THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Carmen Tevis Mullen, Circuit Court Judge

Unpublished Opinion No. 2021-UP-281 (S.C. Ct. App. filed July 21, 2021)

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,.....Respondent,

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, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITION FOR A WRIT OF CERTIORARI

1. THE COURT OF APPEALS SHOULD HAVE APPLIED THE CLAIMS BARRING STATUTE OF SOUTH CAROLINA CODE § 62-3-803 TO RESPONDENT'S CLAIMS A WRITTEN CONTRACT BETWEEN RESPONDENT AND THE DECEDENT.

2. THE COURT OF APPEALS ERRED IN AFFIRMING THE APPLICATION OF THE EQUITABLE REMEDY OF A RESULTING TRUST WHERE RESPONDENT HAD AN ADEQUATE REMEDY AT LAW.

3. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE LOWER COURT'S SUMMARY JUDGMENT OF A RESULTING TRUST WHERE PRETITIONER PRESENTED EVIDENCE CONTRACTING THE EXISTENCE OF A RESULTING TRUST.

CERTIFICATE OF COUNSEL

Counsel for petition certifies that the Petition for Rehearing was made and finally ruled on

by the Court of Appeals on August 23, 2021.

QUESTIONS PRESENTED

1. SHOULD THE COURT OF APPEALS HAVE APPLIED THE CLAIMS BARRING STATUTE OF SOUTH CAROLINA CODE § 62-3-803 TO RESPONDENT'S CLAIMS REGARDING A WRITTEN CONTRACT BETWEEN RESPONDENT AND THE DECEDENT?

2. DID THE COURT OF APPEALS ERR IN AFFIRMING THE APPLICATION OF THE EQUITABLE REMEDY OF A RESULTING TRUST WHERE RESPONDENT HAD AN ADEQUATE REMEDY AT LAW?

3. DID THE COURT OF APPEALS ERR IN AFFIRMING THE LOWER COURT'S SUMMARY JUDGMENT OF A RESULTING TRUST WHERE PRETITIONER PRESENDED EVIDENCE CONTRACTING THE EXISTENCE OF A RESULTING TRUST?

STATEMENT OF THE CASE

Decedent Harriett Tims (hereinafter "Decedent") died intestate February 14, 2016. R. p. 0027. She is survived by her three children, Respondents Michael Tims (hereinafter "M. Tims") and Sam Tims (hereinafter "S. Tims") and Petitioner Deborah T. Krane (hereinafter "Krane") R. pp. 0027-0032. The Estate was opened with the Beaufort County Probate Court and Notice to Creditors was published in the Beaufort Gazette on March 10, March 17, and March 24, 2016. R. pp. 0093; 0095; 0246.

On May 22, 2017, more than a year after publication of the Notice to Creditors and after expiration of the creditor claims period set forth in South Carolina Probate Code § 62-3-803, Respondent Samuel Tims filed a declaratory judgment action against the Estate of Harriett Tims with the Beaufort County Probate Court asking the Court to determine that the intent of the Decedent and M. Tims as set forth in a written Agreement regarding certain real property known as Cloverdale was not part of the Estate, but rather held in a resulting trust by the Decedent for the benefit of Respondent M. Tims. R. pp. 0034-0035.

Petitioner Answered denying the relief sought and filed counterclaims and crossclaims against Respondents for breach of fiduciaries duty and asked that the matter be transferred to Circuit Court. R. pp. 0053-0063. Petitioner's 7th defense asserted that Respondents were time barred from bringing a claim against the Estate pursuant to South Carolina Probate Code § 62-3-803. Respondent M. Tims and S. Tims replied to the counterclaims and crossclaims. Respondent M. Tims joined with Petitioner S. Tims in the request for declaratory judgment and filed crossclaims against Petitioner for breach of fiduciary duty. R. pp. 0073-0077. Petitioner answered denying the counterclaims. R. pp. 0078-0084.

Petitioner filed a Motion for Summary Judgment on the grounds that Respondents' Declaratory Judgment claims were time barred by South Carolina Probate Code § 62-3-803. R. pp. 0087–088. Respondents S. Tims and M. Tims filed separate Motions for Summary Judgment on their allegations that pursuant to a written agreement between Decedent and M. Tims the property deeded to the Decedent by M. Tims was held by the Decedent in a resulting trust. R. pp. 0089-0092. Respondent S. Tims subsequently withdrew his motion for Summary Judgment. R. p. 0186.

Petitioner Krane and Respondent M. Tims filed memoranda of law in support of their positions and in opposition to the opposing motions. R. pp. 0093-0099; 0115–0120; R. pp. 0100-0111. Both parties also filed supporting affidavits, but only Petitioner introduced supporting documents. R. pp. 0121-0185; R. pp. 0112-0114. The lower court heard the Motions on October 9, 2017. R. pp. 0003-0014. The lower court by Order dated February 7, 2018 denied Petitioner's Motion for Summary Judgment and granted Respondent M. Tims' Motion for Summary Judgment. See Id. Petitioner filed a Motion for Reconsideration. R. pp. 0187-0195. The Lower Court denied Petitioner's Motion for Reconsideration. R. pp. 0015-0026. Petitioner timely filed her Appeal. R. pp. 00196-0225.

The Court of Appeals affirmed the judgment of the circuit court. Unpublished Op. No. 2021-UP-281 (S.C. Ct. App. filed July 21, 2021). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE APPLIED THE CLAIMS BARRING STATUTE OF SOUTH CAROLINA CODE § 62-3-803 TO RESPONDENT'S CLAIMS REGARDING A WRITTEN CONTRACT BETWEEN RESPONDENT AND THE DECEDENT.

On November 14, 2012, Respondent and Decedent allegedly entered into a non-recorded agreement entitled "Land Exchange Agreement" (hereinafter "LEA"). The terms of the LEA are as follows:

1. Son is the owner of the following land:

   See attached Exhibit A

2. Son is indebted to MCAS Beaufort in the amount of approximately $65,000.00.

3. Mom is going to secure financing in that amount from Palmetto State Bank to pay off MCAS.

4. Son will deed the title of the property to Mom in order to have a first mortgage on the premises placed the property in Mom's name.

5. Upon the sale of the premises, the amount of money owed to the bank at that time will be paid along with any taxes, insurance payments, interest or any other items paid for by Mom for the ownership, maintenance and upkeep of the property.

6. Upon the acquisition of the contract of sale of the premises, Mom agrees to deed the premises back to Son so that there will be no capital gains on the sale of the property as Son's primary residence.

   The above constitutes the entire agreement of the Parties and all oral negotiations are merged herewith.

R. p. 0127 (emphasis added).

Pursuant to the LEA, Respondent gave Decedent a warranty deed for the property in exchange for Decedent simultaneously paying off Respondent's outstanding debt on the property. R. pp. 0125-0126. Respondent's deed guaranteed "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." R. p. 0126.

As consideration for the transfer of ownership Decedent used her borrowed funds to pay off Respondent's debt and gave her Mortgagee a mortgage on the property now titled in her name. R. pp. 0132-0144. In representations to her lender, Decedent expressly warranted that she "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[,]" and that "the property was unencumbered, except for encumbrances of record." R. p. 0137, para. 5 (emphasis added). The note and mortgage in Decedent's name are still outstanding and is still an Estate debt.

Also simultaneously with the exchange, the closing attorney issued a title opinion to the bank that title was fully vested in the Decedent and that Decedent had "good, valid and marketable title to the property …." R. p. 0129, para. 3; p. 0130 (emphasis added).

Respondent sued the Decedent's estate to claim enforcement of the LEA's terms as he believes they exist. He claims the written LEA is a Resulting Trust. Despite the clear instances of Decedent's ownership in the land and despite the express language of the LEA that includes a merger clause and that the return of the property to Respondent was or is contingent on certain acts of Respondent, the lower court and the court of appeals erroneously held that Respondent's Declaratory Judgment action was not a "claim" and thus did not fall within § 62-3-803. If this Court does not reverse the lower courts' rulings that Respondent's claims set forth in his Declaratory Judgment action are not "claims" within § 62-3-803, the decision will thwart the public policy underlying the claims-barring process and essentially moot the entire claims barring process established by the South Carolina General Assembly.

A. The claims-barring statute encompasses all claims brought against an Estate including Respondent's claim to the property.

"Pursuant to the general statutory scheme of the Probate Code, all claims against a Decedent's Estate ... must be presented after a personal representative is appointed and within the time limits prescribed by § 62–3–803, which our appellate courts have designated as a 'nonclaim statute.'" Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, ___, 754 S.E.2d 875, 879 - 880 (2014)(emphasis added); See S.C. Code Ann. § 62–3–104 (2009) ("No proceeding to enforce a claim against the Estate of a Decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the Estate are governed by the procedure prescribed by this article [§§ 62–3–101 et seq.]."); In re Estate of Tollison, 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct.App.1995) ("Section 62–3–803 is a nonclaim statute.").

> All claims against a decedent's estate which arose before the death of the decedent ... whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statue; are barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent; unless presented within the earlier of the following: (1) one year after decedent's death; or (2) the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication.

South Carolina Probate Code § 62-3-803(a)(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." Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. at ___, 754 S.E.2d at 882.

"All claims", means all claims. It seems simple. However, despite the clear language of South Carolina law, the lower courts contort the nature of Respondent's suit to allege that it is not a

"claim" falling within the claims barring statute. To do so, the lower courts find that Respondent's declaratory judgment claim regarding the intent of the parties to the LEA is a dispute regarding title of a decedent and therefore Respondent's claims do not fit the definition of "Claims" as defined in South Carolina Probate Code § 62-1-201(4). That section states that "Claims" do "not include ... demands or disputes regarding title of a decedent ...." Id. The lower courts hold that Respondent's suit to have the Estate return the property to Respondent, pursuant to the terms of a written agreement under the guise that the property was held in a Resulting Trust means that there is a dispute regarding Decedent's title to a specific asset alleged to be included in the estate. The lower courts are wrong because there is no dispute as to title raised in the declaratory judgment, only a dispute as to the intent of the parties pursuant to the LEA.

1. Respondent's declaratory judgment against the Estate is a "claim".

The lower courts' holdings completely ignore the terms of the LEA, the nature of the suit, the entire definition of "Claims" set forth in § 62-1-201(4) and the intent of the legislature. The LEA is an agreement; a contract between parties. Respondent is attempting to enforce the terms of the LEA as he believes they are. He claims Decedent is obligated to return the property per the terms of the contract.

Section 62-1-201(4) specifically states that a claim "includes liabilities of the decedent ... arising in contract ...." Id. A "Liability" is "an obligation one is bound in law ... to perform[,]" and includes a "condition of being actually or potentially subject to an obligation ...." Blacks Law Dictionary 823 (5th Ed). Thus, Decedent's obligation to return the property to Respondent under the LEA was or is a "liability" of the Estate arising in contract. To contend otherwise is a complete disregard of Respondent's own claims and the terms of the LEA.

2. There is no dispute regarding title.

Here, the Decedent clearly had title in her name pursuant to the general warranty deed given by Respondent. R. pp. 0125-0126. Decedent caused her bank to lend her money based on her (and Respondent's) assurances that title was fully vested in her name and that she had free and marketable title to the property in her name alone.

At best there is an issue of whether and under what conditions Decedent has to return the property to Respondent, but that is governed by the contract. This is a contractual obligation not a question of actual title. There is not a dispute regarding title that would nullify the applicability of the claims barring statute.

Respondent could not demand the property back prior to completion of the contingencies. If Respondent had met the contingencies when Decedent was alive and Decedent failed and refused to return the property, Respondent's suit would properly have been for a breach of the LEA and to enforce the terms of the LEA, and Decedent would have had to return the property. But all of this is pursuant to a contractual agreement, notice of which had to be timely filed with the probate court pursuant South Carolina Code § 62-3-803.

3. Respondent is seeking to enforce the Agreement, not contest or dispute a title to real property.

Respondent's declaratory judgment action is a claim that Decedent was obligated to return the property to Respondent per the terms of the LEA. At its heart, Respondent's action is a claim that he gets the property back pursuant to the LEA if he gets a contract to sell or otherwise pays off the mortgage. R. pp. 194-195, para. 10. While this is not what the LEA states, the claim is not disputing that the title is in Decedent's name, only that Decedent is obligated to return the property

per the terms of the LEA. Respondent admits that title is in Decedent's name. Nothing in any of his pleadings dispute that the title is in Decedent's name.

If, as the Court of Appeals holds, a dispute over whether a property owned by a decedent should be returned or given to another based on a written contract is not covered by the claims barring statute, then no suit against an estate involving real property titled in the decedent's name and pursuant to a written contract would ever be covered by the claims barring statute.

B. The purpose of the claims-barring statute is to allow a speedy and efficient estate administration.

The lower courts' holdings thwart the legislative purpose of having a speedy and efficient estate administration. "[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.").

The lower courts' holding equates to a finding that there is no statutory time constraint on Respondent to notify the Estate of Decedent's obligation under the LEA. It is completely contrary to the Legislative intent of establishing a speedy and efficient settlement of an Estate.

C. That the Lower Courts' rulings contradict the legislative intent and leads to a *reductio ad absurdum* is shown by asking a few simple questions.

If Respondent's claims are not barred by the claims-barring statute, when would they ever be time barred as a matter of law? Is there no time limitation? Under the lower courts' reasoning, how would anyone ever receiving Estate property ever have assurance that they had good and marketable title if a party claiming a property interest as a result of a written agreement did not have a duty to timely notify the Estate of the agreement?

Based on the undisputed facts in this case, the Estate could have distributed the real property to the heirs or sold the property to a third party pursuant to a petition to sell real estate and then closed the estate. The distributees or the third-party purchaser would have no knowledge or ability to know of Respondent's unfiled claims. Despite that consequence, the lower courts' rulings allow Respondent or someone in a similar situation to eventually, at his leisure and with no legal time limitation, file a claim to the property. If the claimant is successful, under the lower courts' ruling, the claimant would get the property returned regardless of the delay. The uncertainty completely contradicts the legislative intent in establishing the claims-barring time limits.

2. THE COURT OF APPEALS ERRED IN AFFIRMING THE APPLICATION OF THE EQUITABLE REMEDY OF A RESULTING TRUST WHERE RESPONDENT HAD AN ADEQUATE REMEDY AT LAW.

A resulting trust is a creature of equity, "devised ... 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). However, "equity is only available when a party is without an adequate remedy at law." EllisDon Constr. Inc. v. Clemson Univ., 291 S.C. 552, 555, 707 S.E.3d 399, 401

(2011). See also Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, ___, 627 S.E.2d 687, 688 (2006) ("The Court will reserve its equitable powers for situations when there is no adeqeuate remedy at law." Id.) citing Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n, 298 S.C.179, 379 S.E.2d 119 (1989). "[E]ven though a decision in favor of the Estate may appear inequitable, equitable considerations are not a factor in the claims-barring analysis." Beach First Nat'l Bank v. Estate of Gurnham, 407 S.C. 194, ___, 754 S.E.2d 875, 884 (2014).

Respondent's Declaratory Judgment claims seek to have the trial court interpret the written agreement between Respondent and Decedent. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

The Court of Appeals in Bowen v. Bowen, 345 S.C. 243, 547 S.E.2d 877 (Ct. App. 2001), rejected the application of a resulting trust where there was a written agreement between the parties. The present court ignored the Bowen precedent in its entirety. Like the parties in Bowen, Respondent's action was commenced to determine the parties' respective rights in certain real property in view of the LEA. See Bowen, 345 S.C. at 248, 547 S.E.2d at ___. And as in Bowen, Respondent's action is "to interpret the parties' written agreement, or contract, and when a contract is clear and unambiguous, the construction thereof is a question of law for the court." See Bowen, 345 S.C. at 249, 547 S.E.2d at ___.

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 precludes 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) the lower court also 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.[1]

3. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE LOWER COURT'S SUMMARY JUDGMENT OF A RESULTING TRUST WHERE PRETITIONER PRESENTED EVIDENCE CONTRACTING THE EXISTENCE OF A RESULTING TRUST.

Because the issue of a resulting trust was before the courts on Respondent's Motion for Summary Judgment, it is not a question of whether Respondent proved his case by clear and convincing evidence, or whether Petitioner rebutted his proof, but rather whether there is a scintilla of evidence contradicting the elements necessary to find a resulting trust. Petitioner provided that evidence. The Court of Appeals ignored Petitioner's evidence. "[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).

A. Evidence of the parties' intent is 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 ___. Petitioner's evidence showed, or at the very least inferred, Decedent's intent in obtaining the property was to hold the property outright without any encumbrance or limitation on Decedent's right to sell.

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[1] The Court of Appeals in Nutt Corp., supra, citing other states' authority, held "that the possibility the statute of limitations may have potentially barred the Nutt Corporation from obtaining a legal remedy is no grounds in itself for allowing [it] to seek equitable relief. Nutt Corp., 396 S.C. at 329, 721 S.E.2d at ___.

1. **Decedent claimed sole, unencumbered, outright ownership over the land contrary to an intent to hold it in trust.**

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." R. p. 0137, para. 5 (emphasis added). Decedent used her money to pay off Respondent's debt in exchange for Respondent giving her title to the property. R. p. 0127.

If Decedent's acquisition of the property was with the right to sell, convey or otherwise dispose of the property as she alleged, and as Respondent warranted, 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 definition of a Resulting Trust for Decedent to be able to unilaterally encumber the property with mortgages or to sell the property. Decedent unilaterally encumbered the property on multiple occasions evidencing an intent contrary to a resulting trust.

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 LEA acknowledges that the Decedent would have costs "for the ownership ... of the property." R. 192, para. 5.

The Court of Appeals also overlooked Decedent's claims of ownership on her October 11, 2013 personal Financial Statement where she included the property in a list of her "wholly owned real estate". R. p. 0183, sched. 6. Decedent made the representation "to induce Palmetto State

Bank ("PSB") to extend or continue the extension of credit" to the Decedent. R. p. 0184. Decedent's claims and recognition 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 and should preclude summary judgment on that issue.

2. Respondent's deed to Decedent shows an intent contrary to a Resulting Trust.

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." R. p. 0126. He now takes the opposite position and argues that he has a claim to the property. However, any claim is only pursuant to the contract between Respondent and Decedent. 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 precludes 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 property exchange evidence outright ownership and not a Resulting Trust.

The closing attorney verified that title was "vested" in the Decedent's name as of the date of the policy, November 14, 2012. R. p. 0129, para. 3. He likewise affirmed that Decedent had "good, valid and marketable title to the property …." R. p. 0130 (emphasis added).

All of this evidence completely contradicts Respondent's arguments that Decedent's intent was to hold the property in trust for Respondent and not as an outright owner. Because this was a

Summary Judgment motion, these facts have to be viewed in a light most favorable to Petitioner and at the very least 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. The terms of the LEA are evidence that there was no Resulting Trust.

In Bowen v. Bowen, 345 S.C. 243, 547 S.E.2d 877 (Ct. App. 2001), the Court of Appeals 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. Similarly, the parties here have a written agreement with a merger clause that negates the need to employ the presumption associated with a resulting trust.

B. No evidence that Respondent paid for the property at the time Decedent acquired the property from Respondent.

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 ...." Id.; 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 only if the consideration for the transfer of the property was paid for by Respondent at the time it was transferred to Decedent. See Lollis v. Lollis, 291 S.C. at ___, 354 S.E.2d at 561.

However, here, it was Decedent that gave consideration for the transfer of 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. The allegation that Respondent paid for the property at the time it was transferred to Decedent, a necessary element of a resulting trust, is simply not true, not supported by any evidence and is a complete failure to take the facts and inferences in a light most favorable to Petitioner.[2]

Petitioner also introduced proof that Decedent made payments for the property and for the business, but this evidence was overlooked. R. pp. 0122; 0146; 0153-0179. Petitioner presented copies of Decedent's cancelled checks and receipts establishing Decedent's expenditures. Id. 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.

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 Petitioner 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. 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

[2] The lower courts' finding that Decedent did not pay anything at the time of transfer is totally false. The recording data for the Mortgage securing Decedent's loan shows that the Mortgage was recorded simultaneously with 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. R. p. 0125. The Mortgage securing the loan to Decedent was recorded in the same book 03190, in the immediately succeeding pages, pages 2754-2762, the same date and time – November 14, 2012, at 4:24:45 PM not November 15, 2012. 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, references Promissory Note No. 7712136 which is the Note the Decedent signed. R. pp. 0132, 0137, para. 3.

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 Petitioner's evidence showing Decedent's claims of outright ownership and is not taking the facts and inferences in a light most favorable to Petitioner.

C. The Merger Clause in the Land Exchange Agreement prohibits introduction of "intent" not in accord with the express language of the Agreement.

The Court of Appeals opinion, in holding that the LEA is 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." R. p. 0127 (emphasis added). The lower 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.

"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 solely contingent on Respondent acquiring a contract to sell the property. R. p. 192, para. 6. Despite the merger clause, the Court of Appeals erroneously looks to Respondent's parol 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 for Decedent to own it outright and pay for it and for the business and the return the property when Respondent acquired a contract to sell the property at which time Decedent would be reimbursed. R. 192. And if the intent of the LEA was to sell the property and reimburse Decedent, 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.

D. The presence of a written agreement distinguishes the present case from law cited by the Court.

The cases cited by the lower court do not involve a written agreement like the LEA and are distinguishable. 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 Petitioner and has to be viewed in a light most favorable to Petitioner.

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. The Bailey 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 because there is a clear, unequivocal merger clause and South Carolina case law prohibits the introduction of parol evidence to alter the terms of the LEA. Also, the father in Bailey who transferred the property to his son, also paid for the property at the time of trasnfer. As shown above, the evidence taken in a light most favorable to Petitioner shows that it was Decedent that paid Respondent 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 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 and fails to take the facts in light most favorable to Petitioner.

The son in Bailey just showed up for the closing. In contrast, the Decedent herein not only showed up for the closing, but gave money to Respondent's to satisfy 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 Petitioner 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.[3] 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 Petitioner's evidence in its entirety and the Lower Court's obligation to take the facts and inferences therefrom in a light most favorable to Petitioner.

In Matter of Howard, 315 S.C. 356, 434 S.E.2d 254 (1993), 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

[3] 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.

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.

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 transfer of the property back to Respondent is expressly contingent on Respondent acquiring a contract to sell the property. There is an express written agreement that spells out that obligation 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 also 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. 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.

Likewise 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 expressly noted 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. Decedent's contractual obligation in this case is completely different than what was before the Saradjian Court.

The Alabama case of Cornelius v. Miller, 836 So.2d 883 (Ala. Civ. App. 2002) is also distinct. There 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. Further the Alabama Court recognized that contract claims for real property do fall within the nonclaim statute. Cornelius v. Miller, 836 So.2d at 885.

CONCLUSION

Because the lower courts should have applied claims barring time limits to Respondent's declaratory judgment action to interpret and enforce a written contract between Respondent and the Decedent, and because the lower courts failed in a summary judgment motion, to take the fact and inferences therefrom in a light most favorable to Petitioner, the non-moving party, the lower courts' holdings should be reversed in their entirety.

RESPECTFULLY SUBMITTED,

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September 21, 2021

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Sep 21 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Unpublished Opinion No. 2021-UP-281 (S.C. Ct. App. Filed July 21, 2021)

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,.....Respondent,

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, ... Petitioner.

PFOOF OF SERVICE

I certify that I have served a copy of the Petition for Writ of Certiorari pursuant to the Supreme Court's Order re: Methods of Electronic Filing and Service under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021) in the above action was made upon the

Clerk of the South Carolina Court of Appeals and upon counsel of record for Respondents as follows:

Patricia A. Howard, Clerk
South Carolina Supreme Court
Email: supctfilings@sccourts.org

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Via: One Drive

Mills Morrison, Jr. Esq.
Email: millsmorrison@yahoo.com
Attorney for Respondent Michael Tims

Samuel H. Tims
Respondent
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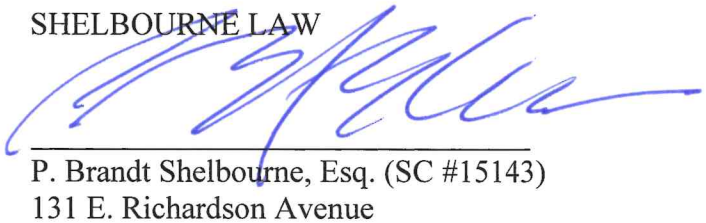

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September 21, 2021
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September 21, 2021

VIA Email Only
Patricia A. Howard, Clerk
South Carolina Supreme Court
Email: supctfilings@sccourts.org

Re: In the Matter of the Estate of Harriet Kathleen Henry Tims, Decedent
Our File No.: 06529

Dear Ms. Howard:

Pursuant to Section (b)(1) of the Supreme Court's Order re Methods of Electronic Filing and Service under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021), please find enclosed for filing a **Petition for Writ of Certiorari** in the above referenced matter.

In accordance with Section (c) of the Reduced Number of Copies Required in Appellate Matters (dated August 25, 2021), a copy of the Appendix is not being filed.

By copy of this letter, I am serving a copy of the Petition for Writ of Certiorari on the Clerk of the South Carolina Court of Appeals via One Drive and serving same on Respondents via email pursuant to Section (d)(1) of the Supreme Court's Order re: Methods of Electronic Filing and Service under Rule 262 of the South Carolina Appellate Court Rules (dated August 25, 2021).

The filing fee for this Petition is being placed in the U.S. Mail.

With best regards, I am

Best regards,

P. Brandt Shelbourne

cc: Jenny Abbott Kitchings – Clerk of the S.C. Court of Appeals (via One Drive)
Mills Morrison, Jr. Esq. (via e-mail)
Samuel Tims (via e-mail)
Client (via email)