RECEIVED
Aug 04 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Appellant Case No.: 2018-001605

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

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

vs.

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

and

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

MOTION FOR RECONSIDERATION BY APPELLANT

P. Brandt Shelbourne, Esq. (#15143)
SHELBOURNE LAW
131 E. Richardson Avenue
Summerville, SC 29483
843.871.2210 (ph)
843.875.2224(f)
Counsel for Appellant

ARGUMENT FOR REHEARING

Appellant Debra Krane hereby moves the Court of Appeals pursuant to Appellate Court Rule 221 for reconsideration of the Court's July 21, 2021 opinion affirming the lower court's denial of Appellant's Motion for Summary Judgment and granting of Respondent's Motion for Summary Judgment on the grounds that the Court of Appeal overlooked and misapprehended certain facts and arguments of Appellant's counsel. This motion is divided into two sections based upon the Court's ruling on two different and distinct Motions for Summary Judgment.

I. ON THE RESULTING TRUST ISSUE

A. The Court Misapprehended and Overlooked the Facts and Inferences Arising Therefrom Provided by Appellant in Opposition to Respondent's Motion for Summary Judgment

In affirming the Lower Court's Summary Judgment, the Court of Appeals, failed to take the facts and inferences therefrom in a light most favorable to Appellant when reviewing whether it was appropriate to find by Summary Judgment that a Resulting Trust existed between Respondent and the Decedent. As the Court has long held where there is even a scintilla of evidence, Summary Judgment is inappropriate.

Because this issue was before the Court of Appeals on Respondent's Motion for Summary Judgment the Court was required to review the in a light most favorable to Appellant. Only in ruling on Appellant's Motion for Summary Judgment could the Court of Appeals view the facts and inferences in a light most favorable to Respondent. Despite the presence of Appellant's evidence, the Court of Appeals took facts in a light most favorable to Respondent, the moving party; facts that Appellant contested with documented evidence in the record.

The facts and inferences therefrom which the Court of Appeals ignored or disregarded include 1.) evidence of the Decedent's intent as to, and Decedent's claims to outright ownership

in the property free of any trust or other encumbrance; 2.) statements by the Respondent as to his intent in deeding the property to Decedent free of an encumbrance such as a trust; 3.) statements by third parties as to Decedent's outright, unfettered ownership; and 4.) proof of consideration paid by Decedent simultaneous with the property exchange and subsequent to the exchange, contrary to Respondent's claims and this Court's finding. The aforementioned, as set forth below in more detail, along with the inferences arising therefrom, establish at the very least a scintilla of evidence that it was not Respondent and Decedent's intent to enter into a Resulting Trust, but rather enter into a contractual agreement enforceable with legal remedies.

"Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another." Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 249, 489 S.E.2d 472, ___ (1997); McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct.App.1987). "The general rule is that when real Estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf." Lollis v. Lollis, 291 S.C. 525, ___, 354 S.E.2d 559, 561 (1987) citing Caulk v. Caulk, 211 S.C. 57, 43 S.E.2d 600 (1947); Green v. Green, 237 S.C. 424, 117 S.E.2d 583 (1961).

"[T]o establish an equitable title or resulting trust against one holding the legal title, the evidence must be clear and convincing." Feaster v. Kendall, 80 SC 30, 61, S.E. 200 (1908). "It is well settled that the evidence to establish a resulting trust must be definite, clear, unequivocal and convincing." Moore v. McKelvey, 266 S.C. 95, 98, 221 S.E.2d 780, 781 (1976) quoting Hodes v. Hodges, 243 S.C. 299, 306, 133 S.E.2d 816, 819 (1963).

However, because this was Respondent's Motion for Summary Judgment in it is not a question with whether Respondent proved his case by clear and convincing evidence, or whether Appellant rebutted his proof, but rather whether there is a scintilla of evidence contradicting the elements necessary to find a resulting trust. Appellant provided that evidence. The Court of Appeal instead erroneously weighed the evidence and found in favor of Respondent.

1. Evidence of Decedent's Intent Not in Accord with a Resulting Trust

To find a resulting trust the Court looks "to effectuate the intent of the parties …." Bailey, 327 S.C. at 249, 489 S.E.2d at ___. Based on the evidence Appellant submitted, Decedent's intent in obtaining the property was that she held the property outright without any encumbrance or limitation on Decedent's right to sell. Simultaneous with acquiring the property, Decedent expressly warranted to the mortgage company that loaned the money to Decedent that the Decedent "is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property." See Krane Affidavit, Ex. C para. 5 (emphasis added) (R. p. 0137, para. 5). With the loan from the bank, this money belonged to Decedent, and Decedent used it to pay off Respondent's debt in exchange for Respondent giving her title to the property.

If Decedent's acquisition of the property was with the right to sell, convey or otherwise dispose of the property as she alleged, there would not be the requisite intent to hold the property in trust for Respondent and thus no Resulting Trust. It would have been contrary to the alleged Resulting Trust for Decedent to be able to unilaterally encumber the property with mortgages or to sell the property. And Decedent did encumber the property on multiple occasions.

Further, the Land Exchange Agreement (hereinafter "LEA") establishes that Respondent was aware that Decedent would so represent that claim of ownership and that he, Respondent, participated in that representation, further justifying an estoppel argument against his current claim. These representations beg the question of how could Decedent have a right to mortgage or sell the property if it was her intent to hold the property in a resulting trust?

The Court of Appeals also overlooked Decedent's claims of ownership on her Financial Statement wherein she stated that the property was wholly hers. Her personal Financial Statement given to Palmetto State Bank dated October 11, 2013, included the property in a list of her "wholly owned real estate". See Krane Affidavit, Exhibit G, page 3 (R. p. 0183, sched. 6). Decedent did not state that she was holding it in trust, but rather that it was wholly hers. Decedent made the representation "to induce Palmetto State Bank ("PSB") to extend or continue the extension of credit" to the Decedent. See Id. page 4 (R. p. 0184). This claim of outright ownership to third parties at the very least infers that it was not Decedent's intent to hold this property in a Resulting Trust.

2. Evidence of Respondent's Intent Contrary to His Assertion at Summary Judgment

The Court of Appeals also overlooked Respondent's express statements made in the warranty deed he gave to Decedent. Respondent expressly stated that Respondent himself was bound "to warrant and forever defend all and singular the said premises unto the [Decedent] and her Heirs and Assigns, against the Grantor [Respondent] and the Grantor's Successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof." See Krane Affidavit, Ex. A (R. p. 0126).

Respondent himself avowed that title was free and clear in Decedent's name. He now takes the opposite position and argues that he has a claim to the property. The Court of Appeals' Opinion does not address the inconsistency of Respondent's specific, sworn statements as evidence of his intent to put exclusive and unencumbered title solely in Decedent's name and protect it from anyone claiming otherwise. At the very least, this inconsistency would preclude Summary Judgment as it is at least a scintilla of evidence that the parties were not holding the property in trust.

3. Third Party Statements Made Contemporaneously with the Exchange of Property Evidence Intent of Outright Ownership and Not a Resulting Trust

Additionally, the Court of Appeals overlooked the closing attorney's representation that title was vested free and clear of any claims in Decedent's name and that Decedent had the ability to sell the property. Closing attorney Thayer Rivers verified that the title was "vested" in the Decedent's name as of the date of the policy, November 14, 2012. See Krane Affidavit, Exhibit B (R. p. 0129, para. 3). He likewise affirmed that Decedent had "good, valid and marketable title to the property …." Id., Rivers' letter dated November 13, 2012 (emphasis added) (R. p. 0130).

All of this evidence completely contradicts Respondent's arguments that Decedent's intent was to hold the property in trust for Respondent. Because this was a Summary Judgment motion, these facts have to be viewed in a light most favorable to Appellant and at the very least they establish a scintilla of evidence that it was not the parties' intent to hold the property in a Resulting Trust, but rather pursuant to a contractual agreement.

4. No Clear and Convincing Evidence that Respondent Paid for the Property at the time Decedent Acquired the Property from Respondent

The Court of Appeals also erred in finding that the Decedent did not give any consideration for the property at the time of the deed and that Respondent paid for the property rather than Decedent, all necessary elements of a Resulting Trust. The allegation that Respondent paid for the property at the time it was transferred to Decedent is simply not true, not supported by any evidence and is a complete disregard of Appellant's evidence.

The party attempting to establish a resulting trust has a very high burden of proof. See Glover v. Glover, 268 S.C. 433, 437, 234 S.E.2d 488, 489 (1977). Its imposition is specific to the time of the transaction and it "is clear that a resulting trust arises, if at all, only at the time of the purchase of the land …." See In Re: Prince, 2011 WL 2747797 (citing Larisey v. Larisey, 93 S.C. 450, ___, 77 S.E. 129, 130 (1913).

A resulting trust would arise if the consideration for the transfer of the property was paid for by Respondent. See Lollis v. Lollis, 291 S.C. at ___, 354 S.E.2d at 561. However, here, it was Decedent that gave consideration for the property at the time of transfer, paying off Respondent's loan. Decedent used her own funds to pay off Respondent's debt, albeit borrowed from the bank, but for which she was personally liable. (R. pp. 0124-0127). There is no credible evidence to support an argument that Decedent did not give consideration for the transfer of the property at the time of the transfer.

A review of the recording data found on the Mortgage shows that the Mortgage was recorded immediately after the Deed on November 14, 2012. The Deed dated November 14, 2012 was recorded with the Beaufort County ROD in book 03190, page 2752-2753, on November 14,

2012 at 4:24:45 PM. See Krane Affidavit, Ex. A (R. p. 0125). The Mortgage was recorded in the same book 03190, and the immediately succeeding pages, pages 2754-2762, the same date and time – November 14, 2012, at 4:24:45 PM not November 15, 2012. Id., Ex. C (R. p. 0136). It would have been impossible to record an unsigned mortgage on November 14, 2012. Likewise, the Note also had to have been signed on November 14, 2012 because the Mortgage, recorded on the same day as the Deed, references Promissory Note No. 7712136 which is the Note the Decedent signed. Id. (R. pp. 0132, 0137, para. 3). Decedent paying off Respondent's indebtedness on the property in exchange for the property being put in her name is the exact opposite of a resulting trust. At the very least, the aforementioned evidence raises a question of fact that would preclude Summary Judgment.

The significance of the simultaneous recording of both the deed to the Decedent and the mortgage securing the loan used by Decedent to pay off Respondent's debt is evidence that Decedent paid more consideration than just the $1.00 recited in the deed and that it was the Decedent that "paid" for the property at closing on November 14, 2012, not Respondent. Had borrowed the funds himself to pay off his mortgage, Respondent would have a legitimate claim. However, this did not happen. It was Decedent that paid off the mortgage at the closing. This Court's statement that Respondent "made all mortgage payments" is not supported by any facts in the record and certainly not by the facts taken in a light most favorable to Appellant.

Appellant also introduced proof that Decedent made payments for the property and for the business, but this evidence was overlooked. Appellant presented the Note and Mortgage, along with copies of cancelled checks and receipts establishing Decedent's expenditures. There is nothing in the record from Respondent other than Respondent's self-serving statements that he made any payments for the property let alone all the payments.

The Court of Appeals, in not viewing the facts and inferences therefrom in a light most favorable to Appellant, found that Respondent occupied the property continuously, operated a deer meat processing business on the Property and made all mortgage payments on the Property since 1993 and that Appellant failed to present a plausible argument as to why Respondent would give away his interest in the Property for one dollar and thus failed to rebut the presumption of a resulting trust.

This finding overlooks Appellant's evidence that it was Decedent that paid for the deer processing business and that Decedent considered herself as an owner. (See R. p. 148). Further, the Court's statement that Respondent gave away his property rights for one dollar is incorrect as shown above. Respondent gave away his rights in the property in exchange for Decedent paying off Respondent's debt which was going to cause Respondent to otherwise lose the property to foreclosure. Decedent paid for the property. If the Court's ruling is upheld, any time a purchaser of property pays the existing debt on the property in exchange for the property, as occurs in a short sale, the seller can later claim that no valid consideration was exchanged.

Likewise the Court of Appeals argument that the LEA's statement that the "Son is the owner of the … land" is evidence of the parties' intent is also misplaced when taking the facts and inferences in a light most favorable to Appellant because that inference is one that reads the LEA as a memorialization of the facts after the parties completed the deal or as a memorialization of how the property would be held rather than a statement of the facts prior to the completion of the same.

The Court's finding is contrary to Respondent's own representation in the Deed and Decedent's representation in the mortgage. A fair reading of that statement in light of the entire LEA shows that the statement is only a recitation of the facts prior to Respondent deeding the

property to Decedent, just as the third, fourth, fifth and sixth paragraphs of the LEA reflect what the Respondent and Decedent were going to do, not what they had already done. To find that the statement of ownership in paragraph 1 of the LEA is indicative of the parties' intent that equitable ownership would remain with Respondent overlooks the context of the statement in the LEA and is contrary to Appellant's evidence showing Decedent's claims of outright ownership and is not taking the facts and inferences in a light most favorable to Appellant.

Despite having to prove his claim by clear and convincing evidence, Respondent offered no corroborating evidence that he paid any money for the property: no cancelled checks, no bank statements, no receipts, no tax returns showing payments. The Court of Appeals opinion states that Respondent made the payments but cannot reference any document to support this. Because this was before the Court on Summary Judgment, Appellant's evidence has to be viewed as creating, at the very least, an inference that it was the Decedent that paid for the property and that it was not the Parties' intent to create a trust which would defeat a finding of a Resulting Trust at Summary Judgment.

The Court of Appeals should reconsider the facts and inferences arising therefrom as set out above and in Appellant's brief filed in this matter, all in a light most favorable to Appellant and find that at the very least there is a scintilla of evidence to preclude Summary Judgment and remand the issue of whether a Resulting Trust arises to the trier of fact for a trial on the merits rather than disposing of this on Summary Judgment.

B. The Merger Clause in the Land Exchange Agreement Prohibits the Introduction of "Intent" not in Accord with the Express Language of the Agreement

The Court of Appeals opinion, in holding that the LEA is evidence of a Resulting Trust, also overlooks the merger clause in the LEA. While accurately quoting the six (6) numbered paragraphs of the LEA, the Court omits the last paragraph of the LEA that unequivocally states that "[t]he above constitutes the entire agreement of the Parties and all oral negotiations are merged herewith." See Krane Affidavit, Exhibit A (emphasis added) (R. p. 0127). The Court's Opinion does not address how the merger clause can be ignored**.**

South Carolina law has long held that a merger clause is legitimate and limits the introduction of extrinsic evidence or understandings used to vary or explain the intent of an agreement like LEA. "A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App.1984); See also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:21 (4th ed.1999); Black's Law Dictionary 880 (9th ed.2009) (defining an integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract."). "The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing." Wilson, 281 S.C. at 266, 315 S.E.2d at 134.

Despite this clear prohibition on ignoring the merger clause, the Court of Appeals does ignore the merger clause and allows Respondent to argue that the intent of the parties was different than what is stated in the LEA. Respondent contends that it was the intent of the parties for the

property to be returned to him upon him paying off Decedent's note and mortgage. See Respondent's Answer and Crossclaim, para. 33, R. p. 76. This is not what the LEA states.

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." Davis v. KB Home of South Carolina Inc., 394 S.C. 116, 127, 713 S.E.2d 799, 805 (Ct. App. 2011) aff'd in part and vacated in part on other grounds Davis v. KB Home of South Carolina, Op. No. 2014-MO-004 (S.C. 2014), quoting Gilliland v. Elmwood Props., 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990); See also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:1 (4th ed.1999) (explaining the parol evidence rule "prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing"). The parol evidence rule is particularly applicable where the written instrument contains a merger or integration clause. Davis v. KB Home of South Carolina Inc., 394 S.C. at 127 – 128, 713 S.E.2d at 805.

The merger clause in this case specifically prohibits Respondent from now claiming that this LEA was something other than what it says on its face: a contractual agreement to take certain acts and upon which the return of the property is contingent on Respondent acquiring a contract to sell the property. Despite the merger clause, the Court of Appeals erroneously looks to Respondent's extrinsic evidence that the parties' intent was to hold this property in a Resulting Trust that would require the property to be returned to Respondent absent his obligation to obtain a contract to sell the property. The stated intent was not for Decedent to hold the property in trust and be returned to Respondent, but Decedent to own it outright and pay for it and the business and

the return the property when Respondent acquired a contract to sell the property at which time Decedent would be reimbursed. And if the intent was to sell the property, then it does not meet the definition of a resulting trust because the property is not held by the Decedent to benefit Respondent, but rather to obtain a third party buyer for the property.

C. Case Law not on Point

1. The Presence of a Written Agreement Between the Parties Distinguishes the Present Case from South Carolina Law Cited by the Court

The Court of Appeals also overlooks South Carolina case law that holds that where the parties had a written agreement, there was no Resulting Trust. In Bowen v. Bowen, 345 S.C. 243, 547 S.E.2d 877 (Ct. App. 2001), this Court held that the parties' written agreement negated the need to employ the presumption associated with a resulting trust. Id., 345 S.C. at 251, 547 S.E.2d at ___. The Bowen Court recognized the need to look to the written agreement to determine the parties' intent. Id. The Court's opinion here fails to distinguish or even address the reasoning in Bowen.

The cases cited by the Court do not involve a written agreement like the LEA. Campbell v. Campbell, 300 S.C. 68, 386 S.E.2d 305 (Ct. App. 1989) cited by the Court of Appeals, did not involve a written agreement, did not involve the party claiming the Resulting Trust deeding the property to the deed holder, and did not involve significant payments by the deed holder for the property or the deed holder's belief and express representation that she owned the property outright, all of which was presented by Appellant and has to be viewed in a light most favorable to Appellant.

Likewise, the Court's reliance on Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) is misplaced for several reasons. That Court acknowledged that the

presumptions could be rebutted by parol evidence. Id., 327 S.C. at 249, 489 S.E.2d at 475. However, in the present case there is a clear, unequivocal merger clause that prohibits the introduction of parol evidence. Further, the father in Bailey who transferred the property to his son, also paid for the property. As shown above, the evidence taken in a light most favorable to Appellant shows that it was Decedent that paid for the property when it was transferred, not Respondent. This is completely different from the facts in Bailey. And while Respondent argues and the Court found that Respondent paid for the mortgage payments after Decedent borrowed the money to pay off the debt and after the transfer, there is nothing in the record to support this.

As the Appellate Court in this case noted, the son in Bailey just showed up for the closing. In contrast, the Decedent herein not only showed up for the closing, but borrowed money in her name and to her liability to pay off Respondent's debt on the property. She used her money, not Respondent's money. This was consideration for the deed transfer and is specifically anticipated and acknowledged by Respondent in the LEA. Further Decedent represented to the mortgage company that she had the right to do so and the right to even sell the property. This is markedly different than what occurred in Bailey.

In Bailey, the son had no evidence that he had anything to do with the property unlike the present case where Appellant introduced evidence that after paying off Respondent's debt, Decedent paid expenses for the property and business and even represented that she was invested in the deer processing business herself as an owner. See R. pp. 0147-0149 (That Respondent was aware of Decedent's claims that she was invested in the business and that she claimed she owned the property in whole is established by Respondent's initials on Decedent's documents where she made this allegation. See R. p. 0148). For the Appellate Court in this case to hold that the facts in this case are analogous with the facts in Bailey, is to overlook or misapprehend Appellant's

evidence in its entirety and the Court's obligation to take the facts and inferences therefrom in a light most favorable to Appellant.

2. The Presence of a Legal Remedy in Enforcing the Terms of the LEA Precludes the Equitable Remedy of a Resulting Trust

As noted in Bowen, supra, because there was a written agreement as to the property there was no need to revert to equity. This legal remedy available in enforcing the LEA which would preclude the equitable remedy of a Resulting Trust. In The Nutt Corp. d/b/a TNC Engineering v. Howell Road, LLC, 396 S.C. 327, 721 S.E.2d. 447 (Ct. App. 2011) this Court recognized that because there was a contractual agreement between the parties, they had a remedy at law. Id., 396 SC. at 328, 721 S.E.2d at____. Just like the parties in Bowen and Nutt Corp., the Respondent and Decedent had a written contractual agreement in the LEA and thus a remedy at law.

Respondent offered to deed his property to Decedent if Decedent paid off Respondent's mortgage. Decedent agreed. Both parties completed their side of the agreement. The only thing left was for Decedent to deed the property back to Respondent if or when Respondent acquired a contract to sell the property and for Respondent to pay Decedent for her expenses incurred. The LEA provides the exclusive contingent status of when the property would be returned to Respondent. Paragraph 5 of the LEA specifically states that the return of the property is to occur upon the Respondent obtaining a contract to sell. There is no other agreement to otherwise return the property. As even Respondent acknowledges, this is a contingency that has not happened.

This contractual right to the contingent return of the property does not meet the elements of a Resulting Trust which is a creature of equity. Presumably, if Respondent never acquired a contract to sell the property, it would remain in Decedent's name.

Significantly, the Court in Nutt Corp. also recognized that even if that legal remedy was prescribed by a statute of limitation, it did not allow for equitable relief. So even if barred by time constraints of the nonclaim statute, Respondent's legal remedy against Decedent and the estate to enforce the LEA prohibits equitable relief because Respondent had a legal remedy in enforcing the LEA as a contract.

II ON THE CLAIMS BARRING STATUTE AND A DISPUTE AS TO TITLE

A. The Results of the Court's Opinion are Contrary to the Legislative Intent Behind § 62-3-803

In rejecting Appellant's argument that Respondent's suit for interpretation of the LEA as a Resulting Trust are barred by § 62-3-803, the Court of Appeals has overlooked the public policy of the State of South Carolina and the Court's holding leads to a reductio ad absurdum. The Court's opinion equates a dispute as to the intent of the parties to a written contract about real property containing a merger clause as a dispute as to the title to property falling within the exception to the nonclaim statute. Under the extended reasoning of the Court's opinion, now any claim for the return of property, whether real or personal, made against an Estate is not subject to the time constraints of § 62-3-803. An Estate can never successfully, expeditiously and safely distribute property to the heirs or beneficiaries where a third party may claim he or she has a right to make the Decedent, and by extension any of the receiving heirs, turn the property they have over to the claimant. All the claimant has to do under the Court of Appeal's holding is allege that there is a dispute as to the Decedent's title and they can bring the claim at any time even if that claim is based on a written contract with the Decedent.

Indeed, the Court holds that suits for specific assets, even if titled in the decedent's name pursuant to a written contract are not actions or liabilities against the decedent's estate, but disputes

over ownership of specific assets in the hands of the personal representatives and therefore fall within § 62-1-201(4) and the exception to the nonclaim statute. The problem with this holding is that in applying the facts of this case the ruling expands the exception to the nonclaim statute in such a way as to essentially swallow the rule.

Even if this is true under the facts in this case where there is a deed in Decedent's name, that the LEA creates a resulting trust, this claim must be presented within the time constraints of § 62-3-803. Otherwise, how would the Estate ever be aware of the claim? The Decedent held property through a warranty deed from Respondent. As with any property in a decedent's name, this property would presumably be distributed to the decedent's heirs or beneficiaries or otherwise sold by the Estate and the funds used by the Estate and then distributed. The property, under the facts herein, is not "heirs property" where there is no title in anyone's name and that cannot be included in an estate. Only if a claimant such as Respondent timely filed notice of a claim would the Estate have notice. Without the notice to the estate, the assets would be sold or otherwise distributed and the estate closed. The recipient of the property whether by purchase or by distribution would never know that its title to the property was secure.

The Court's reasoning allows a party trying to enforce a purchase contract with a decedent to sue the estate or the heirs and beneficiaries after the nonclaim statute has run and even after an estate is closed under a claim that there is a dispute as to the title. All that party has to allege is that there is a dispute as to ownership. The claimant could, under the Court's logic, argue that the decedent agreed to give or sell the property otherwise held in the decedent's name to the claimant, and this would be sufficient to avoid the nonclaim statute.

Likewise, under the Court's logic, if the LEA were held by a third party, unknown to the Estate and the Personal Representatives, that person would have no duty or obligation to timely

notify the estate of the claim. The Estate would have no way of knowing about the claim against the property. The Estate could be fully probated and all property disbursed or otherwise liquidated and the Estate closed with finality and then, years later, the claimant under the LEA could successfully assert a claim to ownership of the property. The Court of Appeal's decision, in abandoning the application of § 62-3-803 to the facts in this case, places no time limitations on Respondent's claims and Respondent in his own arguments alleges that there are none. Thus, the Court's opinion throws into question the safe and speedy transfer of all estate property titled in a decedent's name.

Further confusion is apparent by asking the question of when and how the property is to be conveyed back to Respondent and what happens upon conveyance. Under a Resulting Trust, the property would be returned to the Respondent without contingencies. However, this overlooks the express terms of the LEA which specifically holds that the return is only upon Respondent acquiring a contract to sell and Decedent being paid for all taxes, insurance payments, interest or other items she paid for the ownership, maintenance and upkeep of the property. See LEA, para. 5 & 6. If Respondent never acquires a contract to sell, how can the Decedent and by extension the Estate be made whole in timely fashion. Decedent's right to be repaid would require that the Estate remain open indefinitely or until Respondent acquired a contract to sell. But as Respondent alleges, and the Court has to recognize, under Respondent's argument there is no time limit.

If the existing note is not paid, would the bank have a cause of action against Decedent who is the only one obligated under the Note? How does Decedent's obligation get satisfied if her estate is closed and and how could the estate be closed if she still is obligated on the Note and the property is still in Decedent's name until Respondent gets a contract to sell? This would clearly be contrary to the Legislative intent of § 62-3-803.

It is insufficient to require that the property be transferred to a third party trustee to hold the property in trust until Respondent acquires a contract to sell because the funds from the sale of the property as outlined in paragraph 5 of the LEA are to be used to repay Decedent. This would not fit the definition of a Resulting Trust and those funds would presumably be part of Decedent's Estate and need to be used to pay Estate expenses and distributed to the heirs. That could not happen if the Estate is closed.

In Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, 754 S.E.2d 875 (2014), overlooked by the Court of Appeals, the Supreme Court recognized that "'[b]roadly speaking, all claims against the decedent should be presented for allowance ….'" Gurnham, 407 S.C. at ___, 757 S.E.2d at 880 quoting 34 C.J.S. Executors & Administrators § 548 (Supp. 2013) (footnotes omitted). In recognizing that §62-3-803 is a nonclaim statue, the Court in Gurnham held that "[a] nonclaim statute is a self-contained statute which absolutely prohibits the initiation of litigation based on it after a prescribed period." Id. at ___, 754 S.E.2d at 881 (emphasis added). "[N]oncompliance eliminates a claimant's right of action against a decedent's estate and, in turn, deprives the court of the power to adjudicate the claim." Id. at ___, 754 S.E.2d at 882. Because the Respondent did not timely file notice of his claims against the Decedent that arose or could arise pursuant to the LEA the Court does not have jurisdiction to address the Decedent's obligation to return the property under the LEA even if it was the intent of the parties that that is what would be done.

"[T]he purpose of the nonclaim statute … is to expedite and resolve claims against a decedent's estate with finality." Gurnham, 407 S.C. at ____, 754 S.E.2d at 884 (emphasis added). The Gurnham Court cited as authority In re Estate of Ongaro, 998 P.2d 1097, 1102 (Colo. 2000) (en banc) (analyzing nonclaim statue and stating, "Allowing creditors to toll claims against estates

would frustrate the speedy and efficient settlement of estates and distribution of assets"); Ragan v. Hill, 337 N.C. 667, 447 S.E.2d 371, 374 (1994) ("The time limitations prescribed by the [the nonclaim statute] allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate. The statute also promotes the early and final resolution of claims by barring those not presented with the identified period of time."). This Court's holding that there is no time constraint on Respondent to notify the Estate of Decedent's obligation under the LEA is completely contrary to the Legislative intent of a speedy and efficient settlement of an Estate.

The Supreme Court has recognized that South Carolina's nonclaim statute requires that "all claims against a decedent's estate and his successors must be presented after a personal representative is appointed and with the time limits prescribed by section 62-3-803 …." Gurnham, 407 S.C. at ___, 754 S.E.2d at 880 (emphasis added). The Supreme Court specifically held that "the word 'claims' includes debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the recovery of money." Id.

Respondent has or had claims against the Decedent pursuant to the LEA. That is the specific, express contractual agreement between them as it relates to the property in question. Per the merger clause there is no additional information that Respondent can offer to change the terms of the Agreement. As stated repeatedly herein, if Respondent had obtained a contract to sell the property as spelled out in the LEA, he would have a claim against the Decedent to convey the property back to him. It was a right to demand that Decedent comply with the terms of the LEA. However, because Respondent did not file notice of the LEA within the prescribed period, he has

"no enforceable right of action …." Gurnham, 407 S.C. at ___, 754 S.E.2d at 881 citing and quoting Phillips v. Quick, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct. App. 2012).

The Court of Appeals failed to consider that the Respondent concedes that the title is actually in Decedent's name and that there was not a "dispute regarding title." Rather this was a dispute as to the intent of the parties pursuant to the LEA and whether there was a Resulting Trust created by the LEA. Even the Court of Appeals' Opinion acknowledges that title was indisputably in Decedent's name.

The LEA has conditions that the parties agreed to. If they are not followed then the Court has essentially negated or altered the terms of the LEA based on Summary Judgment alone. If the conditions are followed then that presupposes that there is a contractual obligation enforceable against the Decedent and her estate which would need to be presented within the time constraints of § 62-3-803.

B. The Facts of Case Law Relied Upon to Find an Exception to § 62-3-803 are Distinct from the Facts in the Present Case

The Court of Appeals cites Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993), and case law from Alabama, North Dakota and Connecticut as support for its affirmation that the present claim is not barred by South Carolina's nonclaim statute § 62-3-803. However, all of those cases are factually distinct from the present case.

In Matter of Howard, the dispute was over possession of a gun. Unlike with the present case, the gun was not titled in the decedent's name and was not even in decedent's possession or possession of the estate. There was no written agreement between the claimant and decedent as to ownership of the gun or under what circumstances the gun would be returned to the claimant. There was no affirmation by the claimant that the decedent owned the gun free and clear and that

the claimant would defend the decedent's claim of ownership. However, these facts exist in the present case. There is a written agreement between the Respondent and Decedent and there is affirmation by both Respondent and Decedent that it was their intent that Decedent would have unencumbered ownership of the property in exchange for her payment of Respondent's debt.

The Alabama case of Wadsworth v. Hannah, 431 So.2d 1186 (Ala. 1983) is also distinct. There the claimant and the decedent had a verbal agreement that the decedent would transfer the property to the claimants and the claimants had done all that was necessary for that transfer. The parties agreed that that was the decedent's intent and that all steps save for titling the property in claimant's name had taken place. The Alabama court applied the equitable principal that it would "treat as done that which out to have been done to effectuate the intentions of the parties." This is not the case here. In the present case, the intent to transfer the property back to Respondent is expressly contingent on Respondent acquiring a contract to sell the property. The transfer back to Respondent herein is not the only thing left to happen regarding the property. There is an express written agreement that spells that out unlike in Wadsworth. Any argument that there was a differing intent is prescribed by the merger clause included in the LEA. If all that remains in the present case is to transfer the property to Respondent (which is contrary to Respondent's own arguments), then the Decedent and her heirs are deprived of the repayments specified in the LEA.

In the Matter of Estate of Powers, 552 N.W.2d 785 (N.D. 1996) the North Dakota court found that there was evidence that title to a vehicle was actually in the claimant's name. The claimant in that case presented evidence that he had the title to the vehicle. Further, the Court found that the Will bequeathed the vehicle to the claimant. These facts are totally distinct from the present case in that here the title is clearly in Decedent's name and was put in Decedent's name by the Respondent who now attempts to claim that there is a dispute as to it being in Decedent's name.

Respondent, by his profession in the warranty deed stated that he would defend Decedent's title. Now he attacks it. And unlike in Powers, there is no Will leaving the property to Respondent and the parties had a written agreement as to the property.

The Connecticut case of Saradjian v. Saradjian, 595 A.2d 890 (Conn. App. 1991) is also distinct in that it does not involve a written agreement between the parties as to the land in question. The Saradjian Court pointed out that it did not have an agreement to which it could refer for guidance as to the parties' intent. Further, the Court found that the claim was not a debt of the Estate. In the present case, the obligation to deed the property back to the Respondent was or would be an obligation of the Decedent. If Respondent had obtained a contract to sell the property and Decedent (while Decedent was alive) refused to return the property, Respondent would properly be able to sue Decedent for her obligation under the LEA to return the property. Likewise if Respondent had a contract to sell the property and the Estate refused to deed the property to Respondent on behalf of Decedent, Respondent could sue the Decedent's Estate for breach of the contract with Decedent, assuming that he had timely filed notice of the claim under § 62-3-803. This contractual obligation of the Decedent in this case is completely different that what was before the Saradjian Court.

In the Alabama case of Cornelius v. Miller, 836 So.2d 883 (Ala. Civ. App. 2002), Cornelius as the claimant paid Miller for his interest in real property and both parties signed an agreement stating that the property would be conveyed. Miller died before a deed was conveyed to Cornelius. In finding that the nonclaim statute did not apply the Court expressly found that all the prerequisites for deeding the property to Cornelius had occurred and that Miller did not own the property. The Court ruled that because Miller accepted the cash Cornelius paid for the property, Miller no longer owned the property. These facts also are distinct from the present case. In Cornelius v. Miller all

steps necessary for the transfer of the property had taken place, unlike in the present case. Here, in this case, there is no obligation of the Decedent to return the property to Respondent until Respondent acquires a contract to sell the property. It is a contingent obligation. The parties herein were not just waiting on Decedent to deed the property back to Respondent. Even Respondent admits this. The Alabama Court recognized that contract claims for real property do fall within the nonclaim statute. Cornelius v. Miller, 836 So.2d at 885. Likewise, Respondent's claim here is, or should be a contract claim against the Decedent and fall within the South Carolina nonclaim statute.

While the present case is a dispute as to who ultimately keeps the property, it is not a dispute as to title to the property. The title is held by the Decedent. That is undisputed. Whether and when Decedent has to deed it back to Respondent is the question and that depends upon Respondent complying with the express terms of the LEA – contract between Respondent and Decedent. Whether Respondent has met his obligations under the Agreement that are questions of fact that are answered only by the contract and are issues of law as is what was the parties' intent under the LEA and should fall with the time constraints of South Carolina Code § 62-3-803.

CONCLUSION

Based upon the above arguments, the Court of Appeals should reconsider the facts and arguments presented by Appellant and reverse it's ruling affirming Summary Judgment for the Respondent on the issue of a Resulting Trust remanding the matter to a trier of fact for a trial. The Court of Appeals should also reconsider it's refusal to recognize the application of the time constraints found in South Carolina Code § 62-3-803 to the facts in this case where there was a contractual agreement between Respondent and Decedent contingently obligating Decedent to take certain action and either reverse the Lower Court's denial of Summary Judgment on this issue

or remand the issue to a trier of fact for trial on whether there is a dispute as to title to the property that would fall within an exception to the nonclaim statute.

RESPECTFULLY SUBMITTED,

SHELBOURNE LAW

s/ P. Brandt Shelburne
P. Brandt Shelbourne, Esq. (# 15143)
131 E. Richardson Avenue
Summerville, SC 29483
843.871.2210 (p)
843.875.2224 (f)
COUNSEL FOR APPELLANT

August 4, 2021

RECEIVED
Aug 04 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No.: 2018-001605

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

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

vs.

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

and

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

PROOF OF SERVICE

P. Brandt Shelbourne, Esq. (#15143)
SHELBOURNE LAW
131 E. Richardson Avenue
Summerville, SC 29483
843.871.2210 (ph)
843.875.2224(f)
Counsel for Appellant

I certify that I have served a copy of Appellants' Motion for Reconsideration by e-mail on Respondent, Michael Tims attorney of record Mills Morrison, Jr. Esq. at millsmorrison@yahoo.com and by e-mail on Petitioner, Samuel H. Tims at samueltims74@yahoo.com.

SHELBOURNE LAW

s/ P. Brandt Shelbourne
P. Brandt Shelbourne, Esq. (#15143)
131 E. Richardson Avenue
Summerville, SC 29483
843.871.2210 (ph)
843.875.2224(f)
Counsel for Appellant

August 4, 2021
Summerville, South Carolina

From:	Yvonne Franklin
To:	Mills Morrison, Jr., Esq. (millsmorrison@yahoo.com); Samuel Tims
Cc:	Brandt Shelbourne
Subject:	In the Matter of the Estate of Harriet Kathleen Henry Tims//2018-001605
Date:	Wednesday, August 4, 2021 3:05:00 PM
Attachments:	Mtn for Reconsideration by Appellant.pdf POS Mtn for Reconsideration.pdf

---

Good afternoon,

Attached please find a Motion for Reconsideration by the Appellant which is being electronically filed with the Court of Appeals today in the above matter. Please let me know if you would like a paper copy of the attached.

Thank you,
Yvonne

Yvonne Franklin
Civil Litigation Paralegal
Shelbourne Law
131 E. Richardson Ave.
Summerville, SC 29483
843-871-2210 (ph)
843-875-2224 (fax)
civlit@shelbournelaw.com