THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Brian C. Able, Presiding Associate Probate Judge

Common Pleas Case No. 2015-CP-30-00581
Probate Case Number 2011-ES-000221
Probate Case Number 2015-GC-30-0000712

Appellate Case No. 2019-000906

JOHN ROSCOE STONE, III,
DIANE S. DOUGLAS, and
JONI S. WOFFORD, *Respondents*,

v.

RONNIE G. STONE and S.
TYLER PATTON,
Of Whom S. Tyler Patton is *Appellant.*

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Where, as here, an action had been removed from Probate Court as of right, does a Presiding Probate Judge have authority or other jurisdiction to preside over the trial in the matter, particularly absent Rule 43(k), SCRCP, consent of the parties?

2. Where the evidence showed that Mr. Patton prudently diversified the trust corpus, as recommended by financial advisers, did the court below err in finding that Mr. Patton had violated his fiduciary duties as trustee by failing to maintain a single-stock corpus?

3. Did the Presiding Probate Judge err, under Rule 8(c), SCRCP, in disregarding evidence that S. Tyler Patton relied on the advice of his financial advisor?

4. Given the unreasonable delay and prejudice to S. Tyler Patton from the delay in filing this action, did laches bar relief?

5. Where the evidence was insufficient as matter of law to sustain a verdict for conversion, did the Presiding Probate Judge err in awarding relief for that cause of action (if he did at all)?

STATEMENT OF THE CASE

I. A Formal Petition Is Filed in Probate Court.

On May 7, 2015, John Roscoe Stone, III; Diane S. Douglas, and Joni S. Wofford (the "Remainder Beneficiaries") filed a formal petition in the Probate Court of Laurens County against Ronnie G. Stone, S. Tyler Patton, Ron Dean, and Edward Jones. [Summons & Petition]. The Petition alleged that Ms. Stone, as personal representative, and then later Mr. Patton, as trustee, had improperly administered the late Everett H. Stone's testamentary trust by diversifying the 3097 shares of Aon, Inc. stock—684 shares by Ms. Stone and 2,413 shares by Mr. Patton—that had originally formed the trust corpus into a diversified mutual fund. *See* [*id.* ¶¶ 11-16, 23, 25]. The Petition further alleged that Mr. Dean and Edward Jones, Mr. Patton's stockbrokers and advisors, wrongfully participated in that course of action. *See* [*id.* ¶¶ 10, 18]. The Petition raised causes of action for accounting, conversion of the Aon shares, civil conspiracy, breach of fiduciary duty, and as to Ms. Stone only, fraud. *See* [*id.* ¶¶ 20-36].

Mr. Patton filed an answer denying liability and raising affirmative defenses including failure to state a claim and laches. [Patton Answer]. He specifically denied the allegation that he "knew or should have known" that he was not allowed to diversify the Aon stock. *Compare* [Petition ¶ 17], *with* [Patton Answer ¶18]. He did, however, admit the following allegation, [Patton Answer ¶10]:

> By accepting appointment as Trustee...., S. Tyler Patton became obligated by S.C. Code Ann. § 62-7-804 (as amended) to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, [Mr. Patton as trustee] was required to exercise reasonable care, skill, and caution so as to act in the best interests of Wife and the [Remainder] Beneficiaries.

[Petition ¶9].

Ms. Stone filed an answer denying liability and asserting counterclaims for trespass and conversion against the Petitioners. [Ronnie Stone Answer].

In lieu of answering, Mr. Dean and Edward Jones filed motions to dismiss and to compel arbitration as required under the stock brokerage agreement. [Dean & Jones Motion to Dismiss and Compel Arbitration].

II. The Probate Court Orders the Case Removed to the Court of Common Pleas.

Pursuant to a motion from Mr. Dean and Edward Jones, on July 17, 2015, presiding Judge Able of the Probate Court ordered "the case [removed] to the Laurens County Court of Common Pleas." [Order of Removal].

III. The Court of Common Pleas Dismisses Mr. Dean and Edward Jones.

On January 21, 2016, the Circuit Court entered a stipulated order dismissing without prejudice Mr. Dean and Edward Jones. [Dean and Jones Order of Dismissal].

IV. The Court of Common Pleas Denies Mr. Patton's Motion to Dismiss.

Mr. Patton filed a motion to dismiss the Petition for failure to state a claim, which

came for hearing in February 2016. [Patton Motion to Dismiss]. The basis of the motion was that the Remainder Beneficiaries' claims for conversion were premature in that "they don't even have a vested interest yet, in that they are contingent beneficiaries of the trust...[O]nly upon [Ms. Stone's] death do [the trust assets] pass to the contingent beneficiaries." [2/9/16 Tr.]. The Circuit Court denied that motion in an order filed February 9, 2016 [2/9/19 Form 4].

V. The Court of Common Pleas Refers the Case Back to the Presiding Probate Judge with a Right of Appeal to This Court.

On June 22, 2017, the presiding judge at the Court of Common Pleas entered an order of reference as follows:

> **IT APPEARING** to the Court that the above entitled action is an action at law,
>
> **IT IS ORDERED** that the matter be and hereby referred to Bryan C. Able, Probate Judge for Laurens, County, as Probate Judge to make findings of fact and conclusions of law; dispose of any and all issues and enter a final judgment in the case.
>
> Any appeal from the decision of the Special Referee shall be directly to the South Carolina Court of Appeals or the South Carolina Supreme Court as appropriate.

[Order of Reference].

The only signature of consent on that order was that of Judge Able. [*Id.*].

VI. The Presiding Probate Judge Holds a Bench Trial Awarding Relief to the Remainder Beneficiaries for Breach of Fiduciary Duty.

On September 27, 2018—following what he interpreted as a "remov[al] from the Court of Common Pleas for Laurens County to this [Probate] Court [of Laurens County," ["Fourth Order" dated 8/13/19]—the presiding Probate Judge held a bench trial on the Petition. [Order on Motion to Amend dated 8/13/19]. Because Ms. Stone passed away in 2018, all claims against her were dismissed. [Order on Motion to Amend dated 8/13/19 at 1].

The Presiding Probate Judge entered an order resolving the case on December 3, 2018, which was amended pursuant to timely motions to alter or amend, and entered its final order on August 13, 2019, whose contents are summarized below. [Order on Motion to Amend dated 8/13/19; "Fourth Order" dated 8/13/19].

At the bench trial, the Remainder Beneficiaries "proceeded solely against [Appellant] S. Tyler Patton, on his alleged failure to discharge his fiduciary duties in connection with a trust created by the Last Will and Testament of Everett H. Stone...." [Order on Motion to Amend dated 8/13/19]. *See also* [Trial Tr. 64 (dismissing conspiracy claim by agreement)].

The presiding probate judge found that Mr. "Patton violated his fiduciary duties to [the Remainder Beneficiaries] by selling/disposing of 2,413 shares of Aon, Inc. stock." ["Fourth Order" dated 8/13/19 at 5]. For relief, the court ordered Mr. Patton to provide a written accounting of his tenure as trustee, replaced him as trustee, and or-

dered him to "restore to the corpus of the Everett Stone Family Trust 2,413 share of Aon, Inc. stock...." ["Fourth Order" dated 8/13/19 at 5; Order on Motion to Amend dated 8/13/19].[1]

The orders below were signed "BRYAN C. ABLE ASSOCIATE PROBATE JUDGE," who filed them with the Probate Clerk—not the Clerk of the Circuit Court. [Order on Motion to Amend dated 8/13/19; "Fourth Order" dated 8/13/19].

VII. Mr. Patton Files an Appeal to this Court.

Mr. Patton received notice of the entry of the order disposing of his Rule 59 motion on August 14, 2019. [Notice of Appeal]. He served his notice of appeal to this Court on August 26, 2019. [Notice of Appeal and Proof of Service].[2]

STATEMENT OF ADDITIONAL FACTS

I. Ms. Stone Successfully Completed Probate of Everett Stone's Estate.

Mr. Everett Stone died in 2011 and was survived by his children, the Remainder

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[1] The court below found that Aon, Inc. stock had a share price of $145.97 on March 16, 2018, the date of Ms. Stone's death. ["Fourth Order" dated 8/13/19 at 5].

[2] As explained below, Mr. Patton does not believe that the presiding Probate Judge had jurisdiction to hold a trial in this matter. Even if he did, Mr. Patton does not believe that an appeal directly to this Court is available. Out of an abundance of caution given the unique procedural posture, Mr. Patton also filed a notice of appeal to the Court of Common Pleas, with proceedings there stayed pending this Court's decision as to whether this Court has jurisdiction over the orders at issue. *See Patton v. Stone*, No. 2019-CP-30-00748 (Laurens County Court of Common Pleas).

Beneficiaries and Respondents here; his second wife, Ms. Stone; and his two stepchildren, Appellant S. Tyler Patton and non-party Cy M. Patton. *See* ["Fourth Order" dated 8/13/19 at 1].

Ms. Stone probated her husband's last will and testament in April 2011 in Laurens County. [*Id.*]. She accepted the testamentary nomination to serve as personal representative. [*Id.*].

The probated last will and testament also included the following provisions relevant to this action:

> ITEM IV
>
> I devise to my Trustee, hereinafter named, all my shares of stock in Aon, Inc and Piedmont Natural Gas Company, to be held and administered for the benefit of my wife, **RONNIE G. STONE**, for the term of her natural life. Commencing with the date of my death, my Trustees shall pay to or apply for the benefit of my wife during her lifetime all the dividend and interest income from the trust in convenient installments but no less frequently than quarter-annually. Upon the death of my wife, I direct that my Trustee distribute all my shares of stock in Aon, Inc. equally to my children, **JOHN ROSCOE STONE, III, DIANE S. DOUGLAS and JONI S. WOFFORD**, and distribute all my shares of stock in Piedmont Natural Gas Company equally to my step-children, **S. TYLER PATTON and CY M. PATTON**.
>
> [...]
>
> ITEM IX:
>
> I hereby nominate, constitute and appoint as Trustee **S. TYLER PATTON**, and direct that he shall serve without bond....

[Petition Ex. A].

During the probate process—"on or about November 28, 2011" according to the Petition—Ms. Stone sold 684 share of the Aon stock and invested the proceeds in a mutual fund (Income Fund of America). [Petition ¶13]. Ms. Stone filed with the probate court a notice that showed that Edward Jones had transferred 2,413 shares of Aon stock and 1,784.652 shares in the Income Fund of America into a trustee investment account. [Def. Ex. 1; Trial Tr. 38-39].

The probate court approved the closure of the estate in August 2012. [Trial Tr. 39]. In so doing, the then-presiding probate judge determined "that all laws of South Carolina and the [Probate] code had been followed." [Trial Tr. 39].

II. Mr. Patton Diversified the Aon Stock in Good Faith and on Advice of His Stockbroker.

Frank Stone, the brother of Everett Stone, testified that he confronted Mr. Patton in November 2014 and told Mr. Patton that he thought Mr. Patton had erred by selling the Aon stock and reinvesting the proceedings. [Trial Tr. 58-59]. Thereupon, still in 2014, Mr. Frank Stone contacted Mr. J.R. Stone and told him of the sale of the Aon stock. [Trial Tr. 59].[3] On cross-examination, Mr. Frank Stone conceded that Mr. Ever-

[3] Mr. J.R. Stone testified that he first learned of the diversification in September 2014. [Trial Tr. 32].

ett Stone had trusted Ron Dean's investment advice. [Trial Tr. 60]. Further, without objection, Mr. Stone stated that it was "true" that "Mr. Patton relied on the exact same individual that [Mr. Everett Stone] had for decades in advising [Mr. Everett Stone] in his capacity as trustee..." [Trial Tr. 60-61].

For his part, Mr. Patton testified that by the time he had become trustee, Ms. Stone had already sold approximately 600 shares of the Aon stock and invested the money with Edward Jones. [Trial Tr. 121]. To him, the trust language was a bit "confusing." [Trial Tr. 123]. He did not consult with a lawyer about the trust language, [Trial Tr. 125]. But—as the Remainder Beneficiaries repeatedly elicited on cross-examination—he did rely on Ron Dean and Edward Jones as to the need to diversify the portfolio, [Trial Tr. 130 ("Q Do you take responsibility for what you've done here? A I take responsibility for diversifying the portfolio to make it – on the recommendation of Edward Jones, yes."); 132 ("A...I just told you I was responsible, but I based my decisions on a financial manager."); 140 ("A [The decision to diversify] was based on the

recommendations of Edward Jones and Ron Dean.")].[4] Indeed, he thought that diversification was necessary to preserve the trust for the beneficiaries, in case Aon should turn out to be an Enron, [Trial Tr. 135], as the Remainder Beneficiaries elicited on cross:

> Q All right. I'm going to stop questioning you very shortly. But what I don't understand is how you misinterpreted in my opinion the word held, to be held (inaudible) trust and I direct that this certain stock goes to certain people, how did that get turned around into disposing of what you were supposed to hold?
>
> A When I'm told that it needs to be sold by a professional, then to protect the assets in the account, I thought it was the correct thing to do.

[Trial Tr. 138]. He followed the advice to diversify to make sure that the trust would be around to take care of Mr. Everett Stone's window and be around for Mr. Everett Stone's children to inherit upon the passing of Ms. Stone. *See* [Trial T. 139 ("A That money was for my mom who took care of him and now he was taking care of her and

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[4] At the end of the testimony, after the repeated eliciting of answers that invoked Mr. Patton's reliance on his financial advisors during cross examination by the Remainder Beneficiaries, counsel for the Remainder Beneficiaries moved that the testimony be stricken on the grounds that Mr. Patton did not plead an affirmative defense of reliance on a third party. [Trial Tr. 144]. The transcript shows no ruling on that motion. On direct, however, the court had already overruled an objection that reliance was required to have been pleaded. [Trial Tr. 80 ("Q And did you rely on any parties to help you manage that? A Edward Jones is a professional financial advising firm. MR. THOMPSON: Object again to the – him utilizing the defense of reliance on a third party when it was not affirmatively pled in their pleadings HON. ABLE: Overruled.")].

then it would go to John and Diane and Joni.")]. He testified that he "only had the best intention" for the trust and did not ever personally benefit from his position. [Trial Tr. 139]. In selling the Aon shares and investing in mutual funds, Mr. Patton testified that his goal was to protect the interests of Ms. Stone and the Remainder Beneficiaries. [Trial Tr. 97-98].

Even Mr. J.R. Stone conceded that it is prudent for a trustee to seek advice. [Trial Tr. 44 ("Q So in seeking the advice of a third party, that would be a prudent thing for a trustee to do, correct? A Yes, within the boundaries of what they're supposed to do and what they're not supposed to do.")]. He also freely conceded that Mr. Patton has not "benefited in any way" from the diversification of the Aon stock. [Trial Tr. 49 ("I am not accusing Mr. Patton of benefiting in any way from this. I do not have any evidence that he has benefited in any way of this.")].

Excerpts of Ron Dean's deposition were admitted at trial. Included among the excerpts was testimony that Ms. Stone sold 684 shares of Aon after he "recommended to Ms. Stone that she diversify the assets." [Trial T. 151]. He also recommended that Mr. Patton diversify the Aon stock. [Trial T. 152-53]. At the time of that recommendation to Mr. Patton, "Standard & Poor's had a sell recommendation on it." [Trial Tr. 153].

III. The Diversification of the Trust Led to an Increase in Value.

In July 2012, when Mr. Patton received the assets from the Trust from Ms. Stone,

as personal representative, he received 2,413 shares of Aon stock and mutual fund shares that combined were valued at a little more than $150,000. [Trial Tr. 83-84]. The trust corpus increased to be worth more than $155,000 in September 2012, as Mr. Patton sold 965 shares of Aon and invested the proceeds in a mutual fund. [Trial Tr. 85-86].[5] In February 2013, Mr. Patton sold 884 shares of the Aon stock and again invested the proceeds in a mutual fund. [Trial Tr. 88-89]. In May 2013, Mr. Patton sold 228 shares and invested the proceeds in a mutual fund and ended the month with a trust corpus that had grown to more than $172,000.00. [Trial Tr. 94]. In September 2013, following the sale of the remaining 336 Aon shares and investment of the proceeds into a mutual fund, the trust corpus ended the month with a value of more than $176,000. [Trial Tr. 96-97].

By the end of December 2014, the trust that contained only mutual funds was valued at more than $183,000. [Trial Tr. 101]. By the end of 2017, it had grown to more than $220,000 in value. [Trial Tr. 111]. As of August 31, 2018, directly before the trial, the value was $224,077.41. [Trial Tr. 112].

[5] Although Mr. Patton did not provide specific notice to the Remainder Beneficiaries of the sales during Ms. Stone's lifetime, the Remainder Beneficiaries likewise did not inquire as to the operations of the trust. [Trial Tr. 141].

IV. Mr. J. R. Stone Agreed that He Would Have Wanted Action from Mr. Patton if the Aon Stock Had Declined.

Mr. J. R. Stone maintained that the trust precluded Mr. Patton from selling the Aon stock such that the shares—rather than their value—would be turned over to the Remainder Beneficiaries upon Ms. Stone's death. *See* [Trial Tr. 46-47]. On cross-examination, however, he conceded that he would not have wanted Mr. Patton to sit on his hands if the Aon stock began to decline in value: "Had it dropped, I would have expected him to come to us and discuss with us options based on whatever Ron Dean or whoever told him." [Trial Tr. 47].

ARGUMENT

I. The Presiding Probate Judge Lacked Jurisdiction to Preside; Therefore, this Court Lacks Jurisdiction on Appeal.

A. Standard of Review

"The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties...." *Anderson v. Anderson*, 299 S.C. 110, 115 (1989). Accordingly, it can be raised "at any stage of the proceeding," including for the first time on appeal. *Eaddy v. Eaddy*, 283 S.C. 582, 584 (1984). Whether jurisdiction exists is a question of law for the court...." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104 (Ct. App. 1993) (citation omitted).

B. The Presiding Probate Judge Lacked Jurisdiction as a Probate Judge Following Removal of the Case to the Circuit Court.

The Probate Code does not contemplate that a probate judge will ever be able enter a judgment directly appealable to the Court of Appeals. As relevant here, the Probate Court has exclusive jurisdiction over civil actions related to "trusts," S.C. Code § 62-1-302(a)(3), with the Circuit Court (or, if the parties stipulate in writing or on the record, the Supreme Court) sitting in an appellate capacity. S.C. Code § 62-1-308(a), (i), & (l). That probate-judge-as-trial-judge and circuit-judge-as-appeal-judge set up is subject to one exception: Upon a motion of a party or the probate court itself, the action "must be removed to the circuit court...and the circuit court shall proceed upon the matter de novo" if, among other things, the action involves "internal or external affairs of trusts." S.C. Code § 62-1-302(d)(3). Thus, once an action is properly removed to the circuit court, the text of the Probate Code contemplates no further participation from a probate judge.

When the General Assembly wants to allow one court to transfer a case to another court, it does so expressly. *See, e.g.*, S.C. Code § 22-3-545 (providing procedure to transfer case from general sessions to magistrates or municipal courts); S.C. Code § 63-19-1210(3) (providing methods for transfer of jurisdiction to and from family court). The Probate Code does not, however, contain an express provision allowing a

circuit court to remand a case to a probate judge for trial—even though it allows probate courts discretion to transfer matters *to* circuit court. S.C. Code § 62-1-302(f) ("[I]f an action described in subsection (d) is removed to the circuit court by motion of a party, or by the probate court on its own motion, the probate court may, in its discretion, remove any other related matter or matters which are before the probate court to the circuit court....").

The presiding probate judge here purported to preside over the trial after it had been "removed from the Court of Common Pleas for Laurens County to this [Probate] Court...." [8/13/19 Order at 1], with an appeal lying directly to this Court in the first instance, [Order of Reference]. No statutory authority, however, allowed for such a result. The circuit court should—as required upon removal from the Probate Court—have "proceed[ed] upon the matter de novo." S.C. Code § 62-1-302(d)(3). The Probate Court lacked the power to proceed for the Circuit Court.

C. The Presiding Probate Judge Lacked Authority as a Special Referee.

The Presiding Probate Judge below did not view his authority as that of a Special Referee. He specifically signed his orders in his capacity as an associate probate judge and included a caption that listed the case as being "IN THE PROBATE COURT" and filed them with that court's clerk. [8/13/19 Order Granting Motion to Amend; 8/13/19 Fourth Order]. Out of an abundance of caution, however, Mr. Patton would note that

the Presiding Probate Judge had no authority to act as a special referee, either.

By statute, the Circuit Court has the "authority," *Roche v. Young Bros.*, 332 S.C. 75, 80 (1998), to refer an action for which no jury has been demanded to a special referee only by agreement of the parties: "[T]he presiding circuit court judge, *upon agreement of the parties*, may appoint a special referee in any case who as to the case has all the powers of a master-in-equity." S.C. Code § 14-11-60 (emphasis added).[6] Any "agreement between counsel affecting the proceedings," to be valid, must be "reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRCP. *See also, e.g., Long v. Ehni*, 283 S.C. 554, 554 (1983) (dismissing appeal from order of special referee for lack of written consent by the parties for the special referee to enter judgment directly appealable to the Supreme Court).

Here, no agreement of the parties within the meaning of Rule 43(k), SCRCP appears. Consequently, no authority as a special referee ever vested. Accordingly, to the extent that the Presiding Probate Judge purported to exercise the authority of the Cir-

[6] Rule 53(a), SCRCP, defines "special referee" as "a member of the South Carolina Bar to whom a matter has been referred *under S.C. Code Ann. § 14-11-60*." (emphasis added). Thus, no special referee can ever be validly appointed under Rule 53 if the referee has not already met the qualifications under S.C. Code § 14-11-60.

cuit Court, the attempt was void.

* * * *

This Court only has jurisdiction to hear appeals "from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission." S.C. Code § 11-8-200. At present, however, no reviewable judgment exists because the circuit court has not yet served in either a trial or appeal capacity.

This Court should vacate the judgment below for lack of jurisdiction and remand with instructions for the Circuit Court to conduct a trial on the merits.

II. Because Mr. Patton Prudently Diversified the Trust Corpus, Insufficient Evidence Supports a Judgment for Breach of Fiduciary Duty.

A. Standard of Review

Where, as here, a Complaint seeks equitable relief for an alleged breach of fiduciary duty rather than mere damages, the cause of action will "sound in equity." *Verenes v. Alvanos*, 387 S.C. 11, 17 (2010). A prayer for restoration of property allegedly wrongfully removed from a trust or for an accounting are both forms of equitable relief. *See, e.g., id.* (holding that action sounded in equity where petitioner sued trustee for breach of fiduciary duty and sought to have the trustee "restor[e] to the Trust the lost income, lost capital gain, and lost appreciation in value as a result of the alleged

breach" because those items were species of "restitution"); *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427 (2009) ("An action for an accounting sounds in equity.").

Because this action is equitable, "this Court may review the record and make findings in accordance with its own view of the preponderance of the evidence." *Mallon*, 381 S.C. at 427 (citation and footnote omitted)).

B. Mr. Patton Did Not Breach His Fiduciary Duty When He Diversified the Corpus from a Single-Stock to Mutual Funds.

"To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36 (2012) (citation omitted). The only element at issue here is the second—in the unusual context of the claim by Respondents that *reasonable prudence* itself can be a breach of fiduciary duty.

Trustees owe various fiduciary duties to beneficiaries. Among those duties is a duty to "administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." S.C. Code

§ 62-7-804. Prudence normally augurs for diversification to minimize risk, even if a trustee may have received a single-stock corpus from the settlor. *See, e.g.*, *Beacham v. Ross*, 187 S.C. 398, 408 (1938) ("[The personal representative argues that he] should be excused for failure to dispose of the mill stock before he did for the reason that the testatrix made these investments herself. We think, and it has been so held, that this fact will not justify his act in retaining such securities beyond a reasonable time for making a conversion." (citation omitted)). *See also Restatement (3d) of Trusts*, § 90(b) (2012) ("In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.").

In the context, as here, of investments, the General Assembly has specifically declared that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." S.C. Code § 62-7-933(D). The prudent-investor rule is a "default rule." S.C. Code 62-7-933(B)(2).[7] If a settlor wishes to modify that default rule, the settlor must do so explicitly. *See id. See also Wood v. U.S.*

[7] This is a uniform act. It "must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among the States enacting it." S.C. Code § 62-7-933(L).

Bank, N.A., 828 N.E.2d 1072, 1078 (Ohio Ct. App. 2005) ("We hold that the language of a trust does not alter a trustee's duty to diversify unless the instrument creating the trust *clearly* indicates an intention to do so." (emphasis added)). But "[a] trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust." S.C. Code § 62-7-933(B)(2).

With all due respect to the presiding probate judge, the Court should find no breach of fiduciary duty occurred when Mr. Patton exercised prudence to diversify Aon stock into mutual funds on the good-faith advice of financial advisors. As the Remainder Beneficiaries' own Petition alleged—and Mr. Patton agreed in his answer, [Patton Answer. ¶10]—Mr. Patton "was required to exercise reasonable care, skill, and caution so as to act in the best interests of [Ms. Stone] and [the Remainder Beneficiaries]." [Petition ¶9]. Above and beyond a trustee's potential statutory duty of diversification, the only evidence in the record here was that diversification was prudent; holding the Aon stock was not. *See, e.g.*, [Trial Tr. 138 ("A When I'm told that it needs to be sold by a professional, then to protect the assets in the account, I thought it was the correct thing to do."); 140 ("A [The decision to diversify] was based on the recommendations of Edward Jones and Ron Dean."); 153 (financial adviser testifying that he recommended selling Aon in favor of mutual funds in part because "Standard & Poor's had a sell recommendation on [Aon].")]. The Remainder Beneficiaries here of-

fered no (much less, credible) expert or other evidence that a reasonably prudent investor would have kept Aon stock and run the risk of decline in appreciation and/or dividend yields—particularly for Ms. Stone, who was using the income to care for herself in her elderly years, [T. 139]. *See also Difelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) ("[P]lacing retirement funds in any single-stock fund carries significant risk, and so would seem generally imprudent for ERISA purposes....").

To support their claim that Mr. Patton's prudence was itself a breach of duty, the Remainder Beneficiaries claim that the language of the testamentary trust prohibited diversification. *See* [Trial Tr. 161 (arguing that "*even if Mr. Patton was using good judgment*, he violated the clear and unambiguous terms of the will and consequently should be held liable" (emphasis added)]. But the trust instrument does not reference South Carolina's Uniform Prudent Investor Act or its default duty to diversify. Nor does it affirmatively prohibit the sale of the Aon stock. Given the default rules, common-law and statutory, in favor of diversification, that silence in the testamentary instrument precludes liability for diversification. *See Wood*, 828 N.E.2d at 1077-78 ("Had John wanted to eliminate Firstar's duty to diversify, he could simply have said so. He could have mentioned that duty in the retention clause. Or he could have included another clause specifically lessening the duty to diversify. But he did not. We hold that the language of a trust does not alter a trustee's duty to diversify unless the

instrument creating the trust clearly indicates an intention to do so.").

Even if Mr. Patton mistakenly believed that as trustee he had the power to diversify—after all, the trust called for him to "administer[]" it, [Petition Ex. A] and was designed to provide long-term support to a widow, both of which contemplate prudence in investment—any technical misinterpretation was not so unreasonable as to demand liability, particularly when any mistake was to behave prudently as trustee. *See* S.C. Code § 62-7-933(B)(2) ("A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust." S.C. Code § 62-7-933(B)(2). *See also* [Trial Tr. 161 (arguing that the trust terms were not sufficiently "clear and plain" so as to preclude diversification)].

Accordingly, this Court should find that Mr. Patton did not breach his fiduciary duties and reverse the judgment below.

III. Laches Should Bar the Claims.

A. Standard of Review

As indicated in the previous section, this case is a case at equity. Accordingly, "this Court may review the record and make findings in accordance with its own view of the preponderance of the evidence." *Mallon*, 381 S.C. at 427 (citation and footnote omitted)).

B. The Remainder Beneficiaries' Delay Amounted to Laches.

Laches applies when a litigant has delayed "an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence." *De Laine v. De Laine*, 211 S.C. 223, 231 (1947). When delay becomes unreasonable depends on the facts of the case. *See Babb v. Sullivan*, 43 S.C. 436, 442 (1895) (noting that delay of even months can be too long).

Although the presiding probate judge found that the Remainder Beneficiaries had no notice of any sale of the Aon stock, that finding was, respectfully, incorrect. In June 2012, Ms. Stone filed with the probate court paperwork from Edward Jones showing that the trust account with Everett Jones had 2,413 shares of Aon stock and 1,784.652 shares in a mutual fund (the Income Fund of America), [Patton Ex. 2]. Knowledge of that public record, filed in an estate for which they were heirs, is chargeable to the Remainder Beneficiaries. *See Harmon v. Barber*, 105 S.C. 161, 165 (1916) ("Charters are made a subject of public record, and the collector is charged with knowledge that it is dealing with an unchartered institution....").

Despite that actual or constructive notice, the Remainder Beneficiaries filed no objection to the August 2012 closure of the estate and waited to file this action until May

2015. A delay of approximately 2.5 years ought to be seen unreasonable, particularly given the failure of any explanation for it.

That unreasonable delay was prejudicial to Mr. Patton. Had the Remainder Beneficiaries filed suit against Ms. Stone at any time before he completed the diversification of the portfolio, Mr. Patton could have obtained judicial guidance as to how to proceed. Instead, they waited until diversification had occurred—thus protecting them from downside risk[8]—and sued Mr. Patton in 2015 to try and obtain additional upside.

This Court should hold that laches defeats liability and reverse the judgment.

IV. Rule 8(c), SCRCP, Did Not Require Mr. Patton to Plead Reliance on Financial Advisors.

A. Standard of Review

Whether the Rules of Civil Procedure require a matter to be pleaded is a question of law, for which *de novo* review applies. *See Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 228 (2016) (applying *de novo* review to an issue of interpretation of the Rules of Civil Procedure).

B. Reliance on Financial Advisors Was Not an Affirmative Defense.

The Rules of Civil Procedure only require a defending party to specifically plead

[8] Mr. Patton would note, for example, that while Aon stock closed at $145.97 on March 16, 2018, it had traded as low as $116.10 during the 52 preceding weeks. *See* [Remainder Beneficiary Ex. 2].

"matter constituting an avoidance or affirmative defense." Rule 8(c), SCRCP. The Rules provide a lengthy list of such matters that must be specially pleaded. *Id.* A trustee's reliance on diversification advice from a financial advisor is not specifically included.

"An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. In other words, it assumes all elements of the plaintiff's case have been established." *O'Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 494 (Ct. App. 1983) (citation omitted).

Here, the Petition accused Mr. Patton of violating his fiduciary duty to "exercise reasonable care, skill, and caution" with respect to the administration of the trust. [Petition ¶ 9]. While Mr. Patton admitted that he owed such a duty, [Patton Answer ¶ 10], he denied that he violated that duty. Although the Remainder Beneficiaries did not offer any competing testimony from a financial expert, Mr. Patton's good-faith consideration of expert financial advice was part and parcel of his defense to the claims raised against him. The Remainder Beneficiaries would not have been required to have specially pleaded disregard of advice of a financial expert. So, too, was Mr. Patton not required to have pleaded reliance on such advice.

To the extent that the presiding Probate Judge thought that the Answer did not allow him to consider Mr. Patton's reliance on the advice of Mr. Dean and Edward

Jones, the court below erred as a matter of law.[9]

V. To Whatever Extent the Remainder Beneficiaries Did Not Abandon Their Claim for Conversion, the Claim Had No Merit.

A. Standard of Review

With respect to the sufficiency of a complaint, "the pleadings must be construed liberally, and all well pled facts must be presumed true." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134 (2014). The propriety of a dismissal is a question of law subject to *de novo* review. *See id.*

With regard to the sufficiency of the evidence at trial, because the claim sounds in equity, "this Court may review the record and make findings in accordance with its own view of the preponderance of the evidence." *Mallon*, 381 S.C. at 427 (citation and footnote omitted)).

B. No Conversion Occurred.

The presiding Probate Judge's findings and conclusions (tendered for signature by counsel for the Remainder Beneficiaries) did not award any relief for conversion. [8/8/19 ltr to Hon. Judge Able from Thomas J. Thompson; "Fourth Order" dated 8/13/19]. Indeed, the presiding Probate Judge stated that the case proceeded to trial

[9] As indicated in the discussion of Issue 2, that financial advice was powerfully probative on the issue of compliance with Mr. Patton's fiduciary duties. This Court is entitled to judge the credibility of that evidence for itself. *Mallon*, 381 S.C. at 427.

"solely against...S. Tyler Patton, on his alleged failure to discharge his fiduciary duties...." [8/13/19 Order Granting Rule 59 Motion].[10] Nevertheless, out of an abundance of caution, and to preempt claims that that cause of action provides an alternative basis for affirming the judgment, Mr. Patton will briefly address the claim.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. To establish the tort of conversion, it is essential that the plaintiff establish either title to or right to the possession of the personal property" at the time of the conversion. *Crane v. Citicorp Nat'l Servs.*, 313 S.C. 70, 73 (1993) (citation omitted).

As the Petition itself makes clear, the Remainder Beneficiaries had no rights in the trust during Ms. Stone's lifetime. [Petition ¶ 11]. But it also makes clear that all the Aon stock was exchanged for mutual fund shares prior to the Petition's filing—well

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[10] Abandoning this cause of action was not surprising. Damages for conversion would have been limited to the difference between the value of the Aon stock at the transformation, plus interest, less the amount ultimately in the corpus at the time of distribution. *See Nesbitt v. Moore*, 39 S.C. 351, 355 (1893) ("The general rule of damages for the conversion of stock by the pledgee, is the value of the stock at the time of the conversion, with interest from that time to the time of trial, together with whatever incidental damage may have occurred"). Seeking restoration of the stock share via a claim for breach of fiduciary duties would result in a much higher recovery—if the claim could have been proven.

before Ms. Stone's death in 2018. *See* [*id.* ¶25 & Ex. E-11]. Thus, any supposed conversion, whether pleaded or proved at trial, was done before any Remainder Beneficiary had the right to obtain the Aon stock. That fact is fatal to the claim. *See Crane*, 313 S.C. 70 at 73 ("As it is undisputed that the Cranes had no right to possession or title to the mobile home at the time of its repossession, the trial court correctly dismissed the conversion cause of action.").

Furthermore, with respect to the trial evidence, no breach of fiduciary duty was ever shown; as shown with respect to issue 2, Mr. Patton had the authority to diversify the trust. And given the undisputed evidence that Mr. Patton never converted the funds to his own use—but rather reinvested the funds in trust for the benefit of the beneficiaries—that independently precludes recovery. *See, e.g., Crane v. Citicorp Nat'l Servs.*, 313 S.C. 70, 73 (1993) (explaining that conversion must be the exclusion of the plaintiff's rights).

Thus, there could have been no unauthorized disposition of the trust assets. Neither the pleadings nor the proof would have supported any relief under this cause of action.

CONCLUSION

This Court should vacate the judgment below for lack of jurisdiction and remand for a trial on the merits in the Circuit Court. Alternatively, it should reverse the judgment below with respect to the order to restore Aon stock to the trust.

Dated this 12th day of November, 2019.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Brian C. Able, Presiding Associate Probate Judge

Common Pleas Case No. 2015-CP-30-00581
Probate Case Number 2011-ES-000221
Probate Case Number 2015-GC-30-0000712

Appellate Case No. 2019-000906

JOHN ROSCOE STONE, III,
DIANE S. DOUGLAS, and
JONI S. WOFFORD, *Respondents*,

v.

RONNIE G. STONE and S.
TYLER PATTON,
Of Whom S. Tyler Patton is *Appellant.*

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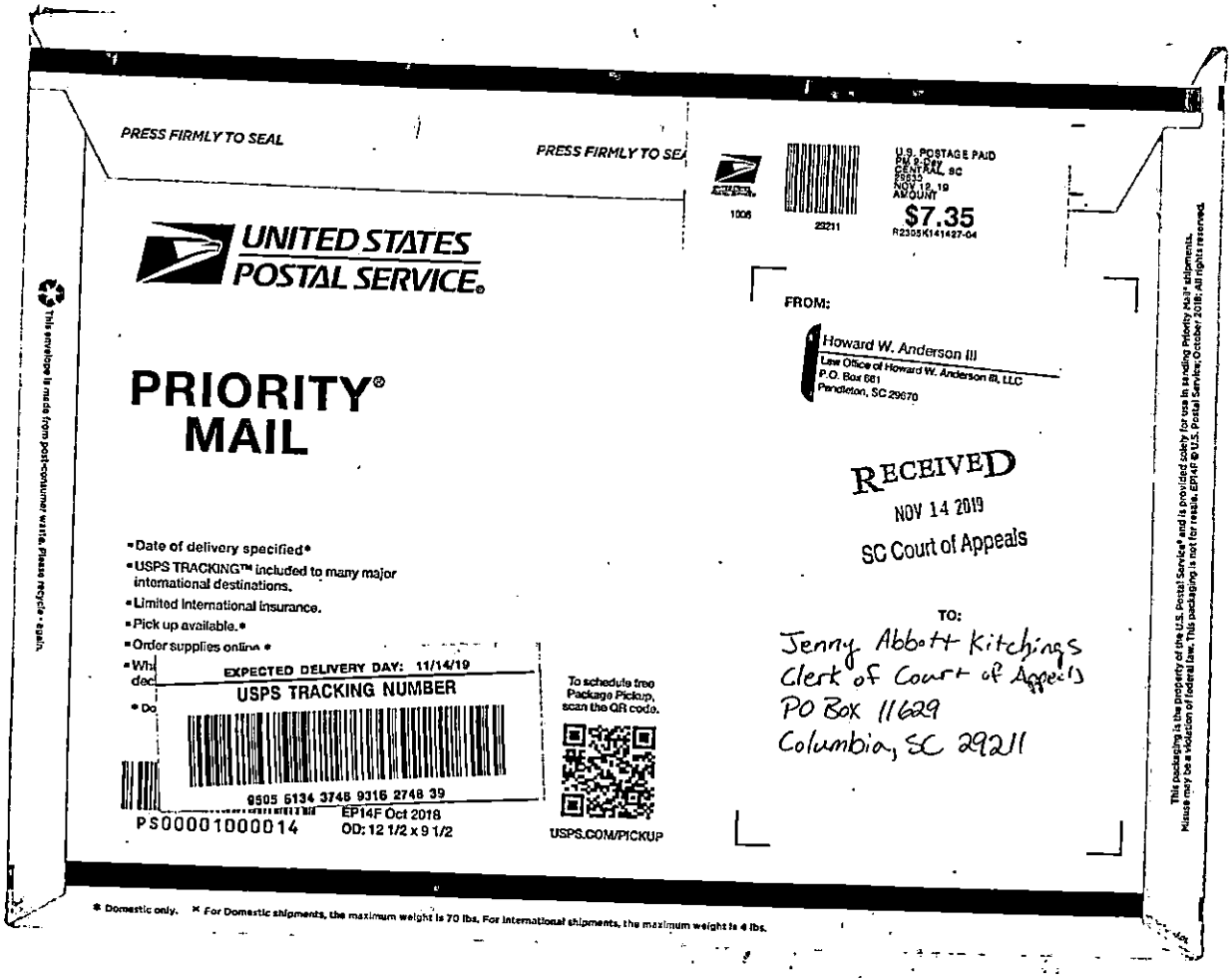

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