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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

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Walton J. McLeod, Circuit Judge

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Appellate Case No. 2020-001673

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Elisa Montgomery Edwards and Emily Cecile Edwards,.....Respondents,

v.

David C. Bryan, III,.....Appellant.

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FINAL REPLY BRIEF OF APPELLANT

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## STATEMENT OF ISSUES

- I. **Did the lower court err in failing to grant a directed verdict and then judgment notwithstanding the verdict where the Respondents failed to adduce evidence of all nine elements of fraud, including a lack of evidence of damages proximately caused by reliance on any misrepresentation?**
- II. **Did the lower court err in failing to grant Appellant's motion for a new trial where the record is susceptible only of a reading that the jury gave Respondents a verdict only on a theory or theories they expressly were not pursuing or which had been dismissed with prejudice?**
- III. **Did the lower court err in failing to grant Appellant's motion for a new trial *nisi remittitur* where the record is susceptible only of a reading that the jury gave Respondents a verdict for damages that could only flow from acts for which Respondents expressly were not suing Appellant?**

## ARGUMENT IN REPLY

Appellant, David C. Bryan, III (hereinafter “David”) submits this brief in reply to the brief submitted by the Respondents, Elisa Montgomery Edwards (hereinafter “Elisa”) and Emily Cecile Edwards (hereinafter “Emily”). The Respondents’ brief does not refute David’s argument – it supports it. The Respondents point out in their brief that, in the light most favorable to them, their damages are the trust distributions they did not receive – damages caused by David’s improper estate administration and conversion of that money, not by any false statement David made.

**I. The Respondents tell the court that their damages flow from improper estate administration and conversion – causes of action on which David had already gotten summary judgment.**

In arguing that they have damages caused by the fraud they claimed David committed, i.e., him lying to the Respondents about what trust distributions they were going to get, the Respondents point only to them not receiving those trust distributions. (Initial Brief of Respondents pp. 8-9, 13-14.) Respondents write as follows:

Respondent Elisa Edwards also testified as to the damages consequently and proximately caused by Appellant:

“Q. Okay. Now, have you been damaged by what you have stated under oath to be the misrepresentations by your uncle about the trust?

A. Well, financially, that was money that I planned on using for retirement. And I never received it and I will never receive it, I guess.”

...

Respondent Elisa Edwards testified in detail about (a) what the amount of money in the “trust” was in September 2020; (b) the exact amount of money (distribution) each of the Respondents would have received in 2020 if it had been distributed in the manner Appellant told the Probate Court he had already done;

(c) that she would have invested the distribution as Appellant told her he had done; and (d) what the current value of the invested money would have been at the date of trial according to her investment experience.

...

The Respondents' evidence was clear and convincing that the total Respondents' invested funds, denied to them by Appellant, would have been worth Six Hundred Thousand Dollars (\$600,000.00) at a "lowball" rate of interest.

(Initial Brief of Respondents pp. 8-9, 13-14.)

The denial of these funds to the Respondents, in the light most favorable to the Respondents, was caused by David keeping that money for himself through improper administration of the estate – not by fraud. See S.C. Code Ann. § 62-3-703(a). The Respondents' failure to receive these funds was not caused by David making a misrepresentation.

“Generally, the injured party in a fraud and deceit action is entitled to recover such damages as will compensate him for his pecuniary loss *and place him in the same position he occupied before being defrauded.*” Gilbert v. Mid-South Machinery Co., Inc., 267 S.C. 211, 223, 227 S.E.2d 189, 194 (1976) (emphasis added, internal citation omitted). The damages recoverable are those that “place him in the same position that he would have occupied had he not been defrauded.” Carter v. Boyd Const. Co., 255 S.C. 274, 282, 178 S.E.2d 536, 540 (1971).

Here, the Respondents claimed that the fraud David committed was in telling them falsely that money was to be distributed to them from the estate through the trust. (R. p. 109 ln. 9 through p. 110 ln. 6, p. 113 ln. 13 through p. 114 ln. 7.) Had this misrepresentation not been made, however, the Respondents would still not have received any more money than they

did. Their failure to receive money was not caused by any fraud of David's – it was caused, in the light most favorable to the Respondents, by David's improper estate administration and conversion of the funds. The position that the Respondents would have occupied had they not been defrauded is a position in which they would not have received any trust disbursements from the estate – the same position they were in at trial.

To sum it up, in the light most favorable to the Respondents, it was not David's *lying* – not his *fraud* – that caused the Respondents' losses; rather, it was David's *mismanagement of the estate and misappropriation of estate funds* that caused the damages. The lower court allowed the jury to take damages from different unlawful acts – not fraud – and graft them on to the fraud claim. The record is devoid of any evidence of damages *that flow from the fraud*. See Gilbert, 267 S.C. at 223; Carter, 255 S.C. at 282.

## **II. David made and renewed the required directed verdict motion.**

Respondents do not quite argue that David's motion for a directed verdict was insufficient, but they erroneously hint that it was not specific enough. (Initial Brief of Respondents p. 12.) They are not correct.

David's attorney interrupted himself during the directed verdict motion. (R. p. 230 ln. 17-23.) Before he did so, however, he pointed out the "failure of evidence" of the fraud claim. (R. p. 230 ln. 19-20.) This was a contention that the record lacked evidence of all of the nine elements of fraud. Mutual Savings and Loan Ass'n. v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423 (1980) (listing nine elements of fraud). This necessarily included the grounds that there was no evidence of damages proximately caused by some misrepresentation of David's – one of the grounds of David's motion for judgment notwithstanding the verdict or for a new trial and the issue that is at the heart of this appeal. (R. pp. 43, 49-50.)

This court has held the following directed verdict motion insufficient to meet the minimum specificity requirement of Rule 50(a), SCRCP:

Your Honor, for the record I'd make a motion for a directed verdict as to the second cause of action, which I think would be characterized as abuse of process, but I gather from a comment you made that you would deny that motion . . . I would not then argue that any further.

Sierra v. Skelton, 307 S.C. 217, 220, 414 S.E.2d 169, 172 (Ct. App. 1992).

That is not the situation here. Here, David argued the “failure of evidence” of the fraud claim, which he argued in his motion for judgment notwithstanding the verdict or for a new trial and which he argues in this appeal. (R. p. 230 ln. 19-20.) Just because he argues with *more* specificity now does not mean that the directed verdict did not meet the minimum threshold.

In Gordon v. Busbee, this court reversed the denial of a directed verdict that the court described being made as follows:

At the close of all evidence, the Gordons moved for directed verdict against George's estate, arguing the money transferred by George should be returned to Clara's estate because he had transferred the funds without Clara's permission. That motion was denied, apparently based on the argument that George and Clara had made an oral contractual arrangement for the execution of these transfers.

397 S.C. 119, 129, 723 S.E.2d 822, 828 (Ct. App. 2012).

This court held that was sufficient as a directed verdict motion on the basis of a specific rule in the specific case of Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985), that bars an attorney-in-fact from making transfers of his principal's property to himself or a third party absent a writing evidencing clear intent to allow such transfers. Gordon, 397 S.C. at 130-31. The court held this “was sufficiently specific to operate as a directed verdict motion for breach

of fiduciary duty.” Id. at 131. If that was specific enough, the directed verdict motion in the instant case was specific enough as well.

**III. Once the estate administration and conversion causes of action were taken off the table, the Respondents’ theory – the one used by the court and the jury and the one the Respondents argue now – fell apart.**

In the light most favorable to the Respondents, the reason that they received no estate funds through the unfunded trust is because David mismanaged the administration of the estate and distributed those funds to himself, converting them. Viewed in that light, some damage was caused by David’s failure to properly administer the estate. See S.C. Code Ann. § 62-3-703(a). The Respondents’ causes of action for those things, though, had already been dismissed with prejudice, and, as they stated themselves, they did not go to trial against David on claims about that. (R. pp. 9-11, 17-18, p. 110 ln. 23 through p. 111 ln. 6, p. 114 ln. 20-22, p. 115 ln. 3-6, p. 155 ln. 5-13.) With the agreement of the Respondents, the circuit court had already granted summary judgment on the causes of action for conversion and negligence *per se* in the estate administration. (R. pp. 9-11).

Assessing the record with an eye looking most favorably to the Respondents, the only evidence of damages they adduced was damage that flowed from the acts subject of those already dismissed causes of action. The fraud they complain of by David did not cause those damages – they suffered no loss because of any representation David made. If David tortiously caused the Respondents to have losses, that was through David’s conversion of funds and negligent estate administration. Once summary judgment was granted on those causes of action, the remainder of the Respondents’ case was properly doomed to fail, at least on the record created in this case. (R. pp. 9-11). The trial court erred in letting it go to the jury and in allowing the verdict to stand.

**CONCLUSION**

Respectfully, the lower court erred prejudicially in failing to grant judgment notwithstanding the verdict or, alternatively, a new trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL  
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE

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I certify that I have served the foregoing final brief on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

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July 15, 2022