vehicles. (R. p. 87). David Shealy states in his affidavit that he is "informed and believe[s] that several vehicles were sold by or on behalf of the Plaintiff and third-Party Defendants for scrap in May 2018." (R. p. 67, ¶ 9). "Exhibit D" contains records and receipts from Prosperity Metal Recycling, Inc., a scrap company which accepted cars for scrap at that time. (R. p. 148). David Shealy further attests that some of his personal property was listed in an auction that the Third-Party Defendant-Respondents hired Starman Bros. Auctions to host on August 12, 2022. (Exhibit E). (R. p. 162).

Respondents' arguments unduly increase the standard of proof required of a litigant to withstand summary judgment and oversimplify the proof David Shealy provided.

C. Reply to arguments against civil conspiracy.

The Appellant reasserts the arguments in his initial brief. The Appellant further notes that Respondents rely heavily on *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284,

278 S.E.2d 607 (1981). While Respondents properly acknowledge that *Todd* was overruled, Respondents state it was *on other grounds*. However, some of the quotes in Respondents' brief seem to conjure up the special damages requirement which the court eliminated in *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021). Appellant does not believe that he is precluded from alleging as overt acts actions which may also give rise other causes of action.

As Justice Kitteridge notes in his concurrence in *Paradis*, *Todd* is more correctly viewed as an election of remedies case. *Id.* at 577, 861 S.E.2d at 782. Shealy should be allowed to prove his claim for civil conspiracy but will be limited to a single recovery for the same wrong.

Respondent also misconstrues Appellant's reference to the consent injunction which is obviously a lawful act. The point is that there is evidence, if viewed in the light most favorable to the non-moving party, that the Plaintiffs used the injunction to prevent David from having access to the property while disposing of personal property David claims belonged to him.

D. Reply to arguments against negligence.

Appellant realleges his argument set forth in the initial brief. Respondents manufacture elements for constructive bailment which do not exist. When Respondents took exclusive possession of the real property containing David's property and denied David access to retrieve his property this created a constructive bailment like the towing company impoundment yard. There does not have to be an express agreement and it can arise by operation of law. *See Hadfield v. Gilchrist*, 343 S.C. 88, 94-95, 538 S.E.2d 268, 272 (Ct. App. 2000). Certainly, being excluded from his property did not benefit David, but allowed his siblings to inventory and sell property which David claims was his own.

Likewise, the Respondents erroneously ignore that a party can assume a duty. All that is required for negligence is that a duty exists. Here the Dominion agreement with the Siblings

specifically provides, that “The responsibility to secure, preserve or insure the Personal Property shall remain the sole obligation of the Obligated Parties.” (R. p. 192, ¶ 9.). See Statement of Facts in initial brief.

There is also evidence that the Third-Party Defendant-Respondent breached these duties as personal property has been moved, sold and auctioned without David Shealy’s consent. (R. p. 66).

CONCLUSION

For the reasons set forth herein and, in the Appellant’s Initial Brief, this court should reverse the granting of summary judgment and remand this case for a trial on the merits.

TOBIAS G. WARD, JR., PA

s/ J. Derrick Jackson

Tobias G. Ward, Jr., S.C. Bar No. 5826

J. Derrick Jackson, S.C. Bar No. 15192

Post Office Box 50124

Columbia, South Carolina 29250

(803) 708-4200

Attorneys for the Appellant

October 23, 2023