

STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2018-0136

2018 TERM

MAY SESSION

Samuel Rogers

v.

Joseph Rogers

RULE 7 APPEAL OF FINAL DECISIONS OF THE HILLSBOROUGH COUNTY SUPERIOR
COURT SOUTHERN DISTRICT

BRIEF OF SAMUEL ROGERS (Appellant)

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QUESTIONS PRESENTED

- I.** Did the lower court improperly reverse its prior decision on a jurisdictional question, particularly given that there was no appeal taken from the initial decision, nor were there any changes in facts, circumstances, or applicable law between the two decisions?

Preserved: PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R.CIV. PROC. RULE 12(E) (January 25, 2018).

- II.** Did the lower court err in ruling that the probate court has exclusive jurisdiction over a tort action for damages brought against the executor of an estate in his individual capacity and in his capacity as a beneficiary of the estate?

Preserved: PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION TO RECONSIDER (December 18, 2017); PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO NEW HAMPSHIRE R.CIV. PROC. RULE 12(E) (January 25, 2018).

RELEVANT STATUTORY PROVISIONS

NH RSA 547:3—Judges of Probate and Their Jurisdiction: Jurisdiction

I. The probate court shall have exclusive jurisdiction over the following:

- (a) The probate of wills.
- (b) The granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons, including establishment of death of a person presumed dead and assignment of homestead and claims against the executor or administrator for those services related to the prior care and maintenance of the decedent and the administration of insolvent estates and appeals therefrom.
- (c) The interpretation and construction of wills and the creation by judgment or decree, interpretation, construction, modification and termination of those trusts described in RSA 564-A:1, I.
- (d) The administration of those trusts described in RSA 564-A:1, I, and the appointment, removal and surcharge of trustees of such trusts.
- (e) The appointment and removal of conservators, and of the guardians of minors, mentally incompetent persons and spendthrifts, and in relation to the duties imposed by law on such conservators and guardians, and the management and disposition of the estates of their wards.
- (f) The adoption of children.
- (g) The change of names of persons who reside in the county and who apply therefor.
- (h) The termination of parental rights.
- (i) Durable powers of attorney for health care under RSA 137-J.
- (j) The interpretation and effect of living wills under RSA 137-J.
- (k) [Repealed.]
- (l) Petitions to quiet title of real estate pursuant to RSA 547:11-c.
- (m) Declaratory judgment actions pursuant to RSA 547:11-b.
- (n) Any other jurisdiction as may be granted by statute.

II. The probate court shall have concurrent jurisdiction with the superior court over the following:

- (a) Subject to RSA 498:4-a, cases involving charitable uses and trusts other than those trusts described in RSA 564-A:1, I, over which the probate court has exclusive jurisdiction as provided in RSA 547:3, I(c) and (d).
- (b) Durable powers of attorney under RSA 564-E.
- (c) Waivers for marriage of minors pursuant to RSA 457:6-457:7.
- (d) Ancillary matters as defined in RSA 547:3-l.
- (e) Petitions for partition pursuant to RSA 547-C.

III. The probate court shall have concurrent jurisdiction with the district court over ancillary matters as defined in RSA 547:3-l.

IV. Nothing in this section shall be construed to confer upon the probate court any additional authority over inter vivos trusts beyond that authority exercised by the superior court prior to the adoption of this section.

NH RSA 491:7—Superior Court: Jurisdiction

The superior court shall take cognizance of civil actions and pleas, real, personal, and mixed, according to the course of common law, except such actions as are required to be brought in the family division under RSA 490-D, district courts under RSA 502-A, or the probate courts under RSA 547; of writs of mandamus and quo warranto and of proceedings in relation thereto; of petition and appeals relating to highways and property taken therefor and for other public use; of actions commenced in the probate or district courts where a right to jury trial is guaranteed by the constitution; of actions commenced in a district court which are transferable by statute to the superior court; of suits in equity under RSA 498:1; of petitions for new trials; of petitions for the redemption and foreclosure of mortgages; of all other proceedings and matters to be entered in, or heard at, said court by special provision of law; and of all other proceedings and matters cognizable therein for which other special provision is not made.

STATEMENT OF FACTS

This case involves a dispute between an elderly father, Samuel Rogers, and his son, Joseph Rogers. On March 10, 2012, Samuel's wife (Joseph's mother), Martha Rogers, died.¹

In her will, dated September 22, 2009, Martha named Joseph the executor of her estate, and gave 2/3 of her estate to Joseph and 1/3 of her estate to Samuel. Joseph was appointed Executor of Martha's estate by the 9th Circuit, Probate Division (Estate of Martha Rogers 316-2012-ET-00595) on May 16, 2012. MOTION TO DISMISS (Oct. 21, 2016), *Appx.*² at 13.

Martha's estate was comprised primarily of various real estate holdings, including the marital home she shared with Samuel and a 50% interest in numerous parcels situated on Rocky Pond Road in Hollis, New Hampshire. The parcels totaled approximately 94.3 acres of undeveloped but subdivided land, ready for development, as well as additional land that could not be developed (the "Rocky Pond Property").

As Executor, Joseph commissioned appraisals of the Rocky Pond Property and of the marital home. The appraiser valued Martha's 50% interest in the Rocky Pond Property at \$550,000 ("RPP Estate Appraised Value") and the marital home at \$273,000.

Based on the RPP Estate Appraised Value, Samuel's 1/3 interest in the Rocky Pond Property was approximately equal in value to Joseph's 2/3 interest in the marital home. The estate was eventually settled by Samuel foregoing his beneficial interest in the Rocky Pond Property and taking title to the marital home only and Joseph taking title to the 50% interest in the Rocky Pond Property (the "Land Swap").

¹ As the parties in this case share the same last name, they will be referred to by their first names for clarity. No disrespect is intended.

² *Appx.* refers to the Appendix, filed separately; *Supp.* refers to the materials bound with this brief.

The Land Swap was completed on September 23, 2013 through Fiduciary Deeds. The probate estate was closed on December 6, 2013.³ MOTION TO DISMISS (Oct. 21, 2016)), *Appx.* at 13. Sometime in 2015, however, Samuel became aware that the Town of Hollis had agreed to purchase the Rocky Pond Property. Samuel received credible information that the purchase price was approximately \$2,500,000 (making Joseph's 50% interest worth \$1,250,000).⁴ The proposed sale price is more than double the value represented in the RPP Estate Appraised Value. Samuel relied on the RPP Estate Appraised Value when he surrendered his beneficial interest in the Rocky Pond Property.

After becoming aware of the impending sale to the Town of Hollis, Samuel uncovered an appraisal commissioned by Joseph in 2005, which valued the Rocky Pond Property at \$1,950,500 (approximately 90% above the value of the RPP Estate Appraised Value).⁵ The present suit followed. Through discovery, Samuel has also learned at the time of the Land Swap, Joseph possessed a 2008 appraisal of the Rocky Pond Property, valuing the property at \$2.1 million, and additionally learned of ongoing discussions, which have gone on for decades, between Joseph and the Town of Hollis regarding a potential purchase of the Rocky Pond Property by the Town.

³ The probate estate was subsequently reopened, Case No. 316-2017-EQ-0089, pursuant to Joseph's motion, based on Joseph's allegations that this suit violates the no contest clause of Martha's will. The case was then again closed when Joseph withdrew his Motion following the Dismissal of Samuel's superior court action. Samuel objected to the second closure, as he wanted to file counter-claims (and may file his claims in the probate court in the future, in order to preserve his rights), but the probate court denied Samuel's motion, and reaffirmed that the case is closed. ORDER (May 11, 2018), *Appx.* at 97.

⁴ Samuel's understanding is that the sale ultimately was not completed.

⁵ Joseph argues the 2005 report was not a formal appraisal. The Hillsborough County Superior Court agreed that it was not a formal appraisal, but found that the report is "extensive," at 13 pages long with 12 additional pages of attachments, including many of the same details as those found in formal appraisals. ORDER GRANTING ATTACHMENT (Jan. 6, 2017), *Appx.* at 37.

COMPLAINT (Sept. 20, 2016), *Appx.* at 01; PLAINTIFF’S RESPONSE TO THE DEFENDANT’S MOTION TO DISMISS (Dec. 1, 2017), *Appx.* at 27.

STATEMENT OF THE CASE

After realizing that his son had misled him regarding the value of the Rocky Pond Property, Samuel filed a Complaint in the Hillsborough County Superior Court Southern District on September 20, 2016. The complaint set forth the facts described above, and asserted the following claims against Joseph: Breach of Fiduciary Duties, Constructive Fraud, Negligence, and Unjust Enrichment.

Reviewing the procedural history of this case is akin to listening to a broken record. As detailed below, Joseph has continually raised the same objections to the Superior Court action and, until the decision which led to this appeal, was continually denied. The following is a summary of the most relevant pleadings below:

- January 6, 2017—The superior court grants Samuel an attachment on the property of Joseph in the amount of \$250,000, based on Samuel’s having, “more than a favorable chance of success.” ORDER GRANTING ATTACHMENT (Jan. 6, 2017), *Appx.* at 37.
- October 21, 2016—Joseph moves to dismiss the case because, inter alia, he argues that the suit is a claim against the estate and therefore the statute of limitations has run. MOTION TO DISMISS (Oct. 21, 2016), *Appx.* at 07. Samuel objected. PLAINTIFF’S RESPONSE TO THE DEFENDANT’S MOTION TO DISMISS (Nov. 10, 2016), *Appx.* at 27.
- December 15, 2016—The superior court denies Joseph’s Motion to Dismiss, ruling that, “[t]he defendant mischaracterizes the nature of the plaintiff’s claims as against the estate of Martha Rogers, rather than as against him personally. The plaintiff’s claims are against

the defendant as an individual, not against the deceased's estate.” ORDER (Dec. 15, 2016), *Appx.* at 32.

- January 13, 2017—Joseph files a Motion to Dismiss or Transfer, arguing that **under RSA 547:3**, the superior court lacks jurisdiction over this matter and the probate court has exclusive jurisdiction. MOTION TO DISMISS OR TRANSFER (Jan. 13, 2017), *Appx.* at 41.
- January 25, 2017—Samuel responds to Joseph's Motion to Dismiss or Transfer, arguing that RSA 491:7 confers superior court jurisdiction over this case because the claims are tort actions against Joseph in his individual capacity, and therefore the probate court does not have exclusive jurisdiction. PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS OR TRANSFER (Jan. 25, 2017), *Appx.* at 43.
- March 7, 2017—The superior court denies Joseph's January 13, 2017 Motion to Dismiss or Transfer. ORDER (March 7, 2017), *Appx.* at 47.
- November 21, 2017—Joseph files another Motion to Dismiss as well as a Motion to Consolidate. In the latter pleading, Joseph again argues that the probate court has exclusive jurisdiction over these claims. MOTION TO CONSOLIDATE (Nov. 21, 2017), *Appx.* at 61. Samuel objected to both motions. PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION TO DISMISS (Dec. 1, 2017), *Appx.* at 64; PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION TO CONSOLIDATE (Dec. 1, 2017), *Appx.* at 68.
- December 4, 2017—The superior court denies Joseph's Motion to Dismiss and Motion to Consolidate. ORDER (Dec. 4, 2017), *Appx.* at 71.
- December 15, 2017—Joseph files a Motion to Reconsider, arguing that the superior court had not yet addressed jurisdiction under RSA 547:3 in this case, MOTION TO RECONSIDER (Dec. 15, 2017), *Appx.* at 72, despite the court having done just that in at least one prior

order. Samuel objected to the Motion to Reconsider. PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER (Dec. 18, 2017), *Appx.* at 76.

- January 16, 2018—In a direct reversal of at least one prior order in this case, the Superior Court *grants* Joseph's Motion to Reconsider and dismisses the case, ruling that the probate court has exclusive jurisdiction under RSA 547:3. ORDER (Jan. 16, 2018), *Supp.* at 01. Samuel filed a motion to reconsider the dismissal, which was denied. PLAINTIFF'S MOTION TO RECONSIDER (Jan. 25, 2018), *Appx.* at 84; ORDER (Feb. 9, 2018), *Supp.* at 08.

This appeal followed.

SUMMARY OF ARGUMENT

In this case, the superior court erred in ruling that the probate court has exclusive jurisdiction over the claims against Joseph. Although the probate court does have exclusive jurisdiction over the administration of an estate, it does not have exclusive jurisdiction over all matters which involve an estate in any way.

Here, the probate administration of Martha Rogers' estate was completed before Samuel filed his complaint against Joseph, and Samuel's claims are against Joseph in his individual capacity, they are not claims against the estate. Samuel is not seeking to re-administer the estate or change the property distribution, but rather is seeking damages in tort against Joseph.

A review of the probate exception to federal court jurisdiction is instructive in this case, and demonstrates that, just as the claims in this case would not fall under the federal court probate exception, they do not fall under the exclusive jurisdiction of the New Hampshire probate court.

Finally, Samuel argues that the superior court erred in reversing its own ruling (arguably multiple rulings) concerning jurisdiction in this case. Though the superior court has substantial discretion to re-evaluate its own rulings before a final judgment, when there have been no changed circumstances between one ruling and the next, and when substantial time, energy, and judicial resources have been invested in a case, the superior court should be precluded from reversing itself and dismissing the case.

ARGUMENT

I. The Probate Court Does Not Have Exclusive Jurisdiction Over Tort Claims Against an Executor, Particularly After the Close of Estate Administration.

- A. *NH RSA 547:3 does not confer exclusive probate court jurisdiction over this matter.*

Because the dismissal in this case was based on a question of law, this court's review is *de novo*. *State v. Gordon*, 146 N.H. 324, 326 (2001).

RSA 491:7 grants the superior court jurisdiction over all, "civil actions and pleas, real, personal, and mixed, according to the course of common law." RSA 491:7. By contrast, "[t]he probate court is not a court of general jurisdiction. Its powers are limited to those conferred upon it by statute." *In re Cigna*, 146 N.H. 683, 689 (2001); *see also Wood v. Stone*, 39 N.H. 572, 572 (1859).

1993 amendments to the law concerning probate court jurisdiction granted the probate court concurrent jurisdiction with the superior court over a variety of matters. *Cigna*, 146 N.H. 683. Granting the probate court concurrent jurisdiction in no way diminished the superior court's jurisdiction.

The only matters for which the probate court deprives the superior court of jurisdiction are those over which the probate court has *exclusive* jurisdiction under RSA 547:3, I. Furthermore, statutes granting the probate court jurisdiction must be narrowly construed. *Cigna*, 146 N.H. at 690.

The claims presented in this case cannot be fairly construed as, "matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons..." RSA 547:3, I(b).

The mere fact that an action may have some connection with an estate, executor/administrator, or other probate matter does not mean the probate court has exclusive jurisdiction. *See, e.g., In re Bunker's Estate*, 110 N.H. 285 (1970); *In re Simard*, 141 N.H. 525 (1996); *Wood*, 39 N.H. at 573-74; *Kelley v. Peerless Insurance Co.*, 121 N.H. 253 (1981).

In *In re Estate of O'Dwyer*, 135 N.H. 323 (1992), the underlying issue involved the effect of the divorce of a decedent on the home he owned jointly with his ex-wife. Although there was certainly a connection to the estate of the ex-husband, the New Hampshire Supreme Court found that the superior court, and not the probate court, had jurisdiction over the question of title. *Id.* at 324. Under current law, the probate court would now likely have *concurrent* jurisdiction over such an issue, *In re Muller*, 164 N.H. 512 (2013), but that does not mean that the superior court no longer has jurisdiction.

In *Tsiatsios v. Tsiatsios*, 144 N.H. 438 (1999), the New Hampshire Supreme Court ruled that the estate was not a necessary party to the action despite the fact that the beneficiaries were arguing, essentially, that the property in question should have been a part of the estate of their late father (their claim was for fraudulent conveyance). *Id.* at 445. *See also Tsiatsios v. Tsiatsios*, 140 N.H. 173 (1995).

In this case, it is important to note that not only was Joseph the executor of Martha Rogers' estate, he was also a beneficiary. If Samuel were bringing these claims against a non-executor beneficiary, superior court jurisdiction would be even more apparent.

For example, in *Patey v. Peaslee*, 101 N.H. 26 (1957), the superior court had jurisdiction over a case brought by the heirs-at-law of a decedent against the decedent's husband. The heirs-at-law claimed that the husband fraudulently induced the decedent to marry him so that he would

inherit her property (and he did so inherit). The heirs-at-law sought a constructive trust on the property. *Id.*

Here, Joseph's role as executor may inform the analysis of his duties and various factual issues, but the case is subject to superior court jurisdiction because "the action is against the defendant, and not the estate." *Rice v. Connelly*, 71 N.H. 382, 382 (1902). The New Hampshire Supreme Court has routinely distinguished between cases against an estate and those against an administrator or executor in his individual capacity. *See, e.g., Blanchard v. Calderwood*, 110 N.H. 29, 35 (1969) ("The action is against the administrator rather than the estate, and does not seek to enforce a demand against the deceased or his estate..."); *Mansfield v. Holton*, 74 N.H. 417, 417 (1908) ("In such case the rents and profits belong to the heir, and if the administrator receives them, he does so, not officially, but in his private capacity..."); *Duncan v. Bigelow*, 96 N.H. 216, 218 (1950) ("Matters affecting the conduct of fiduciaries which have not been definitely placed within the exclusive jurisdiction of the probate court are still cognizable in equity.").

The fact that Samuel is seeking damages, and not simply equitable relief, further supports superior court jurisdiction. *DiGaetano v. DiGaetano*, 163 N.H. 588, 591 (2012). In addition, superior court jurisdiction is proper because the action could not have been brought during the estate administration, as recognized by the superior court in its December 15, 2016 Order. ORDER (Dec. 15, 2016), *Appx.* at 35-36. *See also, Lisbon Sav. Bank & Trust Co. v. Moulton's Estate*, 91 N.H. 477, 477 (1941) ("Until the settlement of the executor's account, the probate court has entire jurisdiction of the necessary procedure.") (emphasis added). It is also revealing that many of the relevant events in this case, such as the 2005 report, the 2008 appraisal, and the

Plaintiff's discovery of the Defendant's conduct, occurred before and after, not during, the estate administration.

Contrary to Joseph's repeated assertions, Samuel is not himself seeking to reopen the estate administration (as noted above, the estate was reopened on other grounds, then closed again), nor is he seeking to have a new inventory or accounting approved. Rather, Samuel is seeking damages in tort actions against Joseph.

B. *Federal court probate exception doctrine supports superior court jurisdiction in this case.*

Although this case does not involve the federal courts, it is useful to look to the federal court probate exception for guidance. *See, e.g., Dinger v. Gulino*, 661 F.Supp. 438, 443 (E.D.N.Y. 1987) ("In the Second Circuit, the standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court." (internal citations omitted)).

This Court has recognized a probate exception, kin to the domestic relations exception, to otherwise proper federal jurisdiction....although a federal court has no jurisdiction to probate a will or administer an estate it has long been established that federal courts of equity have jurisdiction to entertain suits...so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Marshall v. Marshall, 547 U.S. 293, 296 (2006) (internal quotations and citations omitted).

In *Marshall*, the Court was considering a claim by a widow (who happened to be Vickie Lynn Marshall a.k.a. Anna Nicole Smith) against her late husband's son, who was the beneficiary of the husband/father's estate. Although, "as a general matter, courts tend to view the probate exception as extending to all suits ancillary to the probate of a will," *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir. 2000), the United States Supreme Court ruled: "Vickie's claim alleges the *widely recognized tort* of interference with a gift or inheritance. She seeks an *in*

personam judgment against Pierce, not the probate or annulment of a will.” *Marshall*, 547 U.S. at 296-97 (emphasis added).

In *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001), the 5th Circuit accepted federal jurisdiction over claims against an administrator for fraud and breach of fiduciary duty because, “...the suit is against the administrator only in his personal capacity and does not require interference in any state probate proceeding.” *Id.* at 535. *See also Dinger*, 661 F.Supp. at 443 (“alleged fraud, negligence, and breach of fiduciary duty in connection with the disposition of estate property....are essentially common law tort actions.”); *Harhay v. Starkey*, 2010 WL 1904874 (D. Mass. May 10, 2010).

In this case, the complaint also alleges *widely recognized torts*, the resolution of which in superior court will not interfere in any probate proceeding.

Samuel’s argument is further supported by the fact that the probate administration of Martha’s estate was closed, and all property distributed, prior to Samuel filing his complaint in superior court. *See*, MOTION TO DISMISS (Oct. 21, 2016)), *Appx.* at 07. Federal courts have frequently pointed to the importance of this procedural posture. *See, e.g., Breaux*, 254 F.3d at 536-37; *Mangieri*, 226 F.3d at 1; *Dinger*, 661 F.Supp. at 443; *Junco Mulet v. Junco de la Fuente*, 228 F.Supp.2d 12 (D.P.R. 2002); *Lightfoot v. Hartman*, 292 F.Supp. 356, 357 (W.D. Mo. 1968) (“Actions...seeking a personal judgment against an executor...for fraud or other wrongdoing, may be filed and processed in the federal courts but only if a final accounting has been made in the state probate proceedings.” (internal quotations omitted)).

II. Public Policy Requires Courts to Refrain from Reversing Themselves Absent Changed Circumstances.

In its January 16, 2018 Order, the superior court dismissed Samuel’s claims based on lack of jurisdiction. ORDER (Jan. 16, 2018), *Supp.* at 01.

Specifically, the superior court found “that the probate court is the most appropriate venue for the Plaintiff’s action.” *Id.* at 04. The court explained that the, “action clearly relates to an estate and will.” *Id.*

Apart from the fact that the superior court misapplies RSA 547:3, its order also directly contradicts at least one other order of the same court, in the same case.

In its December 15, 2016 order denying the Defendant’s Motion to Dismiss, the superior court found that the claims in this case were a matter of superior court jurisdiction, not probate court jurisdiction, and therefore the three-year statute of limitations applied. ORDER (Dec. 15, 2016), *Appx.* at 32. “The Defendant mischaracterizes the nature of the Plaintiff’s claims as against the estate of Martha Rogers, rather than as against him personally. The Plaintiff’s claims are against the Defendant as an individual, not against the deceased’s estate.” *Id.* at 35.

The court also highlighted the fact that, “the Plaintiff could not have litigated these issues in the matter of *Estate of Martha B. Rogers* as he did not become aware of the Defendant’s actionable conduct until 2015, three years after the probating of Martha Rogers’ estate.” *Id.* at 35-36.

In its January 2018 order, the superior court attempted to distinguish its analysis of the applicable statute of limitations and its analysis of jurisdiction under RSA 547:3. ORDER (Jan 16, 2018), *Supp.* at 03. The superior court’s prior findings, however, in particular that the claims are against Joseph in his individual capacity, dictated a finding that the superior court has jurisdiction over this case.

Furthermore, Joseph’s January 13, 2017 Motion to Dismiss or Transfer expressly argued that, “[t]he probate court has exclusive jurisdiction of these matters,” under RSA 547:3. MOTION TO DISMISS OR TRANSFER (Jan. 13, 2017), *Appx.* at 41. Samuel objected to the motion, arguing that RSA 491:7 gives the superior court jurisdiction over this case, and RSA 547:3 does not create exclusive probate court jurisdiction over these matters. PLAINTIFF’S RESPONSE TO THE DEFENDANT’S MOTION TO DISMISS OR TRANSFER (Jan. 25, 2017), *Appx.* at 43.

When the superior court denied Joseph’s Motion to Dismiss, it was ruling that the probate court did not have exclusive jurisdiction under RSA 547:3. ORDER (March 7, 2017), *Appx.* at 47. “The defendant argues that the plaintiff’s claims are against the defendant in his capacity as executor...rather than against him as an individual, and therefore the claims should be addressed in the probate court....The Court disagrees.” *Id.* at 48. The superior court later erroneously denied that it had ever addressed the application of RSA 547:3, ORDER (Jan. 16, 2018), *Supp.* at 03, but the pleadings and the March 7, 2017 Order tell a different story.

Because the superior court had already found that the claims in this case are against Joseph in his individual capacity, that the issues could not have been litigated in the probate court, and that there is no probate court exclusive jurisdiction, it should not have reversed those rulings. There were no newly discovered facts or law to justify the reversal, and Joseph did not appeal the prior rulings. *See, e.g., Ross v. Eichman*, 130 N.H. 556, 558 (1988) (“The defendants, however, waived the defense of the plaintiffs’ alleged noncompliance with deposit dates because they did not pursue that issue after the trial court’s initial order prior to the first appeal, which resulted in the decision becoming the law of the case.”).

To the extent that Samuel’s argument is undermined by cases such as *State v. Wilkinson*, 136 N.H. 170, 177 (1992) (“New Hampshire law has long granted the superior court jurisdiction

over a matter until its final judgment. Thus, interlocutory rulings may be considered at the discretion of the same or another judge of the superior court.” (internal citation omitted)), *Goudreault v. Kleeman*, 158 N.H. 236, 250 (2009) (reconsideration of different judge’s prior ruling necessary to prevent injustice), and *Jackson & Sons v. Lumbermen’s Mut. Casualty Co.*, 86 N.H. 341, 341 (1933) (consent cannot confer subject-matter jurisdiction), Samuel argues that concerns for judicial efficiency and basic fairness should inspire this court to reconsider its prior rulings.

When this action was dismissed in the superior court, the case had already been pending in the for nearly two years, an attachment was granted (though it was discharged when the case was dismissed), and significant discovery had been conducted. Furthermore, Samuel desires to continue his case in the superior court due to its familiarity with the facts, parties, and procedural history, and its general expertise in handling common tort claims. A defendant should not be permitted to perpetually delay judicial consideration of the merits of the case by repeatedly making the same arguments, at times to different judges, in the hopes that the court will finally reverse itself.

CONCLUSION

The Appellant, Samuel Rogers, requests that this honorable court reverse the Hillsborough County Superior Court Southern District’s orders dismissing his case, and allow Samuel to proceed in superior court, pursuant to New Hampshire law, and in furtherance of judicial efficiency and basic fairness.

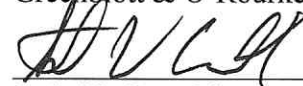
REQUEST FOR ORAL ARGUMENT AND DECISIONS BEING APPEALED

Mr. Rogers requests that his attorney, Seth W. Greenblott, Esq., of the law firm of Greenblott & O'Rourke, PLLC, be allowed 15 minutes of oral argument before the full court because this case involves important issues concerning the exclusive jurisdiction of the probate court and the extent to which parties can rely on orders of the superior court.

Counsel certifies that the written orders being appealed are addended to this brief.

Respectfully submitted,

Samuel Rogers
By his attorney,
Greenblott & O'Rourke, PLLC



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NH Bar ID No. 21170

Dated: 5-24-2018

CERTIFICATIONS

I hereby certify that on 5-24-18 2 copies of the foregoing will be forwarded to Jason Bielagus, Esq., via First Class US Mail.

I further certify that this brief complies with the type-volume limitations contained in the 2018 Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing, that it was counted using Microsoft Word version 1804 and that it contains no more than 4,749 words, exclusive of those portions which are exempted.

Dated: 5-24-18



Seth W. Greenblott, Esq.

SUPPLEMENT TO APPENDIX

1. ORDER (granting Motion for Reconsideration) (Jan. 16, 2018).....Supp. 01
2. ORDER (denying Plaintiff’s Motion to Reconsider) (Feb. 9, 2018).....Supp. 08

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT
No. 226-2016-CV-00487

Samuel Rogers

v.

Joseph Rogers

ORDER ON DEFENDANT'S MOTION TO RECONSIDER

The plaintiff, Samuel Rogers, brings this action against the defendant, Joseph Rogers, seeking damages for breach of fiduciary duties, constructive fraud, negligence, and unjust enrichment. Currently pending before the Court is the defendant's motion to reconsider the Court's Orders of December 6, 2017. (Court Index # 35.) The plaintiff objects. (Court Index # 37.) For the reasons that follow, the motion to reconsider is GRANTED.

Background

The Court finds the following facts relevant for the purposes of this order. The plaintiff and the defendant are father and son, respectively. On March 10, 2012, Martha Rogers, the plaintiff's wife and the defendant's mother, died. Martha's last will and testament left 1/3 of her estate to the plaintiff, and the remaining 2/3 to the defendant. Her estate was comprised primarily of two real estate holdings: the home she shared with the plaintiff ("the marital home"), and a 50% interest in approximately 94.3 acres of undeveloped land on Rocky Point Road in Hollis, New Hampshire ("the Rocky Point Property").

The defendant was appointed executor of Martha's estate by the Probate Court on May 16, 2002. Pursuant to his duties as executor, the defendant had the Rocky

Point Property and the marital home appraised. The appraiser valued the 50% interest in the Rocky Point Property at \$550,000, and the marital home at \$273,000. The defendant suggested to the plaintiff that because the plaintiff's 1/3 interest in the Rocky Point Property was approximately equal in value to the defendant's 2/3 interest in the marital home, they should settle the estate by the plaintiff taking title to the marital home, and the defendant taking title to the 50% interest in the Rocky Point Property.¹ The plaintiff agreed, and the agreement was effectuated through fiduciary deeds on September 23, 2012.

Sometime in 2015, the plaintiff learned that the Town of Hollis had agreed to purchase the Rocky Point Property for \$2,500,000.² Having a 50% interest in the land, the defendant's portion would be \$1,250,000. Thereafter, the plaintiff discovered that the defendant had commissioned an appraisal of the Rocky Point Property in 2005, which valued the property at \$1,950,500. The plaintiff filed this complaint on September 20, 2016.

On December 4, 2017, the Court denied the defendant's motions to dismiss (Court Index #29) and to consolidate (Court Index # 30), citing the reasons outlined in the plaintiff's responses. Currently before the Court is the defendant's motion to reconsider the December 4th rulings. The defendant asserts that the Court has not yet considered the issue of jurisdiction under RSA 547:3, and thus that reconsideration is appropriate.

¹ At these appraisal values, the plaintiff's 1/3 interest in the Rocky Point Property would have been about \$183,000, and the defendant's 2/3 interest in the marital home would have been about \$182,000.

² For reasons unknown to the Court, the sale was never completed.

Standard of review

"A motion for reconsideration allows a party to present, [with particular clarity,] points of law or fact that a court has overlooked or misapprehended." Broom v. Cont'l Cas. Co., 152 N.H. 749, 752 (2005) (citing Webster v. Town of Candia, 146 N.H. 430, 444 (2001)); see also Super. Ct. Civ. R. 12(e). The Court's decision on such a motion will be upheld "absent an abuse of discretion." Webster, 146 N.H. at 444. In addition, a trial court may simply decline to consider a motion for reconsideration in the first instance. See Nottingham v. Bonser, 131 N.H. 120, 135 (1988); Redlon Co. v. Franklin Square Corp., 91 N.H. 502, 505 (1941).

Analysis

The defendant asserts that while the Court addressed the issue of the applicable statute of limitations under RSA 556:3 in its Order of December 15, 2016 (in which the Court denied the defendant's first motion to dismiss), it has not yet addressed the issue of jurisdiction under RSA 547:3. The Court agrees. In the December 15, 2016 Order, the Court examined the question of whether RSA 508:4 or RSA 556:3 was the appropriate statute of limitations for the plaintiff's action. The Court did not address the specific question of whether this action falls under the probate court's exclusive jurisdiction as defined in RSA 547:3, *l*. After a review of the previous pleadings and orders, the Court recognizes that the probate court is the proper forum for this action.

RSA 547:3, in pertinent part, grants probate courts "exclusive jurisdiction" over:

The granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons. . . .

RSA 547:3, I(b). Courts “determine the probate court’s jurisdiction by examining the nature of the claim at issue.” DiGaetano v. DiGaetano, 163 N.H. 588, 591 (2012) (quotation omitted). “The relevant inquiries into the nature of the claim include: (1) whether the action relates to an estate, will, or trust; and (2) whether the relief sought is equitable or legal.” Id. (citation omitted). It is “immaterial whether the action may present factual as well as legal questions, for the probate judge is fully competent to serve as a finder of facts.” Id. (quotation omitted).

Here, the action clearly relates to an estate and will. The plaintiff alleges that the defendant, *during the administration of Martha’s estate*, committed fraud, etc., by purposefully misleading the plaintiff about the value of the Rocky Point Property. The plaintiff and defendant agreed, prior to the distribution of Martha’s estate, that they would settle their respective interests in her estate by the plaintiff taking title to the marital home, and the defendant taking title to the 50% interest in the Rocky Point Property. Because this was done as part of the administration of Martha’s estate, rather than after the estate had been fully settled, the plaintiff’s action here is against the defendant in his capacity as administrator of the estate. Regarding the type of relief sought, the plaintiff is seeking legal relief in the form of damages, but that does not foreclose probate court jurisdiction, especially considering that the plaintiff’s action falls squarely within “the composition, administration, sale, settlement, and final distribution of [the] estate[] of [a] deceased person[].” RSA 547:3, I(b). Weighing these factors, the Court finds that the probate court is the most appropriate venue for the plaintiff’s action.

The plaintiff argues that this Court has concurrent jurisdiction with the probate court over this action under RSA 547:3, II and Probate Court Administrative Order 15. The Court disagrees. RSA 547:3, II states, in pertinent part, that the probate court and superior court have concurrent jurisdiction over:

- (a) Subject to RSA 498:4-a, cases involving charitable uses and trusts other than those trusts described in RSA 564-A:1, I, over which the probate court has exclusive jurisdiction as provided in RSA 547:3, I(c) and (d).
- (b) Durable powers of attorney under RSA 506:6 and 506:7.
- (c) Waivers for marriage of minors pursuant to RSA 457:6–457:7.
- (d) Ancillary matters as defined in RSA 547:3-I.
- (e) Petitions for partition pursuant to RSA 547-C.

RSA 547:3, II. As the plaintiff's claim clearly does not involve a charitable or other type of trust, durable powers of attorney, waivers for marriage of minors, or petitions for partition, the only conceivable way that it could fall under the concurrent jurisdiction statute is as an "ancillary matter." RSA 547:3-I defines "ancillary matters" as:

Claims for liquidated or non-liquidated damages or for the recovery of money or property brought on behalf of an estate, trust, conservatorship, or guardianship against a third party or brought by a third party against an estate, trust, or conservatorship, or guardianship including claims against a fiduciary bond and entry or possessory actions; provided, however, that with respect to any such claims in which the right to trial by jury exists and is demanded by any party, or any claims for penalties or other relief under a statutory or regulatory enactment providing for enforcement through or review by the superior court, the superior court shall have exclusive jurisdiction.

The Court is also guided by Probate Court Administrative Order 15, which further explains the meaning of "ancillary matter[s]," stating, in pertinent part:

As of July 27, 2008, RSA 547:3, Jurisdiction, has been amended to allow the probate court to hear cases involving claims for damages, or for the

recovery of money or property when it involved an estate, trust, conservatorship or guardianship (adult or minor). The probate court has jurisdiction to decide a civil case (e.g. collections, torts, contract actions, suits on bond, small claims, landlord-tenant actions) when an estate, trust, conservatorship, or guardianship (adult or minor) is the plaintiff or the defendant. This jurisdiction is concurrent with district court or superior court.

(Pl.'s Obj. Mot. Recon. Ex. A.)

RSA 547:3 was amended effective July 27, 2008, to add "ancillary matters as defined in RSA 547:3-*f*" and "petitions for partition" to the probate court's concurrent jurisdiction. Prior to July 27, 2008, the probate court had concurrent jurisdiction only over "cases involving charitable uses and trusts other than those trusts described in RSA 564-A:1," "durable power of attorney," and "waivers for marriage of minors." Administrative Order 15 explains that the "ancillary matters" are intended to encompass civil cases such as "collections, torts, contract actions, suits on bond, small claims, [or] landlord-tenant actions[,] when an estate . . . is the plaintiff or the defendant."³ (Pl.'s Obj. Mot. Recon. Ex. A.) The plaintiff's claim against the defendant does not fall within those categories. Rather than a claim against the estate itself, the plaintiff's claim constitutes a challenge to how the defendant, as administrator of Martha's estate, conducted the final distribution of the estate. The plaintiff's claim is not "ancillary" to the estate's final distribution or settlement at all – that is its primary focus. The instant case falls squarely within the probate court's exclusive jurisdiction as it arises out of the administration, settlement, and distribution of Martha's estate. See RSA 547:3, 1(b)

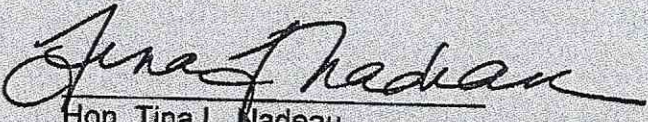
³ The plaintiff argues that Administrative Order 15 expands the jurisdiction of superior courts; the defendant argues that the Order expands the jurisdiction of the probate courts, not the superior courts. The Court agrees with the defendant. Administrative Order 15 was issued contemporaneous to the effective date of RSA 547:3, adding two categories of cases over which the probate court could exercise jurisdiction concurrent with that of the superior courts. The Order is thus properly read as explaining the probate courts' newly expanded concurrent jurisdiction, not as actively expanding the superior courts' jurisdiction.

("The probate court shall have exclusive jurisdiction over . . . [t]he granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons.").

For these reasons, the defendant's motion for reconsideration is GRANTED. The plaintiff's action properly belongs in the probate court. The defendant's motion to dismiss is thus GRANTED. The plaintiff may re-file this action in the probate court.

So ordered.

Date: January 16, 2018


Hon. Tina L. Nadeau,
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

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NOTICE OF DECISION

FILE COPY

Case Name: **Sam Rogers v Joseph Rogers**
Case Number: **226-2016-CV-00487**

Please be advised that on February 09, 2018 Judge Nadeau made the following order relative to:
Plaintiff's Motion to Reconsider; MOTION DENIED

February 15, 2018

Marshall A. Buttrick
Clerk of Court

(293)

C: Seth W. Greenblott, ESQ; Jason A. Bielagus, ESQ