

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Jan 20 2021

SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2020-00594

Melissa Combs a/k/a Melissa ClearyAppellant,

v.

Carlie Elvin Cleary, Individually and as Personal Representative of the Estate of Scott B. Cleary,
and Ditech Financial, LLCDefendants,

Of whom Carlie Elvin Cleary, Individually and as Personal Representative of the Estate of Scott
B. Cleary is the Respondent.

INITIAL BRIEF OF RESPONDENT

THE LAW FIRM OF CISA & DODDS, LLP
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 II. SHOULD THIS COURT CONSIDER APPELLANT’S ARGUMENT THAT ALLEGED ENTITLEMENT TO A JURY TRIAL IS AN ADDITIONAL GROUND FOR REMOVAL TO CIRCUIT COURT WHEN SUCH ARGUMENT WAS NOT RAISED UNTIL ORAL ARGUMENT ON APPELLANT’S MOTION TO ALTER OR AMEND THE ORDER GRANTING RESPONDENT’S MOTION TO DISMISS?1

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT CORRECTLY DETERMINE THAT IT LACKED SUBJECT MATTER JURISDICTION WHERE THE ULTIMATE ISSUE OF THE UNDERLYING ACTION IS HEIRSHIP AND WHERE THE THRESHOLD ISSUE THEREOF IS WHETHER THE DECEDENT WAS A PARTY TO A COMMON LAW MARRIAGE?
- II. SHOULD THIS COURT CONSIDER APPELLANT’S ARGUMENT THAT ALLEGED ENTITLEMENT TO A JURY TRIAL IS AN ADDITIONAL GROUND FOR REMOVAL TO CIRCUIT COURT WHEN SUCH ARGUMENT WAS NOT RAISED UNTIL ORAL ARGUMENT ON APPELLANT’S MOTION TO ALTER OR AMEND THE ORDER GRANTING RESPONDENT’S MOTION TO DISMISS?

STATEMENT OF THE CASE

Scott Cleary (the “Decedent”) died intestate on November 22, 2018. The Decedent’s father and sole heir, Respondent Carlie Elvin Cleary (“Respondent”),¹ was appointed personal representative by order of the Charleston County Probate Court dated January 8, 2019. (See Order of Informal Appointment at 5). Appellant Melissa Combs a/k/a Melissa Cleary (“Appellant”) asserts that she is the common-law wife of Decedent and commenced the underlying action via filing of a summons and complaint and lis pendens in the Charleston County Probate Court on April 4, 2019. (See generally Summons & Compl.; see also generally Lis Pendens). In Appellant’s Complaint, she states as follows:

That this is an action to determine the heirs at law of [the Decedent] who died intestate on November 22, 2018; to try title to certain parcels of real property located in Charleston County, South Carolina, hereinafter more particularly described, and also in the State of North Carolina; to set aside a deed of distribution from the [Respondent] as personal representative to [Respondent] individually dated February 26, 2019; and to remove [Respondent] as personal representative of [Decedent’s estate].

(Compl. at ¶ 4).

¹ Respondent died February 25, 2020 and, by consent, the probate court appointed Respondent’s wife, Betty P. Cleary, as special administrator of the Estate of Scott B. Cleary. (See August 19, 2020 Consent Order Appointing Special Administrator).

On or about May 1, 2019, Respondent filed an answer to Appellant's complaint denying Appellant's allegations and asserting a counterclaim to eject Appellant, Appellant's daughter, and Appellant's boyfriend from residing in the residence once belonging to the Decedent. (See generally Ans. & Countercl.). Appellant filed an answer to Respondent's counterclaim (see generally Ans. to Countercl.), and thereafter filed a motion to remove the action to the circuit court on May 9, 2019 (see generally Mot. for Removal). By order dated May 13, 2019, the probate court granted Appellant's motion for removal.

Following removal to circuit court, Respondent filed a motion to dismiss pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 62-1-302 on the basis that the circuit court was without subject matter jurisdiction over the claims asserted by Appellant. (See Mot. to Dismiss at 1). In support thereof, Respondent also submitted an affidavit which stated, in pertinent part, that Decedent "has never been married and any assertion by [Appellant] that she is my son's common-law wife is completely untrue and, in my opinion, an effort to unlawfully secure my son's assets. (See Aff. of Resp't). The motion was heard before the Honorable Bentley D. Price on January 9, 2020. (See generally Tr. of Hr'g on Mot. to Dismiss). Judge Price ultimately issued a Form 4 Order granting Respondent's motion to dismiss and remanding the underlying action back to the probate court on January 30, 2020. (See Order Grant Mot. to Dismiss). Appellant filed a motion to alter or amend pursuant to Rule 59, SCRPC, on February 7, 2020 (see generally Mot. to Alter or Amend), which was denied by Judge Price via Form 4 Order on March 3, 2020 (see generally Order Den. Mot. to Alter or Amend).

On March 31, 2020, Appellant filed a notice of appeal of the January 30, 2020 order granting Respondent's motion to dismiss and the March 3, 2020 order denying Appellant's motion to alter or amend. (See Notice of Appeal).

STANDARD OF REVIEW

“Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” Dove v. Gold Kist, Inc., 314 S.C. 253, 237–38, 442 S.E.2d 598, 600 (1994). “Whether a court has subject matter jurisdiction is a question of law [this Court] review[s] de novo.” Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009); see also Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 384, 559 S.E.2d 348, 351 (Ct. App. 2001) (“A question of subject matter is a question of law for the court.”).

ARGUMENT

- I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT IT DID NOT POSSESS SUBJECT MATTER JURISDICTION OVER THE UNDERLYING ACTION BECAUSE HEIRSHIP IS THE ULTIMATE ISSUE BEFORE THE COURT, OVER WHICH THE PROBATE COURT IS ENTITLED TO EXERCISE EXCLUSIVE JURISDICTION.

Article V, § 11 of the South Carolina Constitution states that “[t]he 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.” Id. The probate court is not a constitutional court, and, thus, the extent of the probate court’s jurisdiction is defined by the legislature. Id. at § 12. Pursuant to S.C. Code Ann. § 62–1–302, “the probate court has exclusive original jurisdiction over all subject matter related to . . . determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court” Id. at (a)(1). Furthermore, “[t]he probate court has jurisdiction to hear and determine issues relating to . . . common-law marriage . . . in connection with estate . . . actions

pending before it, concurrent with that of the family court pursuant to Section 63-3-530.” Id. at (c).

Therefore, pursuant to S.C. Code Ann. § 62-1-302, the probate court has concurrent jurisdiction with the family court regarding common-law marriage in connection with estate, trust, and guardianship/conservatorship actions. However, the probate court has exclusive jurisdiction over estates of decedents and determining the heirs of an estate. Indeed, this issue is specifically addressed in Thomas v. McGriff, 368 S.C. 485, 629 S.E.2d 359 (2006). In Thomas, the South Carolina Supreme Court considered a dispute regarding which court has jurisdiction to establish that a common-law marriage existed on the date of death. Because the action was solely about the marriage and not about a determination of rights as an heir, the South Carolina Supreme Court found the family court to be the proper place for that particular action. See id. at 488, 629 S.E.2d at 360. In so holding, the Supreme Court recognized that jurisdiction to determine the existence of a common-law marriage depends upon the “ultimate issue” before the court. Id. The Court held that “[i]f the ultimate issue is heirship, which is within the probate court’s exclusive jurisdiction, then the probate court has jurisdiction to resolve the threshold issue whether the decedent was a party to a common-law marriage.” Id.

In her initial brief, Appellant cites to S.C. Code Ann. § 62-1-302(d) for the proposition that her causes of action to quiet title and to set aside the deed of distribution are “actions to try title concerning property in which the estate of a decedent or a protected person has an interest.” As an initial matter, these causes of action are not actions to try title concerning property in which *the estate of a decedent* has an interest; rather, at best, Appellant’s causes of action to quiet title and to set aside the deed of distribution are actions to try title in which *she* has an interest (not the estate). Therefore, the language of Section 62-1-302(d) is plainly and simply inapplicable.

Furthermore, Appellant's actions to quiet title and to set aside the deed of distribution are not, in fact, actions to "try title" at all. There is no question of the validity of any title to real estate. The underlying action is one to determine heirship, that is, whether Appellant is entitled to certain estate assets as Decedent's common-law wife pursuant to the laws of intestacy. (See Appellant's Initial Brief at 3 ("The dispositive issue as to each of Appellant's causes of action is the determination of the Appellant and decedent's status as husband and wife."); see also id. at 5 ("A common law marriage between the Appellant and decedent as alleged in the first cause of action, would establish the factual predicate for the causes of action to quiet title and setting aside the deed of distribution.")). If such a determination is made, the causes of action to quiet title, set aside the deed of distribution, and to remove Respondent as personal representative are essentially moot as the laws of intestacy are clear and would mandate that Appellant would be the sole heir entitled to the assets of Decedent's estate.

In sum, the "ultimate issue" of all of Appellant's claims against Respondent is that of heirship. As the South Carolina Supreme Court held in Thomas, "[i]f the ultimate issue is heirship, which is within the probate court's exclusive jurisdiction, then the probate court has jurisdiction to resolve the threshold issue whether the decedent was a party to a common law marriage." Id., at 488, 629 S.E.2d at 360. Accordingly, since the ultimate issue of Appellant's claims against Respondent is that of heirship, probate court has exclusive jurisdiction over her claims and the threshold issue of whether Decedent was a party to a common-law marriage. Accordingly, the circuit court correctly remanded this action to probate court.

- II. THIS COURT SHOULD NOT CONSIDER APPELLANT'S ARGUMENT THAT HER ALLGED ENTITLEMENT TO A JURY TRIAL IS AN ADDITIONAL GROUND FOR REMOVAL TO CIRCUIT COURT BECAUSE SUCH ARGUMENT IS NOT PROPERLY PRESERVED FOR APPEAL.

An issue raised for the first time in a Rule 59, SCRCP, motion is not preserved for appellate review. See Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005); see also Eaddy v. Oliver, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (holding that an issue first raised in a post-trial motion is not preserved for appellate review). “A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.” Poch v. Bayshore Concrete Prods./S.C., Inc., 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009).

Here, Appellant states as follows in her brief: “Further, an action to determine a common law marriage is a case at law for which the parties are entitled to a jury trial which is an additional ground for mandatory removal under Section 62-1-302.” (Appellant’s Initial Brief at 6). However, Appellant did not raise this argument until the hearing on her motion to alter or amend Judge Price’s order granting Respondent’s motion to dismiss. Indeed, Appellant’s counsel admitted this fact during the March 3, 2020 oral argument on Appellant’s motion to alter or amend, stating as follows:

And another one – and I will be honest, Your Honor, I did not raise this in our prior argument – but in matters in which the parties have the right to a jury trial. And in common law spouse claims, you do have the right to a jury trial, Memorial v. English.

(Tr. of Hr’g on Appellant’s Mot. to Alter or Amend at 3).


Our case law is abundantly clear that a party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. See, e.g., Poch, 386 S.C. at 31, 686 S.E.2d at 699. Although Appellant could have raised this argument prior judgment on Respondent’s motion to dismiss, she did not do so. As such, Appellant’s argument that her alleged entitlement to a jury trial constitutes an additional basis for

removal of the underlying action to circuit court is not properly preserved for appellate review and, respectfully, should not be considered by this Court.

CONCLUSION

Wherefore, based on the arguments and authorities set forth herein, Respondent Carlie Elvin Cleary, Individually and as Personal Representative of the Estate of Scott B. Cleary, respectfully requests that this Court dismiss this appeal or, in the alternative, that this Court affirm the circuit court's decisions in favor of Respondent, and that this Court issue an award of all attorney's fees and costs and for such other and further relief as this Court deems just and proper.

Dated this 20th day of January, 2021.



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APPEAL FROM CHARLESTON COUNTY

SC Court of Appeals

Bentley D. Price, Circuit Court Judge for Charleston County

Appellate Case No. 2020-000594

Melissa Combs a/k/a Melissa Cleary Appellant,

v.

Carlie Elvin Cleary, Individually and as Personal Representative of the
Estate of Scott B. Cleary & Ditech Financial, LLC,

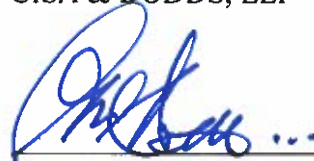
Of whom Carlie Elvin Cleary, Individually and as Personal Representative
of the Estate of Scott B. Cleary Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Initial Brief and Respondent's Designation of Matter To Be Included In The Record On Appeal on Kerry W. Koon, by depositing a copy of it in the United States Mail, postage prepaid, on January 20, 2021, addressed to Kerry W. Koon, 147 Wappoo Creek Drive, Ste. 203, Charleston, South Carolina 29412.

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By:



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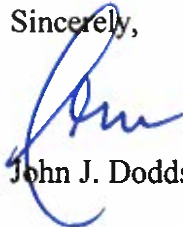
Re: Melissa Combs aka Melissa Cleary v. Carlie Elvin Cleary, Individually and as Personal Representative of the Estate of Scott B. Cleary & Ditech Financial, LLC
Appellate Case #: 2020-000594

Dear Madam Clerk:

Please find herewith the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal together with a Proof of Service of the same for filing in the above referenced matter.

With kindest personal regards, I am

Sincerely,



John J. Dodds, III

JJD,III/psb
Enclosures

cc: Kerry W. Koon, Esq.