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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

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Appellate Case No. 2025-001945

Lower Court Case No. 2023-CP-24-00800

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The Estate of Herbert Rivers Anderson, Jr., by its Successor Personal Representative,  
J. Kershaw Spong.....Appellant,

v.

Anderson Family Properties of Greenwood, LLC.....Respondent.

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**REPLY BRIEF OF APPELLANT**

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## ARGUMENT

Respondent's arguments on appeal fail to address the circuit court's errors in analyzing both Respondent's motion to dismiss and Appellant's subsequent request for leave to amend. These arguments disregard the appropriate legal analysis and application of the controlling law to the allegations in the Amended Complaint. Under the correct analysis, Appellant's claims should not have been dismissed, or, in the alternative, amendment should have been permitted.

The Court should reject Respondent's arguments and reverse the circuit court's decision for the reasons below and set forth in Appellant's initial brief.

### **I. The Court can and should consider allegations in the proposed Second Amended Complaint.**

At the outset, Respondent objects to the inclusion of factual allegations from the Second Amended Complaint as part of the Appellant's Statement of Facts. *See* Resp't. Br. at 7 n.1. But these allegations are part of the record on appeal, *see* (R. pp. 179–255), were presented to the circuit court below, and must be considered for purposes of analyzing Appellant's motion for leave to amend.

Moreover, as noted in Appellant's motion and the subsequent memorandum in support, the allegations in the Second Amended Complaint are based on information obtained by the successor personal representative through his continued administration of the Estate. *See* (R. pp. 160–170, 175–176, 179–255). Despite not having engaged in any discovery in this case, the successor personal representative managed to obtain information supporting these facts and as such, the Second Amended Complaint represents the most up to date and refined factual recitation of the relevant facts in this case. Ultimately, the allegations in the proposed Second Amended Complaint are appropriate for consideration on appeal because they were presented to the circuit court and should have been considered in evaluating Appellant's motion for leave to amend.

**II. The allegations of both the Amended and Second Amended Complaints, when construed in the light most favorable to the Appellant, state viable claims that are not barred by the statute of limitations.**

Respondent spends a substantial portion of the first section of its brief arguing Appellant intentionally omitted from the Amended Complaint certain allegations concerning sales of parcels of property during Anderson’s lifetime—allegations included in the original Complaint<sup>1</sup>—to circumvent the statute of limitations. This accusation is inaccurate and, more importantly, ignores Appellant’s arguments that numerous allegations, when viewed in the light most favorable to Appellant, render the statute of limitations question impossible to answer at this stage of the case on a pre-answer motion to dismiss.

As to the former, the probate court appointed the successor personal representation less than five months before Appellant filed its Amended Complaint. During that time, the successor personal representative began his review of Anderson’s affairs but had not yet retrieved deeds from the public record to understand when all sales had taken place. Accordingly, Appellant’s statement to the circuit court that “[t]he Amended Complaint was intentionally silent as to when lots were sold or when payments were made because such information was not readily available or apparently to [Appellant]” was accurate. (R. pp. 161–162). Appellant had not yet compiled this information from the register of deeds and had not received any business records from Respondent evidencing when sales took place. So, at the time of the Amended Complaint, Appellant could not verify the timing of any sales. Appellant has since gathered those deeds along with other

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<sup>1</sup> The fact the original Complaint included allegations about these sales is direct evidence of the former personal representative’s efforts to intentionally plead this case in a way to invite a statute of limitations defense, which would alleviate Respondent—for whom the former personal representative was the managing member at that time—from its obligations under the Notes. There is no logical reason to include such facts in a collection action unless the action was brought to solicit a finding from the circuit court that any claim under the Notes was time barred.

information related to Respondent's dealings, which led to the amended allegations found in Appellant's Second Amended Complaint. *See* (R. pp. 179–255).

While Appellant does not refute that sales took place during Anderson's lifetime, the point remains that the Order's analysis clearly considers facts not found in the Amended Complaint. Moreover, while the circuit court can take judicial notice of matters appearing in the public record, nowhere in the Order does the circuit court state that it took judicial notice, leaving the only plausible explanation for these facts appearing in the Order's analysis being that the Court either mistakenly or improperly analyzed allegations from the original Complaint. *Cf. Alterna Tax Asset Grp. v. York Cnty.*, 434 S.C. 328, 331, 863 S.E.2d 465, 466 (Ct. App. 2021) (noting the "Master's use of judicial notice [of the real property public records] at the motion to dismiss stage in th[o]se circumstances was problematic").

More importantly, as to the latter, like the circuit court, Respondent ignores the allegations in the Amended Complaint that the Respondent "made some payments on the Notes." *See* (R. pp. 181–182, ¶ 17). This allegation alone renders it impossible for the Court to find the claims are barred by the statute of limitations. *See Wolfe v. Brannon*, 211 S.C. 282, 286, 44 S.E.2d 833, 835 (1947) ("A payment proved to have been made by the maker of a promissory note after it has become barred by the statute of limitations is equivalent to a promise in writing by the maker to pay the debt, upon which action may be brought at any time within [the applicable statute of limitations] after such payment."); *Nandwani v. Queens Inn Motel*, No. 2012-UP-385, 2012 S.C. App. Unpub. LEXIS 474, at \*16–17 (Ct. App. June 20, 2012) (same). When taking the Amended Complaint's allegations and all inferences therefrom in the light most favorable to Appellant as the nonmoving party, the allegation that payments were made makes it impossible to determine

when the applicable statute of limitations began to run because payment could have happened at any time, including within three years of the filing of this collection action.

Further, Respondent failed to address Appellant’s argument about the parties’ intent as to whether each sale creates a separate obligation for payment, triggering a separate statute of limitations for enforcing the Notes. *See Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 355, 878 S.E.2d 896, 902 (2022) (noting the parties’ intent controls whether “separate breaches to give rise to new claims with a new statute of limitations period”). This open question further precluded the circuit court from determining when the statute of limitations began to run on a motion to dismiss.

**III. Because Appellant’s Statute of Elizabeth claim is a separate, viable theory of recovery against Respondent, the circuit court erred in dismissing this claim.**

Respondent argues Appellant’s Statute of Elizabeth claim is improper as a “post-judgment claim” and that the statute of limitations for this claim should be the same as the other causes of action. Respondent misunderstands the nature of this claim.

Normally, the Statute of Elizabeth is a claim made by a creditor to set aside a conveyance made to avoid payment on a judgment. *See generally* S.C. Code Ann. § 27-23-10(A). That said, under Section 62-3-710 of the South Carolina Probate Code, the power to recover fraudulently transferred property rests exclusively with the personal representative. *See* S.C. Code Ann. § 62-3-710 (“The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, *the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.*” (emphasis added)). The three-year statute of limitations on a Statute of Elizabeth claim is subject to the

discovery rule. *See Carr v. Guerard*, 365 S.C. 151, 154 n.5, 616 S.E.2d 429, 430 n.5 (2005) (“[A] three-year limitations period and the discovery rule apply to Statute of Elizabeth claims.”).

Because the claim to set aside a conveyance of a decedent rests “exclusively in the personal representative,” the discovery rule must be interpreted as to when the personal representative knew or should have known of the claim. Here, discovery could have taken place only after the successor personal representative’s appointment. Accordingly, this claim cannot be time-barred, and the circuit court erred in dismissing it.

#### **IV. The circuit court erred in denying Appellant the opportunity to amend.**

Respondent argues that the Court should uphold the circuit court’s denial of Appellant’s alternative motion to amend. But, in doing so, Respondent does not once address the circuit court’s failure to conduct any analysis before denying Appellant the opportunity to amend.

Instead, Respondent baldly states the allegation in the Second Amended Complaint that Anderson Family Properties of Greenwood, LLC’s (“AFP”) general ledger includes entry for a payment towards the Notes in 2020 was somehow “debunked” by Respondent’s claim that this entry was simply a bookkeeping error that was corrected three years later. Resp’t. Br. at 19–20. Respectfully, neither Appellant nor the Court is required to take Respondent at its word concerning the nature of these book entries, especially at this early stage of litigation and on a motion to amend the Amended Complaint. It is plausible that the subsequent “correction” to the ledger—made several months *after* the original Complaint was filed and *within weeks* of the Buchanan Trust instituting proceedings to remove Charles Schulze as personal representative—was done to avoid the very argument being made now. At the very least, claims based on those allegations are not “clearly futile.” Respondent should be allowed to amend the Amended Complaint and conduct

discovery<sup>2</sup> surrounding this book entry and the subsequent “correction” to determine the true reason why these entries were made.

Respondent further argues that the Estate provided “no explanation for its failure and/or intentional decision to include claims and allegations that were known to it at the time the Amended Complaint was filed, including potential claims for breach of fiduciary duty against the original personal representative.” Resp’t. Br. at 21. As required, the successor personal representative included allegations in the Amended Complaint only for which he felt there was sufficient evidence to support. *See* Rule 11(a), SCRPC (“The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it.”) Because his investigation into Anderson’s affairs has been ongoing, the allegations in the Amended Complaint reflected the successor personal representative’s understanding at that time. As his investigation continued, however, the successor personal representative uncovered further details and new facts, which were incorporated in the proposed Second Amended Complaint, including the addition of an alternative claim against the former personal representative.

“When a trial court finds a complaint fails ‘to state facts sufficient to constitute a cause of action’ under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.” *Skydive Myrtle Beach v. Horry Cnty.*, 426 S.C. 175, 179–80, 826 S.E.2d 585, 587 (2019). In rare cases, a circuit court

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<sup>2</sup> To be clear, Appellant does not need to “conduct discovery to determine whether a breach of contract occurred” as Respondent suggests. Resp’t. Br. at 20. As alleged in each version of the Complaint, a breach occurred. Discovery goes to the heart of the question the circuit court improperly considered here on a pre-answer motion to dismiss: when Appellant discovered its injuries and when payments were made on the Notes to restart any statute of limitations that Respondent contends had already begun to run.

“may deny a motion to amend if the amendment would be clearly futile.” *Id.* at 182, 826 S.E.2d at 589; *see also Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) (“Although leave to amend should generally be ‘freely given,’ . . . it may be denied where the proposed amendment would be futile.”), *rev’d on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

Respondent’s arguments on futility are unavailing for two reasons. First, the circuit court’s order denying the motion to reconsider conducted no analysis on the futility of the allegations in the proposed Second Amended Complaint to begin with. But our supreme court has “stress[ed] the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment.” *Skydive Myrtle Beach*, 426 S.C. at 183, 826 S.E.2d at 589.

Second, the circuit court failed to reference or analyze Appellant’s request for leave to amend all together. This failure was an abuse of discretion and should be reversed. *Cf. Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023) (“The exercise of discretion is not to simply make a decision. [It] requires first that the trial court recognize it has the responsibility of discretion . . . [and] then to follow a thought process that begins with the trial court’s clear understanding of the applicable law, continues with the court’s sound analysis of the situation before it in light of the law, and ends with the trial court’s ruling that follows the law and is supported by the facts and circumstances.” (internal citations omitted)).

### **CONCLUSION**

Nothing in Respondent’s brief excuses the circuit court’s error in granting AFP’s premature motion to dismiss, which ignored the well-pled factual allegations in the Amended Complaint, the equitable tolling argument advanced by the Estate, and the additional cause of action under the Statute of Elizabeth. Respondent’s arguments do not address the circuit court’s improper decision

to summarily deny the Estate's motion to amend without any analysis or exercise of discretion. Accordingly, the Court should reverse the circuit court's decision, remand the case with instruction to permit the Second Amended Complaint, and allow this case to proceed with discovery.

Respectfully submitted,

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