

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-08-1839

Amy M. Bannon Zenner,
Conservator for Thomas C. Shoemaker
and Caleb M. Shoemaker,

APPELLANT,

-V-

Sydney Bruce Shoemaker,

RESPONDENT.

INITIAL BRIEF OF APPELLANT

RECEIVED

MAR 25 2019

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

BECAUSE APPELLANT ALLEGES TORTS IN THE PLEADINGS, THE CIRCUIT COURT SHOULD NOT HAVE DISMISSED THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION.

THIS COURT SHOULD NOT AFFIRM THE DISMISSAL BASED UPON ANOTHER BASIS PURSUANT TO SCACR 220(c).

STATEMENT OF THE CASE

Appellant filed the case being appealed, 2017-CP-08-1839, on August 2, 2017. Appellant/Plaintiff alleged Breach of Trust based on a constructive trust created by judicial order, Conversion, and Contempt. A cover sheet was included that categorized the nature of action as Torts – Personal Injury, Conversion (310). Respondent/Defendant filed an Answer and Counterclaim on or about August 31, 2017. Respondent/Defendant generally answered Appellant/Plaintiff's Complaint and counterclaimed for dismissal for failure to allege a cause of action upon which relief may be granted, violation of the South Carolina Frivolous Civil Proceedings Act, and slander. Appellant/Plaintiff filed a Reply on September 6, 2017 denying the counter-claim of Respondent/Defendant and raising the affirmative defenses of truth of the matter asserted and unclean hands.

On March 14, 2018, Respondent/Defendant moved for dismissal based on lack of subject matter jurisdiction. Hearings were held on May 15, 2018 and October 30, 2018 with oral arguments and, in the case of the latter hearing, the filing of a Memorandum in Opposition to

Defendant's Motion to Dismiss based on Lack of Subject Matter Jurisdiction by Appellant/Plaintiff.

The Circuit Court issued its Order granting Dismissal based upon lack of subject matter jurisdiction on November 5, 2018, serving the parties by email on November 9, 2018. That Order initiated this appeal. The Notice of Appeal was served upon the Circuit Court and the Court of Appeals on December 6, 2018. The Notice was then provided to Respondent through his counsel on December 7, 2018.

STANDARD OF REVIEW

Subject matter jurisdiction.

The question of subject matter jurisdiction is a question of law for the court. We are free to decide questions of law with no deference to the trial court. Capital City Insurance Co. v. Bp Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 528 (S.C. App., 2009)

Personal jurisdiction.

The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident's contacts in South Carolina are sufficient to satisfy due process. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E.2d 835, 839 (S.C. App., 2012)

Personal jurisdiction.

At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E.2d 835, 839 (S.C. App., 2012)

12(b)(6) failure to state a cause of action.

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCF. In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Capital City Ins. Co. v. Bp Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 527 (S.C. App., 2009)

FACTS

Appellant/Plaintiff filed a suit in Circuit Court alleging Breach of Trust, Conversion and Contempt. Paragraph 14 of the Complaint stated that “[u]nder paragraph 15 of the Final Order and Decree of Divorce, Sydney Bruce Shoemaker was to become trustee for insurance proceeds designated for the minor children Thomas [C. S.] and Caleb [M. S.]. (Complaint, Para.14) Respondent/Defendant admitted this in his Answer and Counterclaim. (Answer, Para. 2) Appellant/Plaintiff alleged that “[d]efendant Sydney Bruce Shoemaker did not hold the money in trust for the minor children Thomas [C. S.] and Caleb [M. S.]” (Complaint, Para.14) Respondent/Defendant denied this in his Answer and Counterclaim (Answer, Para. 3) and then

went on to state that he added a third child to the trust, (Answer, Para. 8) effectively admitting paragraph 14 of the Complaint. This supports the Breach of Trust cause of action.

Appellant/Plaintiff alleged that “[u]pon information and belief, Defendant has converted the funds he was supposed to hold in trust into his own use.” (Complaint, Para.40) Again, through admitting that he was to hold the money in trust for the minor children Thomas [C. S.] and Caleb [M. S.] (Answer, Para. 3) and then adding a third child to the trust (Answer, Para. 8), Respondent/Defendant did not set the trust up in the best interests of Thomas C. S. and Caleb M. S., he acted for his own purposes. This supports the Conversion cause of action.

Appellant/Plaintiff alleged that “[d]efendant’s acts and omissions were done in contempt of this Court and its orders.” (Complaint, Para.45) and “[s]uch acts were willful, reckless and in gross disregard for the sanctity of this Court.” (Complaint, Para.46) Again, through admitting that he was to hold the money in trust for the minor children Thomas [C. S.] and Caleb [M. S.] (Answer, Para. 3) and then adding a third child to the trust (Answer, Para. 8), Respondent/Defendant did not follow what he admits are the directives of the Court, he acted for his own purposes. This supports the Contempt cause of action.

Oral arguments on the motion occurred on May 15, 2018 at the end of which each party was asked to provide a proposed Order. After those Orders were sent, oral arguments were renewed on October 30, 2018.

At oral arguments on the motion, Movant/Respondent/Defendant made up his own version of the Pleadings and advanced the position that this case involved trust administration, and since the trust is located in Idaho and the trustee is in Idaho, the case should be pursued in Idaho and decided under Idaho law. This is best demonstrated by the following discussion from the transcript:

THE COURT: The -- hold on a second. The action in Berkeley County is for an accounting, breach of fiduciary duties and distribution?

MR. MACK: Yes, sir. We have answered that in alleging that there's been no breach of fiduciary duties and alleging that the Court in South Carolina lacks subject matter jurisdiction with regard to issues related to the administration of the Cameron Shoemaker Life Insurance Trust and that said jurisdiction of said matter would properly be in the State of Idaho. The trust continues to be administered in the State of Idaho, pursuant to the statutes of the State of Idaho. My client is a resident of the State of Idaho. The Court would be required to apply the law of the State of Idaho in a determination of whether there had been any violation in the terms of trust and administration in the State of Idaho. We, therefore, allege in this action that the Court here in Berkeley County South Carolina lacks subject matter jurisdiction with regard to the administrations as related to the administration of the trust and we would ask that the Court dismiss the action, based upon the lack of this subject matter jurisdiction (TscriptOct p.8, lines 9-25; p.9, lines 1-6)

In addition, lack of personal jurisdiction was argued.

THE COURT: But you take the position that there's absolutely no connection to the State of South Carolina, which voids this Court of -- this Court does not have jurisdiction.

MR. MACK: Yes, sir, that's basically it.

THE COURT: It's a long-arm type rule, argument in the reverse.

MR. MACK: Yes, sir. (TscriptMay p.9, lines 10-17)

THE COURT: So it's a tort action or breach of fiduciary duty that if he were in South Carolina it would be no question this Court could hear it. The question then becomes because he is in Iowa --

MR. MACK: Idaho.

MR. ZENNER: Idaho, Your Honor.

THE COURT: -- Idaho, do we have jurisdiction here in South Carolina (TscriptOct p.14, line 1-8)

Appellant/Plaintiff responded that the case involved tort actions as indicated by the foregoing history of the Pleadings and that both subject matter and personal jurisdiction are proper in the South Carolina Circuit Courts, as shown in the following oral argument:

MR. ZENNER: Did you want to see my case real quick? My main case on this issue? Because we were actually here on subject matter jurisdiction and I think that the questions being raised is one more of personal jurisdiction not subject matter jurisdiction. Because I think he's basically saying, Well, my client's not in South Carolina. He's actually this Idaho. And as far as subject matter jurisdiction, you know, again, I've highlighted on page 2 of this case, it's basically whether or not the Court that we're in front of has the power to hear these cases. And I would allege that this Court does have the power to hear this type of case, basically. Whereas we may be having a motion on personal jurisdiction or on venue, depending on how he views that. I think breach of trust and conversion, which are two of the three charges we've alleged. We've also alleged a contempt of court. I think all those are cases that are typically held in the circuit court. So it would seem that we were in the correct court for subject matter jurisdiction. I'm trying to find --

THE COURT: But your suing Mr. Shoemaker, aren't you?

MR. ZENNER: Yes, sir, Your Honor.

THE COURT: Don't you have to have jurisdiction on him?

MR. ZENNER: We do have to have personal jurisdiction, but that was not today's motion. But my argument on personal jurisdiction is that he himself has already appeared in these cases and he's actually implied consent to the jurisdiction of the Court by doing so.

THE COURT: When he accepted the position as trustee?

MR. ZENNER: When he accepted the position as trustee from the South Carolina court; when he then just filed an action in probate court on his own merits and then when he is -

THE COURT: What action did he file in probate court?

MR. ZENNER: He filed an action to remove the conservator, or I'm sorry to reconsider the order appointing the conservator to be accurate. (TscriptMay p.20, lines 23-25; p.21, lines 1-25; p.22, lines 1-15)

This position was restated in Appellant/Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss based on Lack of Subject Matter Jurisdiction which was provided to the Court during the October 30, 2017 oral arguments.

[THE COURT:] All right. You want to respond to that particular motion and then I'll let you argue your motion and respond to his; is that fair?

MR. ZENNER: Yes, sir. May I approach with a memorandum?

THE COURT: You certainly may. (TscriptOct p.9, lines 9-14)

Through the discovery process to date, Plaintiffs received another purported trust that included beneficiaries. This Trust was not for the sole benefit of Thomas S. and Caleb S. The Defendant included another alleged minor child of the deceased Cameron Shoemaker. The Defendant appointed alternate Trustees. The Defendant granted to himself the power to determine what amount, if any, to allocate to each child. The best result Thomas S. and Caleb S, can hope for from their grandfather is that they lost only 1/3 of their money; the worst - that they lose it all except for a token dollar.

He placed those trust funds in the hands of an Edward Jones investment advisor. Those funds have yielded a scant 3% over a 4-year period of time, when the Dow Jones gained 37.5% over the same period of time (12/05/2014 close - 17,958.79, 10/26/2018 close - 24,688.31), opening up the issue of waste. Greatly concerning is the fact that Defendant has been doing retirement planning for himself and his wife with these funds as evidenced by the Edward Jones documents themselves. Similar to the filing with the State of Idaho, none of this conformed to the Orders in 04-DR-08-2062.

Plaintiff alleges that Defendant committed a breach of trust in failing to comply with the Order of Continuance dated March 15, 2014. The Order created a constructive trust in South Carolina for the benefit of Thomas S. and Caleb S. and placed restrictions on the actions of Defendant. Plaintiff alleges that Defendant converted the assets entrusted to him by setting up a trust in the manner he chose, and not for the sole benefit of Thomas S. and Caleb S. in violation of the Order of Continuance dated March 15, 2014. Plaintiff alleges that Defendant is in contempt of this court and the sister courts of South Carolina. Defendant has engaged in behavior that is calculated to obstruct, degrade, and undermine the administration of justice. He has failed to follow the

directives of the court and acted in opposition to its Orders. (Mem., page 3, para. 2 - page 4, para. 1)

In the end, the Court adopted Movant's definition of the suit being one of trust administration despite the pleadings clearly on their face stating actions for tort. (Order, Para. 11) The Court even partially recognized this is a suit in tort stating "...it's a tort action or breach of fiduciary duty that if he were in South Carolina it would be no question this Court could hear it."

(TscriptOct p.14, line 1-3) More controlling in the Court's decision seemed to be an issue of personal jurisdiction, even though the Court failed to rule on that issue. Paragraphs 13-15 and the Findings of Law of the Order were all derived from the Court deeming this a case of trust administration instead of one in tort in Paragraph 11.

ARGUMENTS

BECAUSE APPELLANT ALLEGES TORTS IN THE PLEADINGS, THE CIRCUIT COURT SHOULD NOT HAVE DISMISSED THIS CASE FOR LACK OF SUBJECT MATTER JURISDICTION.

Appellant/Plaintiff filed an action in tort. The Circuit Court somehow was misled into believing that the action was one for administration of a trust. Because of this, the Court was led into error and the decision to dismiss for lack of subject matter jurisdiction needs to be reversed. The issue before the Circuit Court was a motion to dismiss based upon subject matter jurisdiction. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Dove -v Goldkist, Inc., 314 SC 235, 442 SE2d 598, 600 (1994) "There is but one Circuit Court in the State of South Carolina, with uniform subject matter jurisdiction "throughout the State." Id. The Circuit Court shall be a

general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. S.C. Const. Art. V, § 11

Appellant/Plaintiff's Pleadings allege three causes of action: Breach of Trust (Complaint, Heading First Cause of Action), Conversion (Complaint, Heading Second Cause of Action) and Contempt (Complaint, Heading Third Cause of Action). These causes of action are based in tort. As held by the Supreme Court, "[t]ort suits are within the circuit court's jurisdiction. Here, on its face, this complaint alleges a tort and therefore is not subject to dismissal for lack of subject matter jurisdiction." McCullar v. Estate of Campbell, 381 S.C. 205, 672 S.E.2d 784 (S.C., 2009) This Court's precedence also supports subject matter jurisdiction in tort matters, "In the present case, Capital City's breach of contract and fraud claims are part of the general class of cases which the court of common pleas has jurisdiction to hear." Capital City Insurance Co. v. Bp Staff, Inc., 382 S.C. 92, 674 S.E.2d 524, 529 (S.C. App., 2009)

The tort nature was alleged not only in the pleadings, but in oral arguments on the motion:

MR. ZENNER: Did you want to see my case real quick? My main case on this issue? Because we were actually here on subject matter jurisdiction and I think that the questions being raised is one more of personal jurisdiction not subject matter jurisdiction. Because I think he's basically saying, Well, my client's not in South Carolina. He's actually this Idaho. And as far as subject matter jurisdiction, you know, again, I've highlighted on page 2 of this case, it's basically whether or not the Court that we're in front of has the power to hear these cases. And I would allege that this Court does have the power to hear this type of case, basically. Whereas we may be having a motion on personal jurisdiction or on venue, depending on how he views that. I think breach of trust

and conversion, which are two of the three charges we've alleged. We've also alleged a contempt of court. I think all those are cases that are typically held in the circuit court. So it would seem that we were in the correct court for subject matter jurisdiction.

(TscriptMay p.20, lines 23-25; p.21, lines 1-18)

THE COURT: Which is a breach of fiduciary duty, alleged. And then you want an accounting, and then you want distribution under the terms of the trust.

MR. ZENNER: That would be -- yeah, that would be nice if we could get that done. But at the moment, we're trying to get a conversion, the breach of trust actions heard so we can actually say he did this, it was -- and obviously get our damages on that. (TscriptOct p.13, line 18-25)

At the oral arguments, the Court appeared to agree that subject matter jurisdiction exists although it went on to discuss issues of personal jurisdiction.

THE COURT: So it's a tort action or breach of fiduciary duty that if he were in South Carolina it would be no question this Court could hear it. (TscriptOct p.14, line 1-3)

In addition, the Court received Appellant/Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss based on Lack of Subject Matter Jurisdiction which states in relevant part:

Plaintiff alleges that Defendant committed a breach of trust in failing to comply with the Order of Continuance dated March 15, 2014. The Order created a constructive trust in South Carolina for the benefit of Thomas S. and Caleb S. and placed restrictions on the actions of Defendant. Plaintiff alleges that Defendant converted the assets entrusted to him by setting up a trust in the manner he chose, and not for the sole benefit of Thomas S. and Caleb S. in violation of the Order of Continuance dated March 15, 2014. Plaintiff

alleges that Defendant is in contempt of this court and the sister courts of South Carolina. Defendant has engaged in behavior that is calculated to obstruct, degrade, and undermine the administration of justice. He has failed to follow the directives of the court and acted in opposition to its Orders. (Mem., p.4, para. 1)

Plaintiff's causes of action must all be adjudicated in South Carolina. Breach of Trust is based on Defendant breaching the trust placed in him by the Courts of South Carolina. Conversion of those funds began from the moment they were placed in a constructive trust with Defendant. Both of these causes rest squarely in the purview of the South Carolina Courts. Plaintiffs allege that Defendant is in contempt of this Court. "It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court. SC Code Ann § 14-5-320 (1976) In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." Brandt -v- Gooding, 368 SC 618, 630 SE2d 258, 264. (2006) No court of any other state can hear this contempt matter. Even were this case about interpretation and administration of the trust, South Carolina would again be the proper forum. It is South Carolina that set out the trust in question and said trust should have been prepared in South Carolina, according to the laws of South Carolina and pursuant to the Orders which created the trust. (Mem., p.4, para. 3 – p.5 para. 1)

Despite this the Court found in error that "the Plaintiff has initiated litigation in this action questioning Defendant's exercise of his fiduciary duties with regard to the interest of the three

minor beneficiaries and request an accounting of funds received and distributions made pursuant to the terms of said trust.” (order, para. 11)

Following on this error, the Court then went on to determine that Idaho was the proper jurisdiction to exercise subject matter jurisdiction in that Idaho law will be applied to matters regarding the administration of the trust (Order, para. 13); it is inappropriate for the Circuit Court to exercise jurisdiction over the proper administration of an Idaho trust (Order para. 14); that the motion should be granted since this case involves the interpretation of the administration of an Idaho trust (Order, para. 15); and a finding of law that “the Court lacks subject matter jurisdiction with the issues as raised in the pleadings which relate to an Idaho trust and that this matter should be adjudicated in Idaho based upon the fact that the trust in questions is established in the State of Idaho and regulated pursuant to the statutes and regulations of the State of Idaho” (Order p.5, para. 4)

All of these errors compounded and led to the Court improperly dismissing the tort action of Appellant/Plaintiff contrary to the established law of South Carolina.

THIS COURT SHOULD NOT AFFIRM THE DISMISSAL BASED UPON ANOTHER BASIS PURSUANT TO SCACR 220(c).

Although the Record on Appeal includes discussion of the issues of personal jurisdiction and summary judgement, neither of these should be used by this Court to affirm the dismissal of the action by the Circuit Court. Most importantly, a dismissal on other grounds is unsupported by the record. The Circuit Court never ruled on these issues and Respondent/Defendant never requested dismissal based on these grounds.

Personal jurisdiction was discussed several times in oral arguments.

THE COURT: Is there any connections at all to the State of South Carolina? Any nexus to the State of South Carolina other than the fact that it started out as a part of a divorce settlement, the parties were here when it was created?

MR. MACK: Except that the beneficiaries of the trust are two 17-year-old boys who are residents of South Carolina, reside here in Berkeley County. (TscriptMay p.8, lines 15-22)

THE COURT: But you take the position that there's absolutely no connection to the State of South Carolina, which voids this Court of -- this Court does not have jurisdiction.

MR. MACK: Yes, sir, that's basically it.

THE COURT: It's a long-arm type rule, argument in the reverse.

MR. MACK: Yes, sir. (TscriptMay p.9, lines 10-17)

THE COURT: All right. Why -- what connections do we have here that give me, give this Court jurisdiction? (TscriptMay p.9, lines 18-19)

MR. ZENNER: Right, he remarried. So the decedent's wife took control of the funds immediately. We had a hearing here back in December of 2014. That Court said, pending further order, we're going to go ahead and put it in the hands of Mr. Shoemaker, you're going to hold it in trust for these children. Our -- we're alleging that he then turned around and took this money and instead of doing it for the children, he didn't follow that order at all and he converted the money to his own use. And in the trust document he actually prepared, it's not exclusively for these two children. There's some language in

there that we feel actually needs to be adjudicated, which we believe he's perpetrated a fraud on the Courts of South Carolina, and that these minor children, who both live in South Carolina, are being negatively affected thereby. (TscriptMay p.10, lines 15-25; p.11 lines 1-5)

MR. ZENNER: Well, and that's the other thing. His clients availed themselves to the South Carolina courts as well. He did it actually in probate court through another attorney to actually try to set aside the conservatorship (TscriptMay p.13, lines 13-16)

THE COURT: But your suing Mr. Shoemaker, aren't you?

MR. ZENNER: Yes, sir, Your Honor.

THE COURT: Don't you have to have jurisdiction on him?

MR. ZENNER: We do have to have personal jurisdiction, but that was not today's motion. But my argument on personal jurisdiction is that he himself has already appeared in these cases and he's actually implied consent to the jurisdiction of the Court by doing so.

THE COURT: When he accepted the position as trustee?

MR. ZENNER: When he accepted the position as trustee from the South Carolina court; when he then just filed an action in probate court on his own merits and then when he is -

THE COURT: What action did he file in probate court?

MR. ZENNER: He filed an action to remove the conservator, or I'm sorry to reconsider the order appointing the conservator to be accurate. (TscriptMay p.21, lines 20-25; p.22, lines 1-15)

[MR. ZENNER:] We do understand that Mr. Shoemaker lives in Idaho, but we believe that he has subjected himself to the jurisdiction of South Carolina. The decree of divorce and there was also a continuance order, which actually appointed or reaffirmed that he was the trustee. Both were issued by a South Carolina court. He actually put himself under the jurisdiction as trustee. The trust was created by that court, is our argument. (TscriptOct p.9, line 25; p.10 lines 1-7)

MR. ZENNER: Yeah, I disagree that we would have Idaho law. I still believe we'd have South Carolina law. But our opinion is -- our position is that this money actually belongs to these children who are South Carolina residents. It was given to him by a South Carolina court to put in trust, so they created a constructive trust, basically until he did something with it.

He's subjected himself multiple times to the jurisdiction of the South Carolina courts. His attorneys have actually said previously that jurisdiction was proper on those actions, so we're arguing that this Court can actually hear this matter, it has subject matter jurisdiction, obviously, over these claims, that we have personal jurisdiction over the defendant because he's availed himself to the Courts and he's still under the jurisdiction of the South Carolina courts.

THE COURT: Has he availed himself to the Court in this particular action that -- I assume he filed in his answer and was 12(b)6, 12(b) whatever it is, lack of jurisdiction?

MR. MACK: That's subject matter jurisdiction, yes.

MR. ZENNER: He denied it.

MR. MACK: He denied it. (TscriptOct p.20, line 3-25)

It was further addressed in Appellant/Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss based on Lack of Subject Matter Jurisdiction.

Although not expressly stated in Defendant's Motion, personal jurisdiction over the Defendant may be raised at arguments. The Defendant was appointed trustee by the Family Court of the Ninth Circuit pursuant to a divorce decree of the Ninth Circuit Family Court. This established a constructive trust and bound him to South Carolina's jurisdiction. His appointment was confirmed in the Order of Continuance dated March 15, 2015. By accepting this position and the constructive trust it created, Defendant consented to the jurisdiction of South Carolina.

Defendant has converted the funds entrusted to him. Defendant's acts have been done in violation of the Order of the Ninth Circuit Family Court entrusting him with those funds. Even if those acts took place in Idaho, those acts were directed at South Carolina with consequences in tort. Said acts give rise to certain causes of action, including breach of trust, conversion and contempt. These causes of action directly arise out of Defendant's contact with the state.

Further, Defendant has purposely availed himself of the protection of the South Carolina Courts including filing an action in Probate Court for Berkeley County in an

attempt to reconsider the appointment of the Conservator. Defendant has expressly consented to the jurisdiction of the South Carolina courts.

Even if Idaho were the proper venue as Defense counsel had argued, Defendants acts have bound him here. "A court sitting where venue is improper may nevertheless render judgment provided the party who possesses the venue right consents, either expressly or impliedly." Dove -v Goldkist, Inc., 314 SC 235, 442 SE2d 598, 600. Finally, the only beneficiaries of the constructive trust reside in South Carolina...

Defendant clearly has minimum contacts with South Carolina. He could expect to be sued in South Carolina in connection with his appointment as trustee. In addition, the exercise of jurisdiction by this Court is both reasonable and fair, not only because the Court held jurisdiction over the Defendant in appointing him, but also because he expressly and impliedly has submitted to its jurisdiction. (Mem., p.5, para. 2 – p.6 para. 3)

Summary judgment was addressed in Appellant/Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss based on Lack of Subject Matter Jurisdiction.

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Brandt -v- Gooding, 368 SC 618, 630 SE2d 259, 264. (2006) Based on the pleadings of both parties, Defendant committed a breach of trust in setting up the trust; converting the assets entrusted to him to his own use; and acting in violation of the Orders in case number 04-DR-08-2062. Defendant's only disagreement with Plaintiffs' causes of action is where they occurred, not if they did. Examining the facts in the light most favorable to the Plaintiff, she would prevail on her Complaint, therefore, summary judgment is not

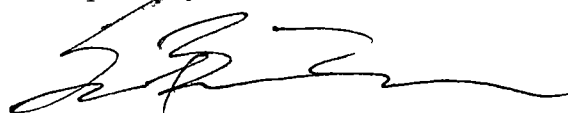
appropriate for the Defendant. Defendant's own pleadings admit that he violated the Orders in 04-DR-08-2062, and therefore has committed the breach, conversion and contempt alleged, by at the very least deciding on his own to add beneficiaries that were not ordered by the Court. Examining the facts in the light most favorable to the Defendant, Plaintiff prevails. (Mem., p.7, para. 1)

Although not addressed during the motion process, failure to state facts sufficient to constitute a cause of action is in the pleadings. In the light most favorable to the Appellant/Plaintiff, similar to the foregoing discussion on summary judgment, causes of action for Breach of trust, Conversion, and Contempt of Court would not only exist, Appellant/Plaintiff would prevail on them.

CONCLUSION

Appellant asks that the Appellate Court reverse the Circuit Court's dismissal for lack of subject matter and remand the case for further proceedings not inconsistent with this Court's order.

Respectfully submitted,



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March 22, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-08-1839

Amy M. Bannon Zenner, Conservator for Thomas C. Shoemaker and Caleb M. Shoemaker,
APPELANT,

-V-

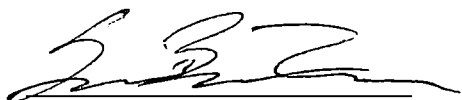
Sydney Bruce Shoemaker,
RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal on Sydney Bruce Shoemaker by depositing a copy of it in the United States Mail, postage prepaid, on March 22, 2019, addressed to his attorney of record, Ben F. Mack, Esq., 110 North Main Street, Summerville, SC 29483.

March 22, 2019

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March 22, 2019

Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Enclosed documents for filing
Bannon Zenner, et.al -v- Shoemaker 17-CP-08-1839

Dear Ms. Kitchings

Enclosed please find the following for filing:

1. Initial Brief of Appellant;
2. Designation of Matter to be Included in the Record on Appeal;
3. Proof of Service of the above documents on respondent.

Sincerely,



Sean Bannon Zenner

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SC Court of Appeals

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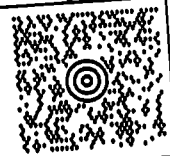
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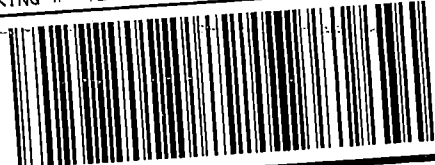


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