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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.

APPELLANT'S INITIAL REPLY BRIEF

Robert H. Brunson, Esq.
John P. Bozeman, Esq.
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street / Suite 600
Post Office Box 1806 (29402-1806)
Charleston, SC 29401
(843) 534-4206

Attorneys for Appellant Gerald Viglione Niesar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

None of Nemeth's arguments are legally sound or persuasive, and this Court should easily decline her invitation to affirm the Appealed Orders.

First, the record forecloses Nemeth's argument that her Motion to Reconsider was timely under Rule 60(b)(4), as she contends. The Motion to Reconsider invoked only Rule 59(e) and never argued the Final Order was void, and this is not an extraordinary circumstance in which Rule 60(b)(4) could apply. Second, Nemeth's conversion argument continues to ignore the distinction between real property and its proceeds. The conversion claim relates only to money, and money received in a real estate transaction is not real estate; it is personal property. Third, Nemeth's contention that the probate court has exclusive jurisdiction over the *executor de son tort* claim simply ignores the removal statute, S.C. Code Ann. §§ 62-1-302(d)(3) and (5), under which the circuit court acquired jurisdiction over the entire action. Fourth, Nemeth's constructive-trust position misstates applicable law and points to no factual dispute. Finally, Appellant's decision to decline Nemeth's offer of judgment does not moot this appeal.

For these reasons, and for the reasons discussed below and at greater length in Appellant's Initial Brief, the Court should vacate or reverse the Appealed Orders and reinstate the Final Order.

ARGUMENT

I. The circuit court lacked subject matter jurisdiction to reverse its Final Order on grounds that it raised *sua sponte* after the time for filing a Rule 59(e) motion to reconsider passed.

As discussed at greater length in Appellant's Initial Brief, the Court should vacate or reverse the Appealed Orders because the circuit court lacked jurisdiction to reverse its Final Order on grounds that the Court raised for the first time after the period for Nemeth to file a Rule 59(e) motion to reconsider had already passed.

Nemeth appears to raise several counterarguments, all of which fail. First, while difficult to follow, and after discussing the irrelevant procedural history of this case's federal proceedings, Nemeth seems to argue the circuit court had jurisdiction to reverse its Final Order because the Order Granting Reconsideration "was clearly relying on SCRCP 60(b)(4) 'the judgment is void' not Rule 59(e)," and such Rule 60(b) motions may be made "within a reasonable time" and are not bound by the same ten-day (now, twenty-day) time limitation. (Resp. Br. at 7). This argument is unavailing for several reasons.

As a threshold matter, the record forecloses any Rule 60(b) argument. Nemeth's Motion to Reconsider and the Order Granting Reconsideration explicitly cited only Rule 59(e), not Rule 60(b), and nowhere argued or mentioned that the Final Order was void. The circuit court's decision not to cite Rule 60(b) or discuss voidness in its Order Granting Reconsideration is, therefore, not only not a harmless error (as Nemeth urges), it is not an error at all. The court ruled on the motion that was before it—Nemeth's Rule 59(e) motion that nowhere discussed voidness or otherwise invoked Rule 60(b). Nemeth cannot now ask this Court to retroactively supply a rationale she never raised to the circuit court and that the circuit court never articulated. Treating her Rule 59(e) motion as a Rule 60(b) motion would circumvent the strict time limits that govern motions to alter or amend a judgment and would undermine the finality that Rule 59(e)'s deadline is designed to protect.

This defect is fatal to Nemeth's argument, but even setting it aside, her invocation of Rule 60(b) fails on the merits. Rule 60(b), SCRCP, provides a narrow, extraordinary mechanism for relieving a party from a final judgment or order under specifically enumerated circumstances—fraud, newly discovered evidence, a void judgment, satisfaction, or "any other reason justifying relief." Rule 60(b), SCRCP. The rule exists to "strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2851 (3d ed.). It is not a vehicle for parties to relitigate issues they failed to raise in their initial motion, nor does it permit courts to revisit final judgments simply because they have developed second thoughts about the merits.

Nemeth has not demonstrated any of the extraordinary circumstances that would warrant relief under Rule 60(b). She does not claim newly discovered evidence, fraud, or misconduct. She does not contend the Final Order has been satisfied, released, or discharged. And her voidness argument under Rule 60(b)(4)—raised for the first time on appeal—fails because the Final Order is not void. A judgment is void under Rule 60(b)(4) only if the court that rendered it "lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright & Miller, *supra*, § 2862. A judgment is not void merely because it is erroneous or because a party disagrees with the court's reasoning. *Id.* Nothing about the circuit court's entry of the Final Order—which was rendered after full briefing, a hearing, and consideration of the parties' arguments—suggests a jurisdictional defect or due process violation that would render it void.

Further, under Nemeth's own theory, Rule 60(b) can reach only a judgment rendered without subject-matter jurisdiction. However, the circuit court's rulings on Appellant's claims for conversion and constructive trust are merits determinations, not jurisdictional holdings. Under her own theory, therefore, Rule 60(b)(4) does not apply to them and the ten-day *sua sponte* bar of *Leviner*, *Heins*, and *Ness* applies to them even if the circuit court lacked jurisdiction over the claim for liability as *executor de son tort*. *See Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000); *Ness v. Eckerd Corp.*, 350 S.C. 399, 402-03, 566 S.E.2d 193, 195 (Ct. App. 2002); *Heins v. Heins*, 344 S.C. 146, 156-57, 543 S.E.2d 224, 229 (Ct. App. 2001).

Nor does the circuit court's *sua sponte* authority rescue the Appealed Orders. While courts possess limited authority to vacate judgments on their own motion under Rule 60(b), that power is circumscribed by the same constraints that govern party-initiated motions. *See, e.g., Budget Blinds, Inc. v. White*, 536 F.3d 244, 251 (3rd Cir. 2008) (recognizing that even when a court *sua sponte* considers its own judgment, "extraordinary circumstances" must exist to justify vacatur, just as they would for a party seeking Rule 60(b) relief). Thus, as with a party, a court may not invoke Rule 60(b) sua sponte to revisit the merits of its prior ruling or to correct perceived errors that could have been raised on appeal. *See Dial One of the Mid-South, Inc. v. BellSouth Telecommunications, Inc.*, 401 F.3d 603, 606–07 (5th Cir. 2005) ("Motions for a new trial or to alter or amend a judgment . . . cannot be used to raise arguments which could, and should, have been made before the judgment issued.") (quotation omitted). Here, the circuit court did not identify any of the extraordinary circumstances enumerated in Rule 60(b). Instead, it simply changed its mind about the merits of Appellant's claims—a decision that falls outside the scope of Rule 60(b) and that the court lacked jurisdiction to make after the Rule 59(e) window closed.

Nemeth's remaining arguments fare no better. She claims that *Heins* and *Ness* are easily distinguishable from this case because *Heins* "was a contempt case in family court and had nothing to do with subject matter jurisdiction," and *Ness* "was a default matter having nothing to do with subject matter jurisdiction." (Resp. Br. at 6). This misapprehends the basis for which Appellant cites those cases. The subject matter of those underlying disputes is beside the point. They are cited for the *procedural* holding that a trial court loses the power to alter its judgment *sua sponte* once the Rule 59(e) window closes.

Ness, for example, is squarely on point. There, the circuit court vacated its prior order after the ten-day period on a ground the movant never raised—the judge's own discovery of a conflict of interest—and this Court held the trial court "lacked jurisdiction to vacate the original order." 350 S.C. at 403, 566 S.E.2d at 195. That is exactly what happened here: the circuit court raised the conversion and constructive trust issues on its own initiative at the January 14, 2026 hearing, two days after the ten-day window closed on January 12. Nemeth offers no reason why the procedural rule that bound the circuit court in *Ness* does not equally bind the circuit court here. The distinction she draws—that the underlying claims differ—is legally irrelevant to a jurisdictional timing bar.

II. The circuit court erred in reversing its initial grant of summary judgment on Appellant's conversion claim because conversion is an available cause of action to recover proceeds from the sale of real property.

Nemeth responds to Appellant's argument that conversion is available to recover the proceeds of the sale of real property by contending the fact that "Respondent sold decedent's house only proves her 'domain and control of real property'" and that the circuit court correctly held conversion cannot lie for an interest in real property. (Resp. Br. at 7). Appellant's claim, however, is—and always has been—for conversion of the *sale proceeds*, not the real estate. The Complaint alleges conversion of the $886,000 in closing proceeds, of which the Estate's share is $443,000 (App. Br. at 14–16; Compl. ¶¶ 20, 36–38). Sale proceeds are personal property, and Nemeth never engages this distinction. *See, e.g.*, *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990) (affirming summary judgment in plaintiff's favor where the subject property was the identifiable proceeds of the sale of automobiles; "Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified.").

The cases Nemeth cites, *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), and *Equitable Trust Co. of Columbia v. Columbia Nat'l Bank*, 145 S.C. 91, 142 S.E. 811 (1928) do not stand for the proposition that a conversion action cannot lie for the sale of proceeds. *Hawkins'* statement that conversion "does not lie" for exercise of dominion over real property is entirely consistent with Appellant's position because Appellant sued over *proceeds*, not realty. *Equitable Trust* is similarly inapposite. That case concerned the alleged conversion of real property itself—a lot and building owned by a corporation—and its statement that conversion "does not lie for an exercise of dominion or control over real property" addressed only the real property, not the cash proceeds of a completed sale, a question the Court never confronted. Indeed, the Court affirmed a conversion recovery for the plaintiff's stock certificate, confirming that identifiable personal property remains a proper subject of conversion—precisely the nature of the Estate's claim to the sale proceeds here, which became personal property upon execution of the contract of sale.

III. The circuit court erred in determining it lacked subject matter jurisdiction to decide a claim for liability as *executor de son tort*.

Nemeth relies heavily on Judge Norton's October 8, 2024 letter and the case cited therein, *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011), to argue the circuit court lacks jurisdiction over claims for liability as *executor de son tort*. However, neither Judge Norton's letter, *Judy*, nor Nemeth's brief address the question on appeal in this case: whether the circuit court gained removal jurisdiction over this claim under S.C. Code Ann. §§ 62-1-302(d)(3) and (5). Even more concerning than Nemeth's total failure to acknowledge and address the removal statute, however, is her factual misrepresentation to this Court that Appellant "re-filed this case in the Beaufort County Court of Common Pleas" after Judge Norton remanded it to state court. (Resp. Br. at 3, 5). That is false. After receiving Judge Norton's letter, Appellant refiled his complaint in the Beaufort County Probate Court *and then* sought removal to the circuit court under S.C. Code Ann. §§ 62-1-302(d)(3) and (5). This Court should excuse neither her omission of this essential fact nor her persistent refusal to explain why the removal statute does not apply.

IV. The circuit court erred in finding there is a genuine issue of material fact with respect to Appellant's claim for constructive trust.

Nemeth contends that a constructive trust is an "extraordinary" "remedy of last resort" that is unavailable whenever "standard monetary damages or another basic legal claim can solve the problem," and that Appellant's conversion claim is that adequate legal remedy. (Resp. Br. at 10–11.) The argument fails at every level: it was not the basis for the ruling below, misstates South Carolina law, and rests on no binding authority.

Appellant recognizes that, under Rule 220(c), SCACR, this Court "may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." *See I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000). That principle does not salvage the Appealed Orders in this case. This Court may affirm on an alternative ground only where the ground both appears in the record and is legally sound. *Id.* ("An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case."). Nemeth's "remedy of last resort" theory is neither.

The theory does not "appear in the Record on Appeal." The circuit court did not reverse summary judgment on the constructive-trust claim on an adequate-remedy-at-law rationale; it reversed solely because it "believe[d]" that "there are questions of fact that need to be decided by the fact finder." (Order Granting Reconsideration at 1). No evidence, argument, or finding below developed the adequacy of any legal remedy, and Nemeth identifies none.

The theory also misstates governing law. A constructive trust in South Carolina "aris[es] by operation of law" to remedy unjust enrichment. *Hale v. Finn*, 388 S.C. 79, 89, 694 S.E.2d 51, 57 (Ct. App. 2010). It "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." *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990). Neither formulation makes the absence of an adequate legal remedy an element of the claim, and Nemeth cites no South Carolina decision holding that the availability of a damages action defeats a constructive trust.

Controlling authority is to the contrary. In *SSI Medical Services*—a case on which both parties rely—the South Carolina Supreme Court affirmed summary judgment imposing a constructive trust over the proceeds of the sale of personal property where those "profits . . . were acquired through a breach of trust and fiduciary duty" and therefore "did not equitably belong to [the defendant]." 301 S.C. at 501, 392 S.E.2d at 794. The decision also recognizes that money is a proper subject of a legal action for conversion and affirmed the grant of summary judgment in the plaintiff's favor on that claim. *Id.* at 498, 392 S.E.2d at 792. *SSI* thus confirms that a plaintiff wronged by the misappropriation of identifiable proceeds may obtain a constructive trust even though a legal action for the same funds is also available. The existence of a conversion remedy did not bar a constructive trust there, and it does not bar the trust sought here.

Nemeth's argument rests entirely on a non-precedential article that Appellant has not been able to locate, not on any precedential decision of the South Carolina appellate courts. (Resp. Br. at 10) (citing Myles Bland & Kyle Ward, *Constructive Trusts in South Carolina: Equity in its Finest Form As It Relates to Real Property Transfers* (2012)). Indeed, Nemeth's own primary authority confirms the settled rule that a constructive trust arises against one who "by fraud, actual or constructive, . . . or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience" holds property "which he ought not in equity and good conscience hold and enjoy," with no requirement that a constructive trust plaintiff must have no adequate legal remedy. *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct. App. 1990) (citing *Briggs v. Richardson*, 288 S.C. 537, 343 S.E.2d 653 (Ct. App. 1986)); (Resp. Br. at 9).

Finally, the sole basis on which the circuit court reversed the Final Order—that "there are questions of fact that need to be decided by the fact finder" (Order Granting Reconsideration at 2)—cannot sustain the reversal, for the reasons set forth in Appellant's initial brief. (App. Br. at 20–21). Neither the court nor Nemeth identified any specific disputed fact that is material to the constructive trust claim; the court spoke only in conclusory terms, and Nemeth submitted no affidavit, documentary evidence, or deposition testimony to create a genuine issue.

In fact, the court explicitly recognized Nemeth's complete failure to create an issue of fact multiple times throughout the January 14 hearing on Nemeth's Motion to Reconsider, even instructing Nemeth's counsel after allowing further briefing: "You need to make sure that there are some kinds of question of fact somewhere in this case about whether or not . . . [a] constructive trust exists." (Jan. 14, 2026 Hearing Tr. at 8–11, 16–18) (circuit court also admonishing Nemeth's Return in opposition to Appellant's Motion for Summary Judgment and Nemeth's Motion to Reconsider: "What you did not include in any of this was any type of affidavit from your client contesting questions of fact or arguing issues of fact, which is what you're required to do in a summary judgment motion."). It is perplexing that the court later held there was an issue of fact with respect to this claim because Nemeth's only two intervening filings—(1) her January 26, 2026 "Amended Notice of and Motion to Reconsider Final Order Granting Plaintiff's Motion for Summary Judgment," and (2) her January 29, 2026 "Return Memorandum to Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider"—not only omitted any factual evidence, they did not even discuss the constructive trust claim at all. Accordingly, it was error for the court to change its mind, having been presented with literally no new factual issues in the interim.

The material facts—the 2007 divorce, the divorce decree's silence as to the Property, the September 3, 2022 contract of sale, Decedent's death during the closing period, Nemeth's false affidavit that the power of attorney remained in force, and her retention of all of the proceeds—are undisputed. (App. Br. at 21–21; Final Order at 2–3, 9–10). On that undisputed record, the Estate was entitled to summary judgment, and neither the court's stated rationale nor Nemeth's new theory supplies a ground appearing in the record on which this Court could affirm.

V. Nemeth's offer of judgment does not moot the appeal.

As a final matter, Nemeth contends that her $24,000 offer of judgment filed on March 26, 2026 (and presumably Appellant's choice to reject it) renders this case moot. (Resp. Br. at 9, 11). This argument is obviously meritless. An unaccepted offer of judgment does not "moot" a case. Rule 68(b), SCRCP governs offers of judgment and allows the offeror to recover interest and certain costs in the event the "offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer." Nowhere does Rule 68 discuss mootness, and Nemeth has not cited any law to support this proposition.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reject Nemeth's arguments, vacate or reverse the Appealed Orders and reinstate the Final Order.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ Robert H. Brunson*

Robert H. Brunson (S.C. Bar No. 11987)
robert.brunson@nelsonmullins.com
John P. Bozeman (S.C. Bar No. 105262)
John.bozeman@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellant Gerald Viglione Niesar

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