No. 2D17-3148

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

RONALD HOWARTH, Individually and as Successor Trustee of the WILLIAM HOWARTH TRUST u/t/d 1980 as Amended and Restated on April 29, 2011,

Appellant,

v.

BETTIE BALL and KEITH HOWARTH,

Appellees.

On Appeal from the Circuit Court of the Sixth Judicial Circuit
in and for Pasco County, Florida
L.T. No. 13-CA-5383, Hon. Kimberly Sharpe Byrd

REPLY BRIEF OF RONALD HOWARTH

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ARGUMENT

I. The Court should vacate the nonfinal order because Bettie and Keith lacked standing as mere beneficiaries rather than personal representatives or trustees

Because they sued in their personal capacities as mere beneficiaries of the estates and trusts rather than as their personal representatives or trustees, Bettie and Keith lacked standing. As such, the Court should vacate the nonfinal order.

A. Bettie and Keith lack standing

In their brief, Bettie and Keith defend the imposition of a constructive trust based on their supposed standing as beneficiaries and interested parties. Their argument places heavy reliance on *Parker* v. *Parker*, 185 So. 3d 616 (Fla. 4th DCA 2016), where the Fourth District held a personal representative was not an indispensable party under § 733.607, *Fla. Stat.*, and a series of cases *Parker* cited in which beneficiaries or relatives have challenged various inheritance issues, *see* Answer Br. 15-19 (collecting cases). *Parker* and those other cases are distinguishable, however, because none of them involved a plaintiff whose standing was challenged by the defendant. As such, Bettie and Keith are mistaken and have misplaced reliance on the wrong cases.[1]

[1] Bettie and Keith also rely (*see* Answer Br. 18) on *In re Estate of Bell*, 573 So. 2d 57 (Fla. 1st DCA 1990). But that reliance is difficult to understand, because the beneficiaries in that case followed the procedure Bettie and Keith should have followed here: those beneficiaries had sued the personal representative of the estate to take certain actions; they did not sue the donee of an *inter vivos* gift.

1. *Parker* v. *Parker* and the cases on which it relies are distinguishable

The principal case on which Bettie and Keith rely is *Parker*. There, the Fourth District confronted a lawsuit between the children (*i.e.*, beneficiaries) of a decedent. 185 So. 3d at 617-20. Some of the children claimed their father's *inter vivos* gift to other children should be set aside. *Id.* at 617-18. To that end, those children filed a lawsuit that alleged tortious interference with inheritance,[2] unjust enrichment, and replevin.[3] *Id.* at 618.

The *Parker* court, however, was not confronted with the sufficiency of the allegations of those causes of action. *See id.* Instead, the defendants moved to dismiss that lawsuit because the plaintiffs had failed to join the decedent's estate as an indispensable party under § 733.607, *Fla. Stat.* 185 So. 3d at 618. The trial court granted that motion, dismissed the action with prejudice, denied the plaintiffs' motion to amend, and denied rehearing. *Id.*

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[2] Tortious interference with inheritance "is a relatively new and undeveloped tort" that "apparently evolved from the commercial tort of interference with prospective advantage." *Whalen* v. *Prosser*, 719 So. 2d 2, 4 (Fla. 2d DCA 1998). The tort exists "not primarily to protect the beneficiary's inchoate rights, but to protect the deceased testator's former right to dispose of property freely and without improper interference." *Id.* at 6. "In a sense, the beneficiary's action is derivative of the testator's rights." *Id.* Almost by definition, it is not a tort that a trustee or personal representative can pursue; rather, it is a tort that only a beneficiary whose expected inheritance has been frustrated can pursue. *See id.*

[3] Bettie and Keith alleged unjust enrichment but not tortious interference with inheritance or replevin. *See* App. 37 at 5.

On appeal, the Fourth District held the estate was not an indispensable party. *Id.* at 618-20. In reaching that conclusion, the Fourth District relied on two series of cases in which decedents' children[4] and other relatives[5] had sought to set aside *inter vivos* gifts without joining the estate as a party. *Id.* But the critical point that *Parker* failed to mention was that, in those cases, nobody challenged the plaintiffs' standing to bring suit. *See supra* notes 4 & 5.

The reason why that makes a difference requires some explanation. Unlike the federal constitution, the Florida Constitution has no analog to the Cases or

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[4] *Pratt* v. *Carns*, 85 So. 681, 682 (Fla. 1920) (entertaining suit brought by decedent's sons to invalidate deeds executed by decedent prior to his death, on the grounds that they were obtained by undue influence); *Mulato* v. *Mulato*, 705 So. 2d 57, 59-63 (Fla. 4th DCA 1997) (entertaining suit brought by son to invalidate deeds executed by decedent before her death, on the grounds that they were obtained by undue influence); *Dunn* v. *White*, 500 So. 2d 565, 566 (Fla. 2d DCA 1986) (permitting son to be substituted as plaintiff for father who died after filing suit to recover property allegedly conveyed as a result of undue influence); *Omel* v. *Simpson*, 386 So. 2d 2, 2 (Fla. 4th DCA 1980) (entertaining suit brought by decedent's daughter to challenge deed executed by decedent, on the grounds that it was obtained by undue influence); *Barger* v. *Barger*, 183 So. 2d 253, 253-54 (Fla. 2d DCA 1966) (permitting decedent's son, who was the sole heir, devisee, and executor of decedent's estate, to pursue action to set aside conveyance of real estate as the product of undue influence).

[5] *Wrobbel* v. *Walda*, 217 So. 2d 340, 341 (Fla. 4th DCA 1968) (entertaining suit by decedent's granddaughters to set aside gifts and transfers made by decedent on the grounds that they were the product of undue influence); *Bryant* v. *Bryant*, 379 So. 2d 382, 383 (Fla. 1st DCA 1979) (entertaining suit by family member of unstated relation to cancel deed executed by decedent, on the basis of decedent's alleged lack of capacity and a confidential relationship with the grantee); *Rowland* v. *McCall*, 118 So. 2d 846, 847 (Fla. 2d DCA 1960) (entertaining suit by decedent's sister to void deed on the grounds that decedent executed it as a result of undue influence).

Controversies Clause. *Compare* U.S. Const. art. III, § 2, cl. 1, *with* Fla. Const. art. V. For that reason, under Florida law, standing is not a jurisdictional prerequisite to suit, the absence of which could be raised at any time, but rather is an affirmative defense that must be pled in an answer lest it be waived. *Dage* v. *Deutsche Bank Nat'l Tr. Co.*, 95 So. 3d 1021, 1024 (Fla. 2d DCA 2012).

Here, the cases on which *Parker* relied did not involve plaintiffs whose standing was challenged (nor, for that matter, did they involve claims that the plaintiffs had failed to join the estates as indispensable parties). *See supra* notes 4 & 5. For that reason, those cases cannot stand for the proposition that a decedent's children or other relatives have standing to sue a donee to set aside an *inter vivos* gift. *See Sierra ex rel. Sierra* v. *Pub. Health Tr. of Dade County*, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995) ("An appellate court is reactive; it can only review asserted errors made by lower tribunals such as courts and administrative agencies."). Rather, they stand only for the proposition that, when a plaintiff's standing has not been challenged, an estate is not an indispensable party to the action.

Additionally, *Parker* is also distinguishable because it involved different causes of action. Specifically, the causes of action for tortious interference with inheritance and replevin (causes of action that Bettie and Keith did not allege here) are claims that appropriately belong to the putative beneficiaries themselves, not the trusts or estates that otherwise might have possessed the gifts. Here, however,

the only cause of action Bettie and Keith raised in support of their prayer for a constructive trust was unjust enrichment. *See* App. 37 at 5. But that is a cause of action that belonged exclusively to William's and Hilda's estates, and therefore it could only be pursued by those estates' personal representatives. *See* Initial Br. 12-14.

2. *McMonigle* v. *McMonigle* and *Traub* v. *Zlatkiss* are the controlling authorities

Instead, the controlling authorities are this Court's decision in *McMonigle* v. *McMonigle*, 932 So. 2d 369, 371 (Fla. 2d DCA 2006), and *Traub* v. *Zlatkiss*, 559 So. 2d 443, 447 (Fla. 5th DCA 1990). Although Bettie and Keith downplay their holdings as obiter dictum (*see* Answer Br. 18-19), they are incorrect.

McMonigle held the beneficiary of an estate "[c]learly … did not have standing to bring [a] separate civil action" without the personal representative's authorization to set aside an *inter vivos* gift to a different beneficiary. 932 So. 2d at 371. And *Traub* held "the cause of action for rescission, or to establish a constructive trust, is in the personal representative of the decedent's estate and cannot be directly asserted by the widow." 559 So. 2d at 447. In both *McMonigle* and *Traub*, those statements were necessary to reach the results in those cases. As such, they are not obiter dictum.

B. Bettie and Keith overestimate the scope of equity jurisdiction and do not confront the elements of unjust enrichment

In defending the scope of the trial court's equity jurisdiction, Bettie and Keith knock down a straw man argument that Ronald never raised. *See* Answer Br. 19-23. At no time did the initial brief contend that, in the context of a properly pled and proven cause of action for unjust enrichment, a trial court could not impose a constructive trust as a remedy. Instead, it is Ronald's argument that Bettie and Keith did not properly plead and prove their cause of action because they failed to establish there was any "'benefit conferred upon a defendant *by the plaintiff*.'" *Fla. Power Corp.* v. *City of Winter Park*, 887 So. 2d 1237, 1242 n.4 (Fla. 2004) (citation omitted) (emphasis added). Simply put, Bettie and Keith (the plaintiffs) did not confer any benefit on Ronald (the defendant), so they could not possibly prevail on an unjust enrichment theory. And Bettie and Keith provide no record support to the contrary, nor do they cite any authority for the proposition that, for unjust enrichment to exist, the benefit need not be conferred by the plaintiff.

C. Liberally construed, Ronald's *pro se* answer raised the affirmative defense of lack of standing as to both Hilda and William

In pertinent part, Ronald's affirmative defense asserts "the Plaintiffs lack standing." App. 38 at 2. Although Bettie and Keith attempt to give that phrase a narrower reading as pertaining only to Hilda's assets, they do not mention that this was a *pro se* answer. As such, it is entitled to a liberal construction. *Chancey* v.

Chancey, 880 So. 2d 1281, 1282 (Fla. 2d DCA 2004) ("We realize that Chancey's allegations in support of setting aside the default and judgment are buried within numerous letters and motions and are not artfully stated. But he is a pro se litigant and his pleadings should be liberally construed.").

D. Bettie's supposed appointment as personal representative of Hilda's estate and Hugh Umsted's role as receiver for Hilda's trust are irrelevant to whether Bettie and Keith had standing in their personal capacities to sue Ronald for unjust enrichment

Citing two documents that do not appear to be part of the record on appeal (*see* Answer Br. 25), Bettie and Keith assert that Bettie is the personal representative for Hilda's estate. First of all, the record on appeal, as it now stands, does not support that assertion. And secondly, even if it were true, it does not matter because Bettie did not sue in her capacity as personal representative. Instead, she sued in her personal capacity as a beneficiary. But, as Ronald has argued, it is in her personal capacity that Bettie lacks standing.

Relatedly, Bettie and Keith mention in passing (*i.e.*, in a single sentence) that Hugh Umsted is the receiver for Hilda's trust. *See* Answer Br. 25. But Bettie and Keith do not explain how that fact would confer standing upon Bettie or Keith to sue Ronald for unjust enrichment in receiving an *inter vivos* gift from William.

CONCLUSION

The Court should vacate the imposition of a constructive trust on the precious metals in the Order of July 17, 2017 and remand for further proceedings.

Respectfully submitted,

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I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

April 16, 2018

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