

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2017-CP-07-01180

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SC Court of Appeals

In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent,

Samuel H. Tims, individually and as Co-
Personal Representative of the Estate
Of Harriet Kathleen Henry Tims,.....Petitioner

Vs.

Michael Tims, Individually and as Co-
Personal Representative of the Estate
Of Harriet Kathleen Henry Tims,.....Respondent

And

Deborah T. Krane, individually and as Co-
Personal Representative of the Estate
Of Harriet Kathleen Henry Tims,.....Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- A. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT S.C. CODE ANN. § 62-3-803, THE NON-CLAIM STATUTE, DOES NOT APPLY, BECAUSE (1) THE NONCLAIM STATUTE DOES NOT APPLY TO DISPUTES OVER TITLE, (2) THE PRESENT ACTION IS A DECLARATORY JUDGMENT ACTION TO DETERMINE THE RIGHTS OF THE PARTIES AS THEY CURRENTLY EXIST, (3) THE PERSONAL REPRESENTATIVES DISAGREE OVER HOW TO TREAT THE ASSET, (4) AN ACTION FOR RECOVERY OF PROPERTY MUST BE BROUGHT WITHIN TEN YEARS AND THE PERIOD HAS NOT YET BEGUN TO RUN, (5) THE CLAIM IS EQUITABLE, (6) MICHAEL TIMS' CLAIMS HAVE NOT VESTED, AND (7) THE NONCLAIM STATUTE DOES NOT APPLY TO MORTGAGES OR LIENS ON PROPERTY OR CLAIMS BY PERSONAL REPRESENTATIVES FOR EXPENSES SERVICING THE ESTATE?

- B. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THERE WAS A RESULTING TRUST IN MICHAEL TIMS' FAVOR REGARDING THE CLOVERDALE PROPERTY, BECAUSE MICHAEL TIMS HAS PAID ALL EXPENSES RELATIVE TO THE PROPERTY, HAS MADE ALL LOAN PAYMENTS, HAS MAINTAINED THE PROPERTY FINANCIALLY AND PHYSICALLY, PAID ALL MONEY TO ACQUIRE THE PROPERTY AND HARRIET TIMS AND DEBORAH KRANE HAVE PAID NOTHING?

- C. WHETHER THE CIRCUIT COURT CORRECTLY STRUCK DEBORAH KRANE'S DEMAND FOR A JURY TRIAL, BECAUSE THERE IS NO ENTITLEMENT TO A JURY TRIAL ON THE EQUITABLE DECLARATORY JUDGMENT CLAIMS AND THE REMAINING COUNTERCLAIMS AND CROSS-CLAIMS OF DEBORAH KRANE ARE PERMISSIVE AND NOT COMPULSORY?

- D. WHETHER APPELLANT'S ARGUMENTS WHICH WERE NOT RULED ON BY THE CIRCUIT COURT AND WHICH WERE NOT RAISED IN APPELLANT'S MOTION FOR RECONSIDERATION SHOULD NOT BE CONSIDERED?

- E. WHETHER, AS AN ADDITIONAL SUSTAINING GROUND, THE FACTS OF THIS CASE CREATE A CONSTRUCTIVE TRUST AS WELL, BECAUSE IT WOULD BE INEQUITABLE TO ALLOW THE ESTATE TO RETAIN OWNERSHIP OF THE PROPERTY AT MICHAEL TIMS' EXPENSE?

STATEMENT OF THE CASE

Harriet Kathleen Henry Tims (“Ms. Tims”) passed away on February 14, 2016, and her three children, Michael Tims, Deborah T. Krane and Samuel Tims filed a joint application for informal probate on March 3, 2016, and they were thereafter appointed co-personal representatives on March 4, 2016. (ROA____) Relations among the parties soon broke down and litigation ensued in Probate Court. On May 22, 2017, Samuel Tims filed a Summons and Petition for Declaratory Relief with the Beaufort County Probate Court. Samuel Tims amended the Petition on May 22, 2017. (ROA____) In his Petition, Samuel Tims asked the Court to determine the status of the title to property on Cloverdale Road in Beaufort County. Samuel Tims asserted that the Cloverdale Property was not an asset of the estate, but rather in a resulting trust in favor of Michael Tims. (ROA____)

Deborah Krane filed an Answer, Counterclaim and Cross-Claim against Michael Tims, denying Samuel Tims contentions and asserting claims for breach of fiduciary duty against Samuel Tims and Michael Tims. Deborah Krane also demanded a jury trial and sought to have the matter removed to Circuit Court. (ROA____) Michael Tims filed an Answer to Amended Petition of Samuel Tims on May 30, 2017, and joined in the relief sought by Samuel Tims. (ROA____) On June 13, 2017, the declaratory judgment petition of Samuel Tims was removed to Circuit Court, while the Probate Court retained jurisdiction over the administration of the estate and such other formal matters which may arise. (ROA____)

Michael Tims filed an Answer and Cross-Claims against Deborah Krane on June 29, 2017, and denied the relief sought by Deborah Krane. Michael Tims also asserted claims against Deborah Krane for breach of fiduciary duty. (ROA____) Deborah Krane filed an Answer and Reply

to Cross-Claims on July 10, 2017. (ROA___) Samuel Tims filed a Response to Answer to Amended Petition on July 11, 2017. (ROA___)

Deborah Krane thereafter filed a Motion for Summary Judgment on September 5, 2017. (ROA___) Michael Tims filed a Motion for Partial Summary Judgment on September 17, 2017. (ROA___) Samuel Tims filed a Motion for Summary Judgment on October 4, 2017, (ROA___) although he withdrew said Motion on October 10, 2017. (ROA___) Michael Tims filed a Memorandum in Support of his Motion for Summary Judgment and against Deborah Krane's Motion for Summary Judgment, along with exhibits and an Affidavit of Michael Tims on October 5, 2017. (ROA___) Deborah Krane filed Memorandums in Support of her Motion for Summary Judgment and against Michael Tims' Motion for Partial Summary Judgment, along with an Affidavit of Deborah Krane and exhibits, on October 9, 2017. (ROA___)

The Circuit Court heard argument from the parties on October 9, 2017, and subsequently issued an Order on February 7, 2018, denying Deborah Krane's Motion for Summary Judgment and granting Michael Tims' Motion for Partial Summary Judgment. The effect of the ruling was to grant Samuel Tims' and Michael Tims' claims seeking to declare a resulting trust, strike Deborah Krane's demand for a jury trial and to deny Deborah Krane's motion to dismiss the claims of Michael Tims and Samuel Tims on the basis of the non-claim statute. (ROA___) Deborah Krane filed a Motion for Reconsideration on February 19, 2018. (ROA___) On August 7, 2018, the Circuit Court issued an Order and granted the motion for reconsideration in part and denied it in part, but left its prior rulings intact. (ROA___) Both of Judge Mullen's Orders are excellent and well written and Respondent is hard pressed to match those efforts here. Deborah Krane filed this appeal on September 4, 2018. (ROA___)

STATEMENT OF FACTS

This case involves a dispute over real property located in Beaufort County located on Cloverdale Road in the Seabrook/Dale section. The property in question was paid for and acquired by Michael Tims and has been owned by Michael Tims since 1993 (ROA____) *Exhibit B to Samuel Tims' Amended Petition*. Michael Tims and his family reside on the property and he operates a deer processing business on it as well. Michael Tims had a loan on the property with MCAS Beaufort for approximately \$65,000.00. Although there is a dispute as to actual value, there is no dispute that the value of the property far exceeds \$65,000.00. The record shows that Michael Tims purchased the property in 1993 and, in 2012, had an outstanding balance on the property of approximately \$65,000.00. (ROA____) *Exhibit B and C of Samuel Tims' Amended Petition*. A recent appraisal shows a value of \$415,000.00 and the appraisal showed the property as vacant land and did not value any of the improvements. (ROA____) *Appraisal of Cloverdale Property*. In 2012, in a convoluted series of events, not really the fault of Michael Tims, the loan company put the loan in default and commenced foreclosure proceedings. Michael Tims was unable to refinance the property in his name and his mother, Harriet Tims, offered to assist. The agreement between Michael Tims and Harriet Tims was that Michael would deed the property to Harriet, Harriet would secure a loan against the property from Palmetto State Bank, Michael Tims would continue paying the new loan and, when the loan was paid off, Harriet would reconvey the property to Michael. The parties reduced the agreement to writing in a document titled the "Land Exchange Agreement". (ROA____) *Affidavit of Michael Tims; Exhibit A to Michael Tims' Memorandum*

Michael Tims deeded the property to Harriet Tims for no consideration, Harriet Tims took a loan from Palmetto State Bank to pay off MCAS, and the parties executed the Land Exchange

Agreement simultaneously. Subsequent to the loan closing, Michael Tims continued to live in the property as his primary residence and primary place of business. Michael Tims paid all loan payments, all taxes and all other expenses associated with the property. Neither Harriet Tims, nor anyone in the family, treated the property as the property of Harriet Tims. At all times relevant to this appeal, the loan was current, but had not been paid off. At all times relevant to this appeal, Michael Tims continued to make payments on the loan, continued to make all payments relative to the property and continued to occupy the property as his primary residence and primary place of business. (ROA____) *Affidavit of Michael Tims*.

Harriet Tims passed away in 2016. All three of her children, being Michael Tims, Deborah Krane and Samuel Tims, were appointed as co-personal representatives. (ROA____) *Order of Informal Probate*. Not long after the appointment, relations between the parties deteriorated and the administration of the estate came to a standstill. Deborah Krane takes the position that the Cloverdale property is an asset of the estate and Samuel Tims and Michael Tims contend it is Michael Tims' property by constructive or resulting trust and, therefore, not an asset of the estate.

ARGUMENTS

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The Circuit Court stated, and Michael Tims agrees, that summary judgment is a drastic remedy and should be cautiously invoked so that no person is deprived of a trial where there are disputed issues of fact. *See eg. Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute of material fact and the moving party is

entitled to judgment as a matter of law. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, however, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The non-moving party must come forward with specific facts showing a genuine issue of fact for trial. If the non-moving party fails to rebut the moving party's initial showing, then the moving party is entitled to summary judgment. *See eg. Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). In the present case, Deborah Krane is not entitled to summary judgment and Michael Tims is entitled to summary judgment on their claim for declaratory judgment. Furthermore, Deborah Krane is not entitled to a jury trial, because the complaint is equitable and the counterclaims legal and permissive.

A. The Circuit Court correctly determined that S.C. Code Ann. § 62-3-803, the Non-Claim Statute, does not apply, because (1) the nonclaim statute does not apply to disputes over title, (2) the present action is a declaratory judgment action to determine the rights of the parties as they currently exist, (3) the personal representatives disagree over how to treat the asset, (4) an action for recovery of property must be brought within ten years and the period has not yet begun to run, (5) the claim is equitable, (6) Michael Tims' claims have not vested, and (7) the nonclaim statute does not apply to mortgages or liens on property or claims by personal representatives for expenses servicing the estate.

Deborah Krane contends that Michael Tims and Samuel Tims' claims regarding the Cloverdale property are barred for failure to file a creditor's claim. This argument is wrong for a whole host of reasons. Respondent apologizes for the length of the heading, but there are simply many arguments why Appellant is wrong.

First, the Non-Claim statute expressly excludes disputes regarding the title of a decedent to specific assets alleged to be included in the estate. S.C. Code Ann. § 62-1-201(4) defines "claims" as "in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator,

including funeral expenses and expenses of administration. *The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.*” [emphasis added] The South Carolina Supreme Court ruled that a dispute over title to a gun was not a claim for purposes of the nonclaim statute. Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993).

Second, this action is a declaratory judgment action to determine the rights of the parties as they currently are, not to create rights which previously did not exist. The Land Exchange Agreement and the parties’ conduct, both before and after Harriet Tims’ death, show that the property should equitably be Michael Tims’ property, held in trust by Harriet Tims, and not an asset of the estate. If the property is not an asset of the estate, then Deborah Krane’s arguments do not apply. If a person holds property in a trust, that property is not part of their estate when they die. People often create trusts and place property in these trusts to avoid the Probate process. Michael Tims has a vested interest in the property which existed prior to Harriet Tims’ death and which now continues after her death.

Third, the personal representatives are, themselves, not in agreement as to how to treat the property. Michael Tims and Samuel Tims contend it is not an asset of the estate and Deborah Krane contends it is an asset of the estate. Pursuant to S.C. Code Ann. § 62-3-802(a), the defense of limitations may be waived by the personal representatives. It is not a jurisdictional defense.

Fourth, an action for the recovery of real property must be brought within ten years. The earliest this period would commence is in 2012 when the parties entered the Land Exchange Agreement. Actually, this period has not even yet commenced, as shown below. The Land Exchange Agreement states, in pertinent part: “Upon the acquisition of the contract of sale of the premises, Mom agrees to deed the premises back to Son[.]” The parties’ understanding was that

meant the property would be deeded back when the loan from Palmetto State Bank was paid off. In any event, there has been no acquisition of a contract for sale and the loan has not been paid off. Michael Tims' right to have the property reconveyed to him is not triggered until one of these events occurred. Therefore, Michael Tims does not yet have a claim for the return of the property.

Fifth, Michael Tims' claim for return of the property has not vested and the claim is equitable. S.C. Code Ann. § 62-3-803(a) states: "All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following: (1) one year after the decedent's death; (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication." A few things are pertinent here: (1) As shown above, Michael Tims does not have a claim for return of the property until acquisition of a contract of sale or the payoff of the loan. Neither of those events occurred before the decedent's death and neither has yet occurred. (2) The current action is equitable, not legal, and this statute does not mention equitable claims.

Sixth, S. C. Code Ann. § 62-3-803(c) states: "All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows: (1) a claim based on a contract with the personal representative within eight months after performance by the personal

representative is due; or (2) any other claim, within the later of eight months after it arises, or the time specified in subsection (a)(1).” As stated previously, Michael Tims does not have a claim for the return of the property until the acquisition of a contract for sale or repayment of the loan, depending on how the Land Exchange Agreement is interpreted. Neither of these events occurred prior to the decedent’s death and neither has yet occurred and so this limitation, if it applies, has not yet begun to run. Furthermore, this limitation does not even apply, because the current claim is equitable and, therefore, not subject to the creditor’s claims limitations.

Seventh, S.C. Code Ann. § 62-3-803(d) states, in pertinent part: “Nothing in this section shall be construed as placing a limitation on the time for: (1) commencing a proceeding to enforce a mortgage, pledge, lien, or other security interest upon property of the estate . . . (3) collecting compensation for services rendered to the estate or reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.” Michael Tims’ interest in the property, if not as a beneficiary of a trust, can certainly be construed as a “mortgage, pledge, lien or other security interest.” Furthermore, the money spent by Michael Tims to service the loan and keep up the property are certainly “services rendered to the estate or expenses advanced by the personal representative.”

This action being one at equity, the question becomes whether the doctrine of laches might bar Samuel Tims’ and Michael Tims’ claims. Laches is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. In general, one with a remainder interest in a trust is not guilty of laches if he sues promptly after his interest vests. *See eg. Eldridge vs. Eldridge*, 398 S.C. 113, 728 S.E.2d 24 (S.C. 2012) In this case, Michael Tims’ interest has not vested, because there has been no acquisition of a contract for sale and the loan from Palmetto State Bank has not been paid

off. For all of these reasons, the Circuit Court's ruling denying Deborah Krane's Motion for Summary Judgment on the basis of the nonclaim statute should be affirmed.

B. The Circuit Court correctly determined that there was a resulting trust in Michael Tims' favor regarding the Cloverdale Property, because Michael Tims has paid all expenses relative to the property, has made all loan payments, has maintained the property financially and physically, paid all money to acquire the property and Harriet Tims and Deborah Krane have paid nothing.

A resulting trust arises to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that, for a different reason, is titled in the name of another. McDowell vs. S.C. Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (1987). Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another. The general rule is that when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. The presumption, however, may not be in accord with the truth. It may be rebutted and the actual intention shown by parol evidence. *See eg.* Hayne Federal Credit Union vs. Bailey, 327 S.C. 242, 489 S.E.2d 472 (S.C. 1997); Jocoy vs. Jocoy, 349 S.C. 441, 562 S.E.2d 674 (2002); Larisey vs. Larisey, 93 S.C. 450, 77 S.E. 129 (1913).

The Court in *Hayne* looked at such factors as the beneficiary of the trust paying all costs of acquiring the property, the beneficiary occupying the house after closing, the beneficiary paying all taxes and insurance and the beneficiary being responsible for caring for the house, financially and physically. All of those elements are present in the Tims' situation. It is uncontested that Michael Tims has paid all expenses relative to the property, has made all loan payments, has maintained the property financially and physically and paid all money to acquire the property.

Harriet Tims has zero investment in the property. The Court in *Hayne* actually found that there was no resulting trust, because the father put title in the son's name in order to defraud creditors. One who seeks equity must do equity and the Court will not enforce a resulting trust set up to defraud creditors. In the Tims' situation, neither Harriet Tims nor Michael Tims intended to defraud anyone, nor did they defraud anyone.

The undisputed facts in this case establish a resulting trust which this Court should enforce. It is undisputed that Michael Tims paid for the property. It is undisputed that Michael Tims has occupied the property as his primary residence and primary place of business. It is undisputed that Michael Tims has paid all expenses relative to the property and all loan payments to Palmetto State Bank. It is undisputed that Michael Tims has been caring for the property both financially and physically. By her refusal to acknowledge Michael Tims' interest, Deborah Krane seeks a windfall at Michael Tims' sole expense. (ROA___) *Affidavit of Michael Tims*. Deborah Krane seeks to throw smoke onto the situation with her affidavit, but she offers no evidence at all to contradict these facts or to show that either Harriet Tims or she contributed any money to the property. (ROA___) *Affidavit of Deborah Krane*. By the terms of the Land Contract, had Harriet Tims or Deborah Krane contributed any money to the property, Michael Tims would be obligated to pay it back before having title returned to his name. (ROA___) *Exhibit to Memorandum of Michael Tims*.

The determination of whether a resulting trust should be imposed is specific to the time of the transaction. South Carolina trust law is clear that a resulting trust arises at the time the purchase is made. The funds must then, or prior thereto, be advanced and invested. A trust will not result from the funds subsequently furnished. Hodges v. Hodges, 354 S.C. 299, 133 S.E.2d 816 (1963)

In the present case, there is no dispute that Michael Tims paid for the property long before the conveyance to Harriet Tims. There is no dispute that the property was transferred with the sole intent of preventing its foreclosure. The record shows that Michael Tims purchased the property in 1993 and, in 2012, had an outstanding balance on the property of approximately \$65,000.00. A recent appraisal shows a value of \$415,000.00 and the appraisal showed the property as vacant land and did not value any of the improvements. (ROA___) *Appraisal of Cloverdale Property*.

The Court correctly granted Michael Tims' request for declaratory judgment and declared that the Cloverdale property is held by the Personal Representatives of the Estate of Harriet Tims as trustees in trust for Michael Tims and is to be returned to Michael Tims upon the acquisition of a contract of sale or the payoff of the Palmetto State Bank loan.

C. The Circuit Court correctly struck Deborah Krane's demand for a jury trial, because there is no entitlement to a jury trial on the equitable declaratory judgment claims and the remaining counterclaims and cross-claims of Deborah Krane are permissive and not compulsory.

Deborah Krane has requested a jury trial in her Answer and Counterclaim/Crossclaim. The action brought by Samuel Tims and joined by Michael Tims is one at equity and there is no entitlement to a trial by jury in an equitable action. See eg. Lester vs. Dawson, 327 S.C. 263, 491 S.E.2d 240 (S.C. 1996). Deborah Krane has brought counterclaims for breach of fiduciary duty. Where the complaint is equitable and the counterclaim legal and permissive, the Defendant waives his right to a jury trial. Johnson vs. South Carolina National Bank, 292 S.C. 51, 354 S.E.2d 895 (S.C. 1987) Deborah Krane's counterclaims are permissive. They involve complaints about the other handling of the estate. They have nothing to do with Samuel Tims' and Michael Tims' claims for declaratory judgment. Deborah Krane's request for a jury trial was correctly stricken.

D. Appellant's arguments which were not ruled on by the Circuit Court and which were not raised in Appellant's Motion for Reconsideration should not be considered.

Where an issue is neither addressed by the Trial Court nor raised by Appellant in a Rule 59(e) Motion, that issue is not preserved for appellate review. *See eg. Noisette vs. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) In her initial brief, Deborah Krane makes several arguments which do not appear in either Order of the Circuit Court nor in Appellant's Motion for Reconsideration. Deborah Krane makes a policy argument as to the nonclaim statute which was not addressed below. Deborah Krane takes great issue with the dates of the loan documents and the recording dates shown. Also, Deborah Krane argues that the \$1 of nominal consideration means Harriet Tims did pay for the land and the incurring of indebtedness constituted consideration. Assuming, *arguendo*, that the incurring of \$65,000.00 in indebtedness constituted consideration, the appraised value of the property (without reference to the improvements) of \$415,000.00 far exceeds that consideration. These issues were not properly raised at any time below. Should the recital of nominal consideration or the incurring of indebtedness be an issue, Michael Tims is obligated under the agreement to repay all amounts paid by Harriet Tims which relate to the property and is not entitled to have the property conveyed back to him before paying back all amounts. While payments after the land transaction are not relevant per se to a resulting trust, the evidence shows that all payments after the transaction relevant to the property were made by Michael Tims. (ROA___) *Affidavit of Michael Tims*. The record is devoid of Harriet Tims or anyone besides Michael Tims paying any expenses relative to the property at any time relevant to this case.

E. As an additional sustaining ground, the facts of this case create a constructive trust as well, because it would be inequitable to allow the Estate to retain ownership of the property at Michael Tims' expense.

A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. Because an action to declare a constructive trust is in equity, the Court may find the facts in accordance with its own view of the evidence. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. A constructive trust arises whenever a party has obtained property 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 or property transferred by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty. The burden is on the plaintiff to establish a constructive trust by clear and convincing evidence. Although fraud is generally cited as an element to establish a constructive trust, a party need not show actual fraud. Further, equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust. *See eg. Carolina Park Associates, LLC, vs. Marino, 400 S.C. 1, 732 S.E.2d 876 (S.C., 2012)*

While the relationship between Harriet Tims and Michael Tims is most applicable to that of a resulting trust, the situation between the Estate of Harriet Tims (and, specifically, Deborah Krane) is more along the lines of a constructive trust. Deborah Krane arguably has acquired title to the property (and the benefit of the money Michael Tims has expended on the property) under circumstances that make it inequitable for her to keep it. Deborah Krane's holding title and

refusing to acknowledge Michael Tims' interest shows fraud, bad faith, an abuse of confidence and breach of fiduciary duty. It is noteworthy that Samuel Tims, who is in the same position as Deborah Krane and stands to have no interest in the property if his and Michael Tims' claims prevail, joins Michael Tims in seeking to impose a resulting or constructive trust.

CONCLUSION

The Circuit Court's Orders should be affirmed in their entirety. Deborah Krane's Motion for Summary Judgment was correctly denied, because the property at issue is not an asset of the estate, Michael Tims' claim for the return of the property has not yet ripened and for all of the other reasons given above. The Circuit Court correctly granted Michael Tims' claims for a declaratory judgment to the effect that the Personal Representatives of the Estate of Harriet Tims, as trustees, hold title to the Cloverdale property in trust for Michael Tims and that Michael Tims may have the property deeded back to his name upon payoff of the Palmetto State Bank loan or acquisition of a contract for sale. Deborah Krane's request for a jury trial was correctly stricken, because the complaint is equitable, and the counterclaims are legal and permissive. This Court should not consider arguments raised by Appellant for the first time here. As an additional sustaining ground, the case also supports a constructive trust, because Appellant has (arguably) acquired title under circumstances which make it inequitable for her to retain it. For all of these reasons, Judge Mullen's Orders should be affirmed.

Respectfully submitted.

Dated: FEB 8, 2019
Hardeeville, South Carolina

Law Offices of Darrell Thomas Johnson, Jr., LLC



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Attorney for Respondent Michael Tims

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2017-CP-07-01180

RECEIVED
FEB 11 2019
SC Court of Appeals

In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent,

Samuel H. Tims, individually and as Co-
Personal Representative of the Estate
Of Harriet Kathleen Henry Tims,.....Petitioner

Vs.

Michael Tims, Individually and as Co-
Personal Representative of the Estate
Of Harriet Kathleen Henry Tims,.....Respondent

And

Deborah T. Krane, individually and as Co-
Personal Representative of the Estate
Of Harriet Kathleen Henry Tims,.....Appellant.

PROOF OF SERVICE

I certify that I have, on this 8th of February, 2019, served a copy of (1)
Respondent's Motion to Amend Respondent's Initial Brief and Designation of Matter, (2)
Amended Initial Brief of Respondent and (3) Respondent's Amended Designation of Matter to be

Included in the Record on Appeal, by depositing the same in the United States mail, with proper postage affixed, and addressed as follows:

P. Brandt Shelbourne, Esquire
131 E. Richardson Avenue
Summerville, South Carolina 29483

Eric M. Campbell, Esquire
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169 Jasmine Hall Road
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February 7, 2019

RECEIVED
FEB 11 2019
SC Court of Appeals

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: In the Matter of Estate of Harriet Kathleen Henry Tims, Decedent
Appellate Case No. 2018-001605

Dear Ms. Kitchings:

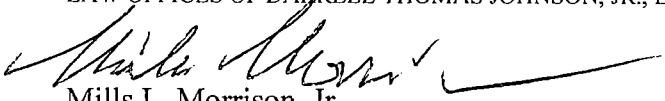
Enclosed please find an original and one copy each of (1) Respondent's Motion to Amend Respondent's Initial Brief and Designation of Matter, (2) Amended Initial Brief of Respondent, (3) Respondent's Amended Designation of Matter to be Included in the Record on Appeal, (4) Proof of Service. Also enclosed is a \$50 filing fee. Please file the originals with the Court and return filed stamped copies to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter and please let me know if you have any questions or concerns. By copy of this letter, I am serving the same on all parties.

With kind regards, I remain

Sincerely,

LAW OFFICES OF DARRELL THOMAS JOHNSON, JR., LLC


Mills L. Morrison, Jr.

MLM:lm/Enclosures

Cc: Mr. Michael Tims
Mr. Samuel Tims
P. Brandt Shelbourne, Esquire
Eric Campbell, Esquire

