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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS**

APPEAL FROM THE GREENVILLE COUNTY PROBATE COURT

Hon. Debora A. Falkner, Probate Judge

Common Pleas No. 2022-CP-23-01064

Appellate Case No. 2026-000267

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 Power of
Attorney for Florence Petrak Mensch,

Appellant,

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

v.

Respondents.

REPLY BRIEF OF APPELLANT STERLING RAYMOND MENSCH, III

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ARGUMENT

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

“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).

A. Appellants' blanket reliance on this Court's previous holding that the Greenville County Probate Court had subject matter jurisdiction to hear causes of action related to pre-death conduct and damages is misplaced.

When this Court heard Appellant's first appeal in this matter, it affirmed the Circuit Court's ruling as to all three of Appellant's issues on appeal. *Mensch v. Waddell*, Op. No. 2024-UP-384 (S.C. Ct. App. Filed Nov 13. 2024). Thereafter, our Supreme Court granted Appellant's writ of certiorari but expressly limited the scope of its review to the issue of whether Appellant's appeal from the Probate Court was timely. *Mensch v.*

Waddell, Op. No. 2025-MO-037 (S.C. Sup. Ct. Order filed July 2, 2025). The Supreme Court ultimately found that the appeal from the Probate Court was timely, thus reversing the Court of Appeals as to that issue, and remanded the case to the circuit court for further consideration of the merits. *Id.* In taking such action, our Supreme Court neither affirmed nor reversed the Court of Appeals’ ruling as to whether the Probate Court had subject-matter jurisdiction to award damages for alleged pre-death misconduct, and as to whether the Probate Courts’s Order was final and appealable — instead determining that further consideration of the remaining issues by the court below was necessary before it would, if necessary, consider said merits and reach a final determination. *Id.* What remains from Appellant's original appeal for final determination is the issue of whether the Probate Court had subject-matter jurisdiction to award damages for the alleged pre-death misconduct and whether the underlying order was in fact final.

Respondents now errantly operate under the misunderstanding that because the Supreme Court did not address the two remaining issues on appeal, the Court of Appeals’ previous ruling carries precedential weight sufficient to estop Appellant from raising the remaining issues on appeal again. This is not the case. While the “law of the case” doctrine generally requires that issues that “have been decided in a prior appeal” not be “relitigated in the trial court in the same case,” the doctrine only applies to issues either explicitly or necessarily decided in the prior appeal. *Flexon v. PHC-Jasper, Inc.*, 413

S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015). Here, our Supreme Court, in granting certiorari, made it clear that it was not addressing the remaining substantive issues on appeal. Moreover, the Supreme Court did not necessarily address or decide the remaining substantive issues on appeal, as its ruling as to the timeliness of Appellant's appeal was purely procedural and did not implicate the substantive aspects of Appellant's appeal at all. Indeed, it would make little sense for our Supreme Court to impliedly adjudicate the substantive issues of Appellant's appeal, only to remand the appeal for further consideration of those very issues. As this Court acknowledged in *Flexon*, "prior adjudication does not preclude consideration on a subsequent appeal of questions expressly left open or reserved by the court." *Id.* quoting 5 C.J.S. Appeal and Error § 994 (2007). In cases, such as this one, an appellate court may "dispose[s] of only a part of the case at one term, and reserve[s] it for further and final action at another." *Id.* quoting *Searles' Adm'r v. Gordon's Adm'r*, 156 Va. 289, 157 S.E. 759, 761 (Va. 1931). This is precisely the action taken here by our Supreme Court in addressing only the procedural matter of the appeal's timeliness and remanding the remaining substantive issues for further litigation.

To give the Court of Appeals' prior ruling as to the remaining issues on appeal authority sufficient to estop Appellant, after the Supreme Court expressly reversed and remanded the appeal for further consideration of the merits, would be to nullify the operation of remand as a procedural tool, and would undermine the authority of our

Supreme Court. There would be no use in our Supreme Court remanding a case only for it to fail on arrival due to the Court of Appeals' prior, unaffirmed opinion. The honorable Judge Gravely, presiding over the reversed and remanded appeal, acknowledged this, as he took great care in reaching his final Order affirming the Probate Court that Appellants now appeal from. As he noted in his Order, the appeal has been reversed and remanded "for consideration of the merits of the appeal" and he reached his ruling only "[a]fter hearing arguments from Counsel for both parties and a complete review of the file" *Mensch v. Waddell*, 2022-CP-23- 01064, Order Affirming the Probate Court, S.C. Cir. Ct. January 5, 2026, p. 2.

Because the Supreme Court explicitly did not address the issues of the scope of the Probate Court's authority nor the finality of the underlying order, and reversed and remanded the appeal for further consideration of the merits, the issues remain undecided, and the Court of Appeals' prior ruling does not carry precedential weight sufficient to estop Appellant from raising the issues again on appeal. As such, Appellant's appeal is neither frivolous nor taken for the purpose of delay, and consequently is not subject to dismissal.

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

"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).

i. Only the Circuit Court Has Subject-Matter Jurisdiction to Award Damages Misconduct Occurring Prior to a Decedent’s Death.

Under our constitution, the Circuit Court is this 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, its subject-matter jurisdiction is limited to those classes of cases that the General Assembly has authorized by statute. *Judy v. Judy*, 393 S.C. 160, 169 (2011); *Kosciusko v. Parham*, 428 S.C. 481, 492 (Ct. App. 2019).

As explained below, no jurisdiction to adjudicate pre-death claims was conferred under S.C. § 62-3-302(a). While S.C. Code § 62-3-302(b) does confer some jurisdiction over pre-death claims, the grant of jurisdiction extends only to settlement approval and disbursement, which were not at issue here.

a. S.C. Code § 62-3-302(a)’s General Grant of Jurisdiction of “Estates” Does Not Include Pre-Death Claims.

The Probate Court’s general jurisdictional grant extends, as relevant here, to “estates of decedents, including the contest of wills, construction of wills, determination of property

in which the estate of a decedent or a protected person has an interest, and determination of heirs and successors of decedents and estates of protected persons....” S.C. Code § 62-3-302(a)(1). This point is not challenged by Appellants in their Initial Brief.

Insofar as the Respondents sought to adjudicate claims for alleged misconduct predating the Decedent’s death, they were not administering an “estate” within the meaning of the Probate Code. Indeed, the “claims[] that Probate Court can administer are those “which arise at or after the death of the decedent.” S.C. Code § 62-2-201(4). Thus, an estate can use the Probate Court to authorize the recovery for damages to or theft of property after a person has died, that authority does not extend to adjudicating pre death damage or theft. *See generally Greenfield v. Greenfield*, 245 S.C. 604 (1965) (recognizing that a person who takes or injures a decedent’s property after the decedent’s death can be liable in the Probate Court as an executor de son tort).

Indeed, if S.C. Code § 62-3-302(a) already conferred jurisdiction over pre-death claims, then the (limited) grant of jurisdiction conferred under S.C. Code § 62-3-302(b) for pre-death claims, discussed below, would be superfluous. But statutes must not be read to render any portion of them meaningless. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128 (2012).

Accordingly, under S.C. § Code 62-1-302(a), the Probate Court was without jurisdiction to award damages for pre-death conversion of property (\$546,921 after the 1/3 credit against the \$820,382), for failure 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). If the estate wanted to litigate those items, it was required to have filed an action in the Court of Common Pleas. Because the Probate Court's order was void as to those items, this Court should vacate those items and reduce the damages award by \$776,720.¹

b. S.C. Code § 62-3-302(b) Confers limited jurisdiction over claims falling under the survivor statute.

The General Assembly has granted the Probate Court very limited jurisdiction over actions under the survival statute. The Probate Court's "jurisdiction over matters involving...actions under 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). South Carolina's survival statute provides, in relevant part, 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... representative... of a deceased person...." S.C. Code § 15-5-90. The General Assembly passed that statute to overturn "the common-law rule that a personal right of

¹ The Probate Court did have statutory jurisdiction to award damages concerning the failure to timely file the 2018 post-death tax return (\$40,314), the failure to stop the pension overpayment (\$30,157), and the cost to repair the home (\$10,000). *See* S.C. Code § 62-3-301(a). Additionally, the Probate Court had jurisdiction to award attorney fees. S.C. Code § 62-1-111.

action dies with the person” *Page v. Lewis*, 203 S.C. 190, 193 (1943). Abatement at common law extended to all tort claims. *See 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.”). Likewise, statutory claims abated upon death, *Claussen v. Brothers*, 148 S.C. 1, 4 (1928) (citation omitted), until the passage of the survival statute.

Here, almost all the damages awarded against the Appellant Mensch were for alleged wrongful acts that occurred prior to the death of the Decedent in 2018, [1/26/2022 Damages Order Pg. 6-7]. The damages were for torts and statutory actions that, but for the survival statute, would have been extinguished upon the Decedent’s passing. The Probate Court’s jurisdiction over those actions was thus limited to settlement approval and proceeds distribution, which were not at issue.

Accordingly, to whatever extent jurisdiction may have otherwise existed under the general grant of jurisdiction under S.C. Code § 62-1-302(a), that jurisdiction was stripped under S.C. § Code 62-1-302(b) for an adjudication of damages for pre-death conversion of property (\$546,921 after the 1/3 credit against the \$820,382), for failure 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). If the Estate wanted to litigate those items, it was required to have filed an action in the Court of Common Pleas. Because the Probate Court’s order was void as to

those items, this Court should vacate those items and reduce the damages award by \$776,720.³

Appellants, however, gloss over the informative law set forth above, and instead turn on S.C. Code Ann. §62-8-401 which they argue stands for the general proposition 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.” [Initial Brief of Appellant at 4]. However, Appellant ignores entirely how the provisions of the statute to which they cite interplay with S.C. Code Ann. §15-5-90, which reads, in relevant part, 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... representative... of a deceased person....” S.C. Code § 15-5-90. The General Assembly passed that statute to overturn “the common-law rule that a personal right of action dies with the person” *Page v. Lewis*, 203 S.C. 190, 193 (1943). Abatement at common law extended to all tort claims. *See 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.”). Likewise, statutory claims abated upon death, *Claussen v. Brothers*, 148 S.C. 1, 4 (1928) (citation omitted), until the passage of the survival statute.

Claims brought in accordance with S.C. Code Ann. §62-8-116 and S.C. Code Ann. §62-8-117, the statutes relied on heavily, if not exclusively by Respondents, *only* have

meaning, when viewed against the backdrop of allegations by a petitioner of pre-death conduct by an agent being brought *after* the death of the principal, by way of the application of S.C. Ann. § S.C. Code § 15-5-90. But for the survival statute, the acts of an agent would have abated upon the death of the principal. Abatement at common law extended to all tort claims. *See 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.”). At first glance Respondents’ failure to address the interplay of these two statutory provisions may come across as a simple unwillingness to do so, perhaps because Respondents find Appellant’s arguments so unpersuasive, but upon closer inspection that perception morphs into what Appellant believes is Respondents’ fundamental inability to square the two without coming to the very conclusion Appellant has arrived at.

II. Appellants’ reliance on R. 60(b) SCRCP is misplaced and inapplicable.

Appellants confusingly argue on one hand “...subject matter jurisdiction may be raised at any time, even on appeal...” [Initial Brief of Respondent at 5] while in the same breath undermining that longstanding legal principal through a suggestion that R. 60(b) SCRCP serves as some exception to the very rule cited by Respondents. [*Id.*]. Respondents have once again mischaracterized the function of a well settled rule of law, this time R. 60(b) SCRCP. [*Id.*]. R. 60(b) is not an error preservation tool, but rather, a mechanism to seek relief from final judgment. [*Id.*]. A challenge to subject matter jurisdiction is not a direct, or even collateral attack on the face of the judgment, but rather, an attack on the

court's authority to even here the dispute. (*See Dove v. Gold Kist*, 314 S.C. 235, 236, 442 S.E.2d 598, 599 (1994) holding "subject matter jurisdiction is the power to hear and determine the general class to which the proceedings in question belong.). In fact, Appellant does not cite to a single case where this Court or any other found that R. 60(b) was an error preservation mechanism capable of rendering a challenge to subject matter jurisdiction "waived." That is likely because it is well settled in this state that "[t]he lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by a court." *State v. Gentry*, 363 S.C. 93, 96, 610 S.E.2d 494, 496 (2005).

III. Judicial estoppel does not act as a means by which to undermine the law in this jurisdiction that a challenge to subject matter jurisdiction can be raised at any time, even for the first time on appeal.

For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013). While Appellant better understands the premise of this argument compared to some of the others presented in Respondents' Initial Brief, the theory of judicial estoppel is incorrectly applied to this particular issue and can be quickly

and concisely disposed of. The gravamen of Respondents’ argument in support of the application of judicial estoppel in the present matter is that “Sterling Mensch specifically admitted subject matter jurisdiction of the probate court in admitting paragraphs 9 and 10 in his answer to the First Amended Petition.” [Respondents’ Initial Brief at 10].

However, it is well settled in this state that “[t]he lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by a court.” *State v. Gentry*, 363 S.C. 93, 96, 610 S.E.2d 494, 496 (2005). Respondents’ entire argument fails as a result of these protections. Regardless of Appellant’s alleged admission to subject matter jurisdiction of the Probate Court, the same cannot be waived, even if it was Appellant’s desire to do so. [*Id.*].

IV. Appellant’s obligation to file its State of Issues on Appeal was in fact satisfied, thus triggering Respondents’ obligation to submit to the lower court is Designation of Matter.

Appellant is admittedly confused by Respondents’ position that it failed, as required by S.C. Code §62-1-308 to file the required Statement of Issue on Appeal. [Respondents’ Initial Brief at 13]. Appellant filed his Notice of Appeal from the Probate Court to the Court of Common Pleas on February 23, 2022. [Notice of Appeal to Common Pleas]². On April 4, 2022 Appellant filed with the Greenville County Court of Common Pleas its “Designation of Issues on Appeal” and cites to the very statutory provision in that filing that Respondent alleges Appellant

² Appellant will be filing an Amended Designation as his original did not contemplate the need to use this document for purposes of this appeal.

violated. [Designation of Issues on Appeal]³. Upon execution of the remittitur by the South Carolina Supreme Court, the matter went back to the lower court for further adjudication not inconsistent with the Supreme Court's findings. When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007). Because Appellant's Designation of Issue on Appeal was already before the Circuit Court, there was no further obligation to refile the same, but the burden then shifted to Respondent to timely file its designation of matter, which they did not do.

As a direct result of Respondents' failure to timely designate a record, they were then precluded from arguing to the lower Court any facts not so designated. "Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal."). The lions' share of Respondents' arguments relies on the previous rulings of this Court on related issues. [*See generally* Initial Brief of Respondents]. However, because the previous Order of this Court was not included in Appellant's record, with Respondents having never designated their own matters to be included, the lower Court should not have considered those findings, which it clearly did given the direct citations in its January 5, 2026 Order, nor should this Court as the matter was not properly preserved below.

CONCLUSION

Based on the foregoing, this Court should vacate the lower court's order.

³ Appellant will be filing an Amended Designation as his original did not contemplate the need to use this document for purposes of this appeal.

Dated this 23rd day of July, 2022.

Respectfully submitted,

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