THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue, Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. **Where Appellant's claims were brought against a living individual, not the estate of a decedent, did the circuit court err in ruling that Appellant's claims were barred under the Probate Code's non-claim statute?**

II. **Where Appellant pled and made a factual showing of proper claims for the sale of land owned by a living person, did the circuit court err in ruling that Appellant's claims were barred by the executor *de son tort* statutes or otherwise failed?**

III. **Where the record shows that Appellant pled and made an evidentiary showing of all essential elements of his claims and the record did not establish any affirmative bar to them, was the Respondent entitled to summary judgment or dismissal on any alternative basis?**

IV. **Where Appellant pled proper claims for the sale of real property and made an evidentiary showing to support them, did the circuit court err in canceling the lis pendens filed by Appellant?**

ARGUMENT

The Appellant (hereinafter "Cook") submits this reply brief to address matters raised by the Respondent (hereinafter "Phillips") in his brief in this case. Rather than simply rehash the arguments presented in Cook's appellant's brief, this reply brief is an attempt to concisely address arguments raised in Phillips' brief.

At the heart of this appeal is the truth that, because Cook's claims are against a living person – Phillips – for what that living person did, it was reversible error for the lower court to summarily end those claims on the basis of a statute that puts time limits on the assertion of claims against an estate.

I. The fact that Cook's contract with a deceased person is part of the factual background of this case does not transform Cook's claims against a living person into claims against an estate. Cook is suing Phillips for what Phillips did to him.

Phillips argues that Cook's claims are barred under the probate non-claim statute, S.C. Code Ann. § 62-3-803, because "Cook's Complaint is grounded and based on alleged contracts which he signed with Claudia Harden in 2006." (Initial Brief of Respondent p. 7.) Phillips misapprehends the scope of the statute.

The non-claim statute does not limit, nor does it purport to limit, anything other than the time in which "claims against a decedent's estate" may be presented. S.C. Code Ann. § 62-3-803(a)&(c). Cook's claims are not for the enforcement of the contract he had with Claudia Harden and are not asserted against her estate. (R. pp. 14-25.) This statute does not and cannot impose a bar or limitation on Cook's claims asserted directly against Phillips for the things Phillips did to Cook.

And Phillips did quite a bit to Cook. After the subject property was taken off the market, Phillips assured Cook that taking the property off the market was only a

temporary measure and that that the property would be re-listed. (R. pp. 17-18, 91-92.) Phillips, who was fully aware of the agreement between Cook and Harden, assured Cook "that nothing had changed, the he and his father had decided to put furniture in the home to 'stage it,' and that they planned to re-list the Property soon." (R. pp. 17-18, 91.) As time went on, Phillips continued to assure Cook that he knew Cook was owed for his work and that he would be paid for it. (R. pp. 18-19, 91-92.) Later, Cook brought the topic of performing the agreement to sell up to Phillips again, recounting Phillips' previous assurances. (R. pp. 19, 92.) Phillips then stated that the agreement was between his father and Cook and that Cook's "time was up and nothing could be done about it." (R. pp. 19, 92.)

These are the things that Cook sued Phillips for. (R. pp. 14-25.) They are all things that Phillips did, not things Claudia Harden did. (R. pp. 14-25, 91-92.) Despite his awareness of his promises that the property would be sold and Cook would be paid, Phillips refused to sell the property and to pay Cook, and Phillips issued a deed of distribution of the property from Harden's estate to himself. (R. pp. 19-20, 42-49, 92.)

In other words, Phillips did not honor *his* repeated promises to Cook that the property would be sold and Cook would be compensated for his significant investment of time and money. (R. pp. 14-25, 91-92.) Phillips induced Cook not to file a creditor's claim with Harden's estate, then called time on Cook, reneged on his promises, and has taken the property for himself. (R. pp. 14-25, p. 68 ln. 18-25, p. 87 ln. 6-11, pp. 91-92.)

A person, even if that person is a personal representative at the time he commits a wrong, does not get to escape liability for his own tortious and fraudulent conduct by

hiding behind the non-claim statute. The probate code itself tells us that. S.C. Code Ann. §§ 62-1-106, 62-3-808(b).

II. The statute of limitations does not bar Cook's claims against Phillips, especially when those claims arise from acts Phillips committed within a year of the commencement of this action.

Phillips contends that the statute of limitations on Cook's claims began to run in 2006 but never offers any explanation of why that would be so. It is not so. It was not until 2015 that Phillips notified Cook that Phillips was reneging on his promises. This action was commenced in 2015. (R. pp. 8-49.) Cook's claims against Phillips could not be barred by the statute of limitations. S.C. Code Ann. § 15-3-530.

Further, as noted in Cook's brief, statutes of limitation are not applicable to equity claims and, thus, could not bar Cook's equitable claims, anyway. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005); Parr v. Parr, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977); Parrot v. Dickson, 151 S.C. 114, 148 S.E. 704, 707 (1929).

III. Phillips had and undertook a duty to Cook.

Contrary to Phillips' contention, Phillips had a duty to Cook, both because of their relationship as personal representative and creditor and because Phillips, by making promises to Cook, would have undertaken a duty to him anyway.

Situations in which a confidential or fiduciary relationship exists include the relation of "executors or administrators and creditors[.]" Chapman v. Citizens & S. Nat. Bank of S.C., 302 S.C. 469, 475-76, 395 S.E.2d 446 (Ct. App. 1990) (quoting Black's Law Dictionary 270). While Phillips served as personal representative of Claudia Harden's estate, the parties were in that relation.

Further, by promising Cook that the property would be sold and Cook would get paid, Phillips would have undertaken a duty to Cook anyway. "At common law, when there is no duty to act, but an act is voluntarily undertaken, the actor assumes a duty to use due care." Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997). "While the law imposes this duty on a volunteer, the question whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder." Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813 (1997).

IV. A constructive trust is, and ought to be, a flexible remedy.

Phillips argues that, because Phillips obtained title to the subject property by operation of law through inheritance, Cook's constructive trust claim must fail because the definition of a constructive trust "requires that someone obtain property by means of a fraudulent act." (Initial Brief of Respondent p. 12.) Phillips has misapprehended the law here.

"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, either has obtained *or holds the right to* property which he ought not in equity and good conscience hold and enjoy." Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) (emphasis added).

Further, a constructive trust is a remarkably flexible remedy. Constructive trusts arise "under the broad doctrine that equity regards and treats as done what in

good conscience ought to be done" and "the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice." Dominick v. Rhodes, 202 S.C. 139, 149, 24 S.E.2d 168 (1943). "[E]quity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust." Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979).

V. Cook's brief uses the correct analysis for unjust enrichment.

Phillips' brief says that Cook has incorrectly stated the test for unjust enrichment/quantum meruit established as the proper analysis by the Supreme Court in Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872-73 (2000). A look at that case, though, reveals that Cook has stated the correct test and that it is Phillips who has misquoted the case.

The relevant passage from Myrtle Beach Hospital is below:

> Further, we note this Court's current test for *quantum meruit* differs from that used by the Court of Appeals, and further note a discrepancy between the two courts' implied by law tests. Interestingly, the Court of Appeals' implied by law test is the same as **this Court's *quantum meruit* analysis:**
>
> **(1) benefit conferred by plaintiff upon the defendant;**
>
> **(2) realization of that benefit by the defendant; and**
>
> **(3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.**
>
> Compare, e.g., Columbia Wholesale Co. v. Scudder May, N.V., 312 S.C. 259, 440 S.E.2d 129 (1994) (*quantum meruit* test) with Webb v. First Fed. Sav. & Loan Ass'n, 300 S.C. 507, 388 S.E.2d 823 (Ct.App.1989) (implied by law test).

> We adopt the Scudder May test as the sole test for a *quantum meruit*/quasi-contract/implied by law claim. **We therefore overrule the following cases to the extent they rely on this different *quantum meruit* test first announced by the Court of Appeals in Webb v. First Fed. Savings & Loan Ass'n, *supra:***
>
> **(1) valuable services or materials were furnished;**
>
> **(2) to the defendant;**
>
> **(3) who accepted, used and enjoyed them;**
>
> **(4) under such circumstances as reasonably notified the defendant that the plaintiff was expecting to be paid by the defendant.**
>
> Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995); Myrtle Beach Hosp. v. City of Myrtle Beach, 333 S.C. 590, 510 S.E.2d 439 (Ct.App.1998); Wade v. Brooks, 306 S.C. 553, 413 S.E.2d 333 (Ct.App.1992); Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct.App.1990) *cert. dismissed* 305 S.C. 330, 408 S.E.2d 242 (1991); and Webb v. First Fed. Savings & Loan Ass'n, 299 S.C. 1, 382 S.E.2d 4 refiled 300 S.C. 507, 388 S.E.2d 823 (Ct.App.1989).

Id. (emphasis added). The test quoted by Phillips is the one rejected by the Court. Id.

VI. Phillips argues confusingly from materials that he has improperly included in the record on appeal.

Phillips' brief contains the following:

> It is important to understand that Cook had previously filed a Summons and Petition for Allowance of Credit Claim on September 16, 2015 against the Estate of Bennie Richard Phillips, Sr. ("Phillips, Sr."). The claim was denied by Motion and the matter was removed to the Circuit Court for the Tenth Judicial Circuit by Order of the Probate Court filed October 23, 2015. The claims made by Cook in the action against the Phillips, Sr. Estate were substantially the same claims made in the present action. Prior to the Summary Judgment Motion hearing in this case, Cook's attorney initiated contact

> with Phillips, Sr.'s attorney and a Stipulation of Dismissal without Prejudice was filed January 21, 2016.

(Initial Brief of Respondent pp. 2-3, citations to record omitted.) Phillips then writes that "[t]he effect of the dismissal as to any claim against Bennie Richard Phillips, Sr. is that any claim that may have existed, if any at all could have, is now barred." (Initial Brief of Respondent p. 14.)

Phillips has incorrectly designated the material he referenced for inclusion in the record on appeal; moreover, though, he is wrong about the conclusion he asks the court to make in this regard.

First, inclusion of materials in some other case that were never presented to the lower court in this case is against the Appellate Court Rules, as is argument made on the basis of such materials. Rule 210(c), SCACR, prohibits the inclusion in the record on appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997). Making factual contentions in a brief on the basis of material outside the scope of Rule 210(c), SCACR, is similarly prohibited. "The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." Rule 208(b)(4), SCACR (bracket in original). The Rule's language regarding what can be referenced in the brief mirrors the language in Rule 209, SCACR, limiting factual references to material that was properly designated for inclusion in the record on appeal.

Second, Phillips is wrong about his conclusion that dismissal without prejudice of similar claims made by Cook against another party would bar his claims in this case. Phillips seems to be arguing res judicata, but that would not apply. "Res judicata bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). Here, there is no identity of parties: Phillips and his father were not the same person. Further, there has been no adjudication of the issue in the first suit. Phillips himself observes that the dismissal in the first suit was without prejudice. As a dismissal without prejudice, it could not adjudicate anything. Rule 41(a)&(b), SCRCP; see Gamble v. State, 298 S.C. 176, 177, 379 S.E.2d 118 (1989) (discussing dismissal without prejudice); Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997) (dismissal with prejudice operates as adjudication on merits).

VII. This is no sham affidavit case.

Citing Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004), Phillips implies that Cook's affidavit is a sham and should be disregarded by this court. (Initial Brief of Respondent p. 13.) The essence of the concept of a sham affidavit is that it is an impermissible contradiction of previously given sworn testimony, as the following notes:

> A trial court may exclude an affidavit when it was submitted "to contradict that party's own prior sworn statement" in "an attempt to create a sham issue of material fact." Cothran, 357 S.C. at 218, 592 S.E.2d at 633. Our supreme court delineated the following considerations for "distinguishing between a sham affidavit and a correcting or clarifying affidavit":

> (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

McMaster v. Dewitt, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014) (quoting Cothran, 357 S.C. at 218).

Cook never gave any testimony in this case other than in his affidavit. Not only is his affidavit not a sham, the sham affidavit analysis never gets off the ground, because there is no prior testimony for Cook's affidavit to be inconsistent *with*.

VIII. Vitriol is no substitute for logic.

Throughout his brief, Phillips insults and accuses Cook. This occurs so many times in Phillips' brief that considerations of economy do not bear listing each instance here. Cook trusts that Phillips' brief makes his uncivil tone and personal attacks impossible for this court not to see.

"*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane you ignorant etcetera . . .') only shows the paucity of your own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002). As the undersigned once read in a brief, there is a saying in our profession: "If you have the facts and not the law, argue the facts. If you have

the law and not the facts, argue the law. If you don't have either the facts or the law, pound the table."

This court should not be cowed by Phillips' aggression. It "only shows the paucity of [his] own reasoning." Id.

CONCLUSION

Cook's claims are against a living person – Phillips – for what that living person did. It was reversible error for the lower court to summarily end those claims on the basis of a statute that puts time limits on the assertion of claims against an estate. This court should reverse and remand.

Respectfully submitted,

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