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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen t. Mullen, Circuit Court Judge

Appellate Case No. 2026-001061
Civil Action No. 2025-CP-07-00873

In the Matter of: George Francis Niesar (Decedent),

Gerald Viglione Niesar, Individually and as Personal
Representative of the Estate of George Francis Niesar,

Appellant

v.

Christine Nemeth,

Respondent

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. When the learned trial judge determined the circuit court lacked subject matter jurisdiction, the court must reverse its final order regardless of the timing?
- II. Was the learned circuit court judge right in vacating her decision granting summary judgment to Appellant on his conversion claim because of lack of subject matter jurisdiction?
- III. Was the learned circuit court judge right in finding the circuit court lacked subject matter jurisdiction to determine a claim for liability as *executor de son tort*.
- IV. Whether the circuit court judge erred in finding there was a genuine issue of material fact with respect to Appellant's claim for a constructive trust and should have dismissed Appellant's case entirely.

STATEMENT OF THE CASE

The Respondent is the sole heir by will of the Decedent, George Niesar. Appellant Gerald Niesar is only a creditor of his brother George's estate. Appellant claims he is owed \$24,000.00 for an unsecured loan to the Decedent. The Appellant is not an heir of the estate. Despite this, Appellant got himself appointed as personal representative of the Decedent's estate in Beaufort County Probate Court. Despite lacking \$75,000 in controversy, Appellant then removed his probate case to Federal Court (Case # 9:23-cv-04660-DCN) on September 15, 2023. On December 24, 2023 the Appellant filed his Amended Complaint (Jury Trial Requested) in Federal Court. On April 25, 2024 the Appellant filed his Second Amended Complaint. Respondent filed an Answer to the Second Amended Complaint with Affirmative Defenses and Counterclaims.

Respondent filed a Motion for Summary Judgment in Federal Court, the grounds for which were;

1. **FRCP Rule 12(b)(1)** The Federal Court lacks jurisdiction as the controversy is not \$75,000.00 or more, 28 U.S.C. §1332. The case should be remanded to Beaufort County Probate Court case number 2023-ES-07-00417.
2. **FRCP 12(b)(6)** The Appellant is not an heir of decedent George Francis Niesar.
3. **FRCP12(b)(6)** This matter should be remanded and heard in the Beaufort County Probate Court case number 2023-ES-07-00417.
4. **FRCP12(b)(6)** This is a matter that should be remanded and addressed in the Beaufort County Probate Court case number 2023-ES-07-00417.
5. **FRCP 12(b)(8)** There is another action pending between the same parties in Beaufort County, SC Probate case number 2023-ES-07-00417. Appellant's claim for \$24,000.00 should be remanded to Beaufort County Probate Court.

6. **28 U.S.C. 1447(d)** The case should be remanded to Beaufort County Probate Court pursuant to 28 U.S.C. 1447(d) for lack of subject matter jurisdiction.

Judge Norton informally remanded the case back to Beaufort County Probate Court by letter of October 8, 2024 (this letter is attached to Respondent's Amended Motion to Reconsider Final Order Granting Plaintiff's Motion for Summary Judgment) to the Beaufort County Probate Court noting that "Consequently, if Appellant/Gerald is intitled to a remedy in this case, the Probate Code appears to envision that he find that remedy in the Probate Court" (p. 2, ¶ 1). Instead, Appellant/Plaintiff re-filed this case in the Beaufort County Court of Common Pleas which ultimately determined it had no subject matter jurisdiction for the conversion claim and no subject matter jurisdiction to determine a claim for liability as *executor de son tort* and refused to grant Appellant summary judgment on his cause of action for constructive trust. This appeal followed.

STANDARD OF REVIEW

De novo review is prescribed by article V, § 5 of the South Carolina Constitution which states in equity cases, the Supreme Court “shall review the findings of fact as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside”. De novo review allows an appellate court to make its own findings of fact; however, this standard does not abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of evidence is against the finding of the judge. *Stoney v. Stoney* 422 S.C. 593, 812 S.E.2d 486 (2018).

ARGUMENT

I. Jurisdiction

“While the Federal Court has jurisdiction over Gerald’s (Appellant’s) tort claims¹, jurisdiction over administration of George’s (Decedent’s) Estate rests exclusively with the Probate Court. See Marshall v. Marshall, 547 U.S. 293, 311-12 (2006)” – Federal Judge David C. Norton’s letter to Judge Galvin (Letter, p. 2, ¶ 1).

Instead of just asking his former sister-in-law for his \$24,000, and despite not being a beneficiary of his brother’s estate, Appellant got himself appointed as Personal Representative. Despite Appellant’s claim for a \$24,000 loan, Appellant removed his case to Federal Court.

It is extraordinary that once Appellant discovered that the Respondent was the sole beneficiary of the estate on October 13, 2023 (Appellant’s Second Amended Complaint in District Court (p. 4 & 5, ¶ 26 & 27), Appellant failed to dismiss his federal case.

Appellant’s Federal Court case was informally remanded by Judge Norton to Beaufort County Probate Court by letter dated October 8, 2024 because “if Gerald (Appellant) is entitled to a remedy in this case, the Probate Court appears to envision that he find the remedy in Probate Court” (Letter, p. 2, ¶ 1). However, Appellant did not take this wise advice and re-filed this action in Beaufort County Circuit Court which has no jurisdiction according to Judge Norton and the learned circuit court judge. The Final Order Granting Plaintiff (Appellant’s) Motion for Summary Judgment dated December 31, 2025 was vacated due to lack of jurisdiction.

¹ Providing there is over \$75,000 in controversy which there is not in this case, just a claimed unsecured loan by the Plaintiff to the Decedent of \$24,000.00. Respondent is the sole beneficiary so Appellant’s claim against the estate is really only \$24,000, since the estate is all going to the Respondent minus \$24,000.

The letter from Federal Judge David C. Norton dated October 8, 2024 was attached to and incorporated by reference in Appellant's Return to Respondent's Motion for Summary Judgment. His Honor's letter succinctly and with a great deal more learning than most attorneys have, stated the jurisdictional challenges that faced the circuit court in the Final Order Granting Plaintiff's (Appellant) Motion for Summary Judgment. Specifically, "If Gerald is entitled to a remedy in this case, the Probate Code appears to envision that he find the remedy in Probate Court" (Letter p. 2, ¶ 1).

On motion and upon such terms are just, the court may relieve a party of his legal representative from final judgment, order, or proceeding [if] ... the judgment is void. Rule 60(b)(4), SCRCP. A judgment of a court without subject matter jurisdiction is void. *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).

Coon v. Coon, 364 S.C. 563, 566, 614 S.E.2d 616, 619 (S.C. 2005).

"Before a court can determine a right it must have the power to act," South Carolina Law Review, Marcellus S. Whaley Vol. 11, Issue 5, page 5 Spring 1959. In *Riddle v. Reese*, 53 S.C. 198, 31 S.E. 2d 222 (1998) the court held;

As we understand it, jurisdiction cannot be conferred even by actual consent, and cannot be waived by any act or omission of the parties. On the contrary, the question may be and has been raised for the first time, even in this court. *State v. Penny*, 19 S.C. 218 (S.C. 1883); *Ware v. Henderson*, 25 S.C. 385 (S.C. 1886). **Indeed, it may be raised by this court, without any motion from either of the parties.** *Lowry v. Thompson*, 25 S.C. 416, 1 S.E.141 (1886). It is true that jurisdiction of the person may be waived; but this is not a case of that character (bold added).

The *Heins* case cited by the Appellant (App. Initial Brief (AIB), p. 10, ¶ 1, p. 11, ¶ 1, p. 12, ¶ 2, p. 13, ¶ 1) can easily be distinguished. That was a contempt case in family court and had nothing to do with subject matter jurisdiction. Another family court case cited by Appellant is *Ness*, which was a default matter having nothing to do with subject matter jurisdiction.

Appellant cites Rule 59(e) and *Leviner* (AIB, p. 10, ¶ 1) for the proposition that the trial judge loses jurisdiction after 10 days unless a motion to reconsider is filed. The learned trial judge was clearly relying on SCRPC 60(b)(4) “the judgment is void” not Rule 59(e). That the circuit court did not site specifically Rule 60 is harmless error under SCRPC Rule 61. Respondent’s motion challenging subject matter jurisdiction was certainly brought within a “reasonable time” and certainly “not more than a year after judgment.”

To argue otherwise would fly in the face of SCRPC 1 which states;

These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. **They shall be construed to secure the just, speedy, and inexpensive determination of every action** (bold added).

Secondly, Respondent filed a Motion to Reconsider Final Order Granting Plaintiff’s (Appellant) Motion for Summary Judgment on January 6, 2026, which was later expanded in an Amended Motion to Reconsider Final Order Granting Plaintiff’s (Appellant) Motion for Summary Judgment on January 26, 2026. The Order Granting Plaintiff Motion for Summary Judgment was filed on December 31, 2025, so the Motion to Reconsider is well within the 10 days².

II. Conversion

“Appellant acknowledges that a conversion action “does not lie when alleging the exercise or domain or control over real property “Hawkins v. City of Greenville, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004)” (AIB p. 14, ¶). That Respondent sold decedent’s house only proves her “domain and control of real property.”

² Appellant admits that Respondent “Nemeth timely files a Motion to Reconsider” (AIB, p. 11, ¶1).

The circuit court wisely ruled that it had no jurisdiction to hear a cause of action for conversion when the thing converted is an interest in real property *Equitable Trust Co. of Columbia v. Columbia Nat'l Bank*, 145 S.C. 91, 93, 142 S.E. 811, 813-815 (SC 1928).

III. *Executor de son Tort*

Let us quote from Judge Norton's letter dated October 8, 2024 (Letter, p. 2, ¶ 1) informally remanding the case to the Beaufort County Probate Court from the Federal Court, not to Common Pleas court where the Appellant chose to re-bring his case;

In reviewing the relevant sections of the Probate Code, it appears that only Probate Court has the authority to hold someone accountable as a executor de son tort. See S.C. Code Ann. § 62-3-620 (“Acting sua sponte or upon the petition of an interested person, the probate judge . . . may order the *executor de son tort* to account for the property in his possession.” (emphasis added)); see also *Judy v. Judy*, 712 S.E. 408, 412-14 (S.C. 2011) (discussing Section 62-3-620) and finding that it confers jurisdiction to the probate court to hear a claim for waste related to the destruction of value of an estate's real property). Indeed, this remedy appears to be interwoven in the estate administration process, See S.C. Code Ann. § 62-3-619 (“[T]he value of the property shall be deducted from any distribution or payment of any claim or commission to which the executor de son tort is entitled from the estate.”); accord *Maryland v. Territory of Md.*, 2017 WL 1807157, at *5 (D. Md. May 5, 2017) (finding that the plaintiff's claims of *executor de son tort* fell under Maryland law because the case does not involve the administration of an estate). Moreover, while the federal court has jurisdiction over Gerald's tort claims, jurisdiction over administration of George's Estate rests exclusively with the Probate Court. See *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006). **Consequently, if Gerald is entitled to a remedy in this case, the Probate Code appears to envision that he find the remedy in the Probate Court** (bold added).

The cause of action for liability as *executor de son tort*, pursuant to S.C. Code Ann. § 62-3-620, the probate court has exclusive jurisdiction over all subject matter related to estates of decedents, *Judy v. Judy*, *supra*. This being so, Appellant's case was properly dismissed by the learned circuit court trial judge for lack of subject matter jurisdiction.

IV. Constructive Trust

South Carolina law recognizes that a constructive trust is an extraordinary equitable remedy imposed only where property has been acquired or retained through fraud, abuse of confidence, breach of fiduciary duty, or other unconscionable conduct. See e.g., *SSI Med Servs, Inc. v. Cox*, 301 S.C. 493, 500 (1990) (“A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.”); *Halbersherg v. Berry*, 302 S.C. 97, 106 (Ct. App. 1990) (“A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, wither has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy.”).

Appellant never established those elements in order to prove he is entitled to a constructive trust. Appellant identified no fraudulent transfer of title. The Respondent is the sole heir of the Decedent’s estate and have every right to sell it. Appellant identified no wrongful conveyance of ownership. Appellant identified no abuse of confidence resulting in the Respondent obtaining title to her former husband’s real estate. Appellant identified no breach of fiduciary duty through which Respondent acquired ownership of the property. Most importantly, Appellant identified no evidence that Respondent wrongfully acquired title in the first place. At best, Appellant is entitled to re-payment of his \$24,000 loan. Respondent filed an Offer of Judgment for \$24,000 on March 26, 2026 making Appellant’s case not only lacking in jurisdiction but moot as well.

To establish a constructive trust there must be no alternate remedy of law. A constructive trust is a remedy of last resort. If standard monetary damages or another basic legal claim can solve the problem, the court will refuse to grant an equitable trust. (Myles Bland & Kyle Ward, *Constructive Trusts in South Carolina: Equity in its Finest Form As it Relates to Real Property Transfers* (2012)). In this case, Appellant had his remedy in his conversion cause of action for monetary damages.

The learned circuit court trial judge was right in not granting Appellant summary judgment on its constructive trust cause of action and should have dismissed this cause of action as well.

CONCLUSION

Subject matter jurisdiction cannot be waived. It may be raised by the circuit court without any motion for either party. Once the learned trial court judge determined the circuit court lacked subject matter jurisdiction, Her Honor had no choice but to reverse and vacate her prior judgment under SCRCP Rule 60 because it was void. This is a case of much ado about nothing. Appellant is not a beneficiary of the estate of his brother. If Appellant as Personal Representative of the estate had won half the value of the Decedent's home, that half would be re-paid to Respondent minus Appellant's \$24,000. Respondent filed an Offer of Judgment on March 26, 2026 in the circuit court for \$24,000, so the case is moot.

Respectfully Submitted,

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