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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
THE HONORABLE H. STEVEN DEBERRY, IV., CIRCUIT COURT JUDGE

Appellate Case No.: 2022-001006

Wendy Lynch, Respondent,

v.

Elizabeth Langley and Rebecca White Lynch, Defendants,

of whom Elizabeth Langley is the Appellant and
Rebecca White Lynch is a Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. THE ISSUE OF WHETHER THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO THE CAUSE OF ACTION FOR CIVIL CONSPIRACY IS NOT PRESERVED FOR APPEAL.

II. EVEN IF PRESERVED FOR APPELLATE REVIEW, THE LOWER COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR DIRECTED VERDICT AS THERE WAS EVIDENCE PRESENTED TO SUPPORT THE JURY'S VERDICT AS TO THE CAUSE OF ACTION FOR CIVIL CONSPIRACY.

III. THE ISSUE OF WHETHER THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO THE CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT PRESERVED FOR APPELLATE REVIEW.

IV. EVEN IF PRESERVED FOR APPELLATE REVIEW, THE LOWER COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO THE CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS EVIDENCE WAS PRESENTED TO SUPPORT THE JURY'S VERDICT.

V. AS THE VERDICT FORM WAS APPROVED WITHOUT OBJECTION BY ALL PARTIES, THE TRIAL COURT DID NOT ERR IN ALLOWING THE VERDICT FORM TO BE SENT TO THE JURY.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE VOICEMAIL MESSAGE FOR RESPONDENT LEFT BY APPELLANT'S ATTORNEY TO BE ADMITTED INTO EVIDENCE AS THE VOICEMAIL WAS NOT HEARSAY.

VII. THE TRIAL COURT DID NOT ERR IN ALLOWING THE USE OF THE WORD "KILL" AS THERE WAS NO OBJECTION TO THE USE OF THE WORD AT TRIAL.

STATEMENT OF THE CASE

Pursuant to 208(b)(2), SCACR, Respondent presents her own Statement of the Case:

I. *FACTS*

As summed up in closing, this case is about the commandment of "honoring thy father," and "credibility . . . the coin of the realm." (R. p. 990, lines 1-8). It is also about envy, greed, and wrath directed by two sisters against the oldest sister, all because the two sisters refuse to honor their father's last wishes. (R. p. 997, line 13).

The parties, Wendy Lynch ("Respondent"), Elizabeth Langley ("Appellant"), and Rebecca White Lynch ("Respondent White") are all daughters of James Lynch ("Judge Lynch"), a Florence County magistrate with an "independent, decisive" spirit who served the State of South Carolina for over two decades. (R. p. 667, lines 6-7; p. 670, lines 8-12). At the center of this case is his will that has been judged by our Courts to be the legally valid Last Will and Testament of James Lynch. See *Langley v. Lynch,* Op. No. 2015-001941 (S.C. Ct. App. filed May 24, 2017).

Beginning on April 25, 2022, a Florence County jury heard five days of testimony and evidence of Appellant and Respondent White (collectively, "the SISTERS") accusing Respondent of: (1) starving, dehydrating, and over-dosing Judge Lynch in his final days (although he was under the care of doctors and nurses in a hospital); (2) sending their father "to heaven early"; (3) conspiring with the will attorney to "make up" the will; (4) conspiring with *the SISTERS'* numerous attorneys and with judges to favor Respondent; (5) not being a biological daughter; and (6) stealing from their father's estate to include

"50 pounds of gold bars," "silver coins," and "a duffle bag with five million dollars in cash." At the end of the week, the jury returned verdicts in Respondent's favor against the SISTERS on Respondent's causes of action for civil conspiracy, intentional infliction of emotional distress, and abuse of process. On the cause of action for defamation, the jury found Appellant alone responsible. *Verdict Form.* In addition to actual damages, the jury awarded $250,000 in punitive damages against each of the SISTERS. *Id.* Only Appellant has appealed.

In the Beginning

In or around mid-April 2012, while still serving Florence County as a magistrate, Judge Lynch was diagnosed with a brain tumor (glioblastoma). (R. p. 600, lines 1-7). Judge Lynch immediately had his clerk of court call his friend and attorney, Frederick Hoefer of Florence, concerning preparation of Judge Lynch's power of attorney (POA) and healthcare POA. (*Id.;* R. p. 605, lines 8-10). Mr. Hoefer, an attorney practicing for over 40 years, "knew [Judge Lynch] well" and knew the diagnosis and its seriousness. (R. p. 596, lines 11-16; p. 599, lines 10-11; p. 625, lines 2-9).

According to instructions from Judge Lynch, Mr. Hoefer prepared the POAs along with Judge Lynch's Last Will and Testament. (R. p. 605, lines 19-23). Importantly, during Judge Lynch's lifetime, he acquired significant assets to include $1.5 million in liquid assets in addition to significant land holdings. (R. p. 168, lines 19-25; p. 173, lines 10-16; p. 175, line 9 – p. 176, line 4; pp. 1117-1147).

In preparing the will, Mr. Hoefer had no question concerning Judge Lynch's competence. (R. p. 608, line 10 – p. 610, line 11). As Mr. Hoefer testified:

> . . . [Judge Lynch] was certainly aware that he was likely going to die and that it was imminent. But aside from that, I saw no deterioration of his faculties or anything. And, like I said, I've known him – I had known Jimmy for about 20 years. I knew his family. No nothing – there was nothing that he said or did that caused me any concern.

(R. p 625, lines 17-22). Mr. Hoefer testified that he prepared the will exactly as Judge Lynch instructed. (R. p. 615, lines 2-5)("I'm confident that that Will is exactly what Jimmy Lynch wanted.").

Judge Lynch signed his Last Will and Testament in Mr. Hoefer's office on May 11, 2012. (R. p. 607, lines 9-18; pp. 1113-1116). As Mr. Hoefer explained, he met privately with Judge Lynch for over an hour. (R. p. 607, line 21 – p. 608, line 6). While Appellant argued over the date, Mr. Hoefer testified that Respondent drove Judge Lynch to Mr. Hoefer's office on May 11th, and Appellant was in the office waiting room to drive Judge Lynch home. (*Id.*, R. p. 313, lines 19-22; p. 626, lines 2-16; *see also* p. 627, lines 4-10).

Around the same time, Judge Lynch approached Senator Land concerning the cancer diagnosis. (R. p. 650, lines 3-6). Evidence was presented that Judge Lynch wanted Respondent (a nurse) appointed magistrate in his place. Otherwise, he planned to serve until his term was up or something happened to him. (R. p. 649, line 24 – p. 650, line 15). Judge Lynch continued to practice as a magistrate actively trying cases until June 29, 2012. (R. p. 924, lines 13-17). Thereafter, Respondent served as magistrate after being appointed by Governor Haley. (R. p. 675, lines 9-12).

Sometime in the summer of 2012 after the will's execution, Judge Lynch moved out of his personal residence and moved in for a period of time with his then-girlfriend. (R. p. 672, lines 13- 19; p. 673, lines 7-10). At some point thereafter, he moved back to

his home and Respondent, a registered nurse, and her son moved in to care for Judge Lynch. The SISTERS also participated in his care. (R. p. 158, lines 3-7).

In or around November 2012, the SISTERS became aware of the Will provisions when Appellant read the will which they found stored in Judge Lynch's safe. (R. p. 414, lines 9-15). There is no dispute that upon reading the Will, the SISTERS became extremely unhappy. While the will provided that all three daughters would individually and jointly receive large sums of cash and real properties, Judge Lynch left his home and a lake property <u>jointly</u> to Respondent *to share* with her son[1] because, in part, Judge Lynch did not want those properties sold. (R. p. 680, line 25 – p. 681, line 11; pp. 1113-1116).

Starving, Dehydration, and Morphine Overdoses

Almost immediately after the will was read by the SISTERS, evidence was presented, including the SISTERS' own admissions, that they began making serious accusations to friends, community members, hospitals, doctors, Adult Protective Services (DSS), social workers, police, and others that Respondent, a nurse with 27-years of experience, was physically harming Judge Lynch. Specifically, they were accusing Respondent of "starving" their father, "dehydrating" him, trying to overdose him with morphine, and drinking while caring for him. (R. p. 158, lines 1-25; p. 161, lines 8-12; p. 328, line 9 - p. 329, line 4; p. 341, lines 2-8; p. 352, line 23 – p. 354, line 1; p. 408, lines 2-17; p. 509, lines 21-25; p. 521, lines 14-17; p. 663, line 21– p. 664, line 1; p. 795, lines 21-

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[1] Respondent testified that Judge Lynch left the farm and lake house to her and Judge Lynch's grandson (Jordy) because Judge Lynch "knew how much Jordy loved it. . . Jordy spent many days with daddy at the lake on the boat, fishing, skiing, just piddling around. And he wanted us to have it because he didn't want it sold." (R. p. 680, line 25 – p. 681, line 11).

24). It is alleged this abuse occurred in spite of the fact Judge Lynch was being cared for by doctors, nurses, hospitals, and the SISTERS themselves. (R. p. 158, lines 3-7; p. 436, lines 7-8; p. 865, line 25 – 866, line 2).

In response to the SISTERS' complaints, there was evidence presented that Adult Protective Services (DSS) began an investigation, to include interviewing Judge Lynch in the final months of his life. (R. p. 346, lines 13-16; p. 347, lines 2-14; *see also* p. 355, lines 16-25). DSS found no harm by Respondent and to the contrary, noted that Judge Lynch trusted Respondent, that money appeared to be at the root of the allegations, and that the accusations began when the SISTERS read the will. (R. p. 352, line 23 – p. 353, line 13).

"Sent to Heaven Early"

Appellant has freely admitted to telling a number of individuals, "I alleged that [Respondent] tried to send [Judge Lynch] to heaven early." (R. p. 328, lines 17-20). In or around the end of December 2012 or beginning of January 2013, Judge Lynch's condition, as expected, deteriorated. He was in the hospital for four and a half weeks before his death at McLeod Regional Medical Center on February 9, 2013 from glioblastoma. (R. p. 436, lines 2-6; p. 567, lines 7-14; p. 1148).

Immediately upon Judge Lynch's death, the SISTERS demanded an autopsy and told hospital staff that Respondent "accelerated" Judge Lynch's death. (R. p. 570, line 16 – p. 571, line 14). While coroners do not usually get involved when someone has died following a long hospital stay, the SISTERS' accusations against Respondent were such that the Florence County Coroner began investigating Judge Lynch's death. (R. p.

574, lines 1-7). Coroner Von Lutcken testified that he went to the hospital, drew blood and urine from Judge Lynch's body, ordered a SLED toxicology report, reviewed the medical records, and spoke to the SISTERS about the SLED toxicology. (R. p. 567, lines 15-19; p. 573, lines 10 – 25; p. 574, line 17 – p. 576, line 5).

Coroner Von Lutcken testified under oath that based on his investigation, he determined the manner of death was *natural* noted nothing suspicious in the toxicology or otherwise. (R. p. 565, line 17 – p. 566, line 6; p. 577, line 24 – p. 578, line 2). When he spoke to the SISTERS reassuring them the death was natural, they responded that "Wendy was a mean person and she's vindictive and that they honestly believed that she had done something to their father. They were adamant about that." (R. p. 578, lines 13-15). The death certificate issued on February 11, 2013 and certified by the attending physician, Mark A. Fox, MD, lists Judge Lynch's cause of death as "glioblastoma multiforme" and the manner of death as "natural." (R. p. 1148).

Disputing the death certificate, Appellant (also a nurse) told the jury: "[M]y daddy never was diagnosed with glioblastoma, so its wrong." (R. p. 318, line 12; p. 337, lines 4-9; p. 459, line 10). Appellant *told the jury* that Judge Lynch did not die of brain tumors. (R. p. 337, line 16; p. 375, line 18). Consistent with earlier accusations against Respondent, Appellant also told the jury: "My daddy died of dehydration and starvation." (R. p. 339, lines 2-6). The SISTERS even testified that Respondent Lynch gave Respondent White a lethal dose of Ativan to administer to Judge Lynch. (R. p. 518, line 21 – p. 519, line 4; p. 537, line 22 – p. 538, line 3). According to the SISTERS, the

harm was thwarted by the SISTERS when they spoke to each other and realized the dose was lethal. (*Id.*)

Board of Nursing

Following the death of Judge Lynch, and following the DSS and coroner's investigations, Respondent was notified by the SC Board of Nursing ("SCBON") that a complaint had been made against her nursing license alleging she had harmed Judge Lynch. (R. p. 1156).

The SCBON complaint contained the *same allegations* the SISTERS had made to DSS, the coroner, and others. Specifically, that "while in [Respondent's] care, Mr. Lynch suffered from Dehydration, Malnourishment from not having fluids and eating," that DSS had been called to address possible elder abuse, and that Respondent had been under the influence of alcohol while caring for Judge Lynch. (R. p. 1156). Disputing a statement Appellant had earlier given under oath, she testified that she did not *make* a complaint to the SCBON because she did not "initiate" the complaint. (R. p. 371, lines 2-12; p. 372, line 24 – p. 373, line 4). Appellant did not deny speaking with SCBON investigators as she had "an obligation to report." (*Id.*) After investigation, the SCBON dismissed the complaint. (R. p. 1157).

Magistrate Position

The jury heard evidence that following the issuance of the death certificate and the coroner and DSS investigations – all finding no abuse and no foul play in Judge Lynch's death – the SISTERS' actions in accusing Respondent did not stop. In early 2014, when Respondent's magistrate position was up for appointment or reappointment,

Appellant testified that she "simply called [Senator Johnson] to inquire about" the magistrate position as "she heard four people were in the running." (R. p. 358, line 6 – p. 359, line 3). In response, counsel confronted Appellant with her earlier deposition wherein she testified she went to Senator Johnson and told him Respondent tried to send Judge Lynch "to heaven early" and told him all the things Respondent had "done to our family." (R. p. 359, line - p. 360, line 25; p. 364, line 18 – p. 366, line 13; p. 367, lines 13-16). Although Senator Johnson did not recall the substance of the conversation and had promised the position to someone else, he did remember that Appellant "was the only caller that did not want [Respondent] to be the magistrate." (R. p. 652, lines 2-15; 661, lines 4-8).

A Locksmith, 50 Gold Bars, Bags of Silver, and 5 Million Cash in a Duffle Bag

Shortly after Judge Lynch's death, testimony was presented that the SISTERS entered into Judge Lynch's home *where Respondent was living*. While denying that they "broke" into Respondent's home, Appellant told the jury, "the garage door was open and I went under the garage and we unlocked the door." (R. p. 439, lines 4 – 16; p. 525, lines 16-18). The SISTERS were aware that Respondent was out of town at the time. (R. p. 438, lines 1-5). The SISTERS[2] then instructed a locksmith to re-key the house and drill into Judge Lynch's safe along with a safe Respondent testified belonged to her adult son, Jordy. (R. p. 441, lines 5-19; p. 555, lines 1-2; p. 700, line 15 - p. 701, line 3).

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[2] Although this event occurred after Judge Lynch's death, Appellant testified she had authority to enter the home because "that was my home, had been my home" and she had her father's dual power of attorney which the Court can take judicial notice has no effect post-death. (R. p. 439, lines 19-21; p. 440, lines 1-5).

Appellant admits the SISTERS "secured some money" from the safe because "[Respondent] had already been in the safe, moved everything around. Things had disappeared."[3] (R. p. 445, lines 15-19). When Appellant was asked why she believed Respondent had taken anything from the safe, she responded, "She was staying there. Who else did it?" (R. p. 445, line 23 - p. 446, line 2). The locksmith receipt was made out to Appellant and signed by Respondent White. (R. p. 1153).

Although the SISTERS are the ones who admit to drilling into Judge Lynch's safe with a locksmith, evidence was presented that the SISTERS began accusing *Respondent* of stealing Judge Lynch's estate assets which they alleged included "50 pounds of gold bars," "bags of silver," and "five million dollars in cash in a duffle bag."[4] (R. p. 186, line 3 – p. 187, line 3; p. 377, line 3 – p. 378, line 14; p. 470, line 16 – p. 471, line 11; p. 558, line 24 – p. 559, line 15). When Appellant was confronted at trial with making these statements to include Facebook posts purporting to be from her Facebook account, the jury was able to judge Appellant's credibility with her continual answer of "I don't recall." (R. p. 378, lines 15-24; p. 410, line 4 – p. 412, line 18). In trial, Appellant made these same allegations in testimony before the jury. (R. p. 445, line 23 – p. 446, line 2; p. 470, lines 22-25)(Q: What about the gold? Do you have any idea what happened to

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[3] There was testimony presented that Respondent White, at an earlier point in time before Judge Lynch's death, had taken with or without permission, $50,000 from Judge Lynch's safe. (R. p. 184, lines 15-20; pp. 1117, 1119-1122).

[4] Respondent testified she has never seen a gold bar in her life and has never seen five million in a duffle bag. As to the "bags of silver," Respondent testified that the Special Administrator, trial witness Porter Stewart, has in his care three bags of nickels, dimes, etc. that may have silver content. (R. p. 719, line 9 – p. 720, line 22).

the gold that you think is missing? Appellant: I assume [Respondent] has it hidden somewhere.").

Ten-year Will Contest

Almost immediately after Judge Lynch's death, Appellant filed a will contest action alleging both that Judge Lynch was incompetent and that Respondent had unduly influenced him into making the will. See *Langley v. Lynch,* Op. No. 2015-001941 (S.C. Ct. App. Filed May 24, 2017). Appellant was given every opportunity for two years to discover and produce evidence of undue influence and/or incompetence, but produced none. On May 24, 2017, this Court issued an Order in *Langley v. Lynch, supra,* affirming Judge Brown's grant of summary judgment dismissing Appellant's will contest action.

Although the will contest has been fully litigated, with no incompetence or undue influence found, the jury heard from Appellant's own mouth that 1) Mr. Hoefer was not her father's attorney (contrary to Mr. Hoefer's testimony); (2) Judge Lynch did not make the will (contrary to the Court of Appeal's decision and Mr. Hoefer's testimony); and (3) Respondent and Mr. Hoefer "conspired" together and "had this Will facilitated" (no evidence and contrary to Court of Appeal's decision). (R. p. 315, lines 20-21; p. 317, lines 22-25; p. 434, lines 18-25; p. 516, line 3 – p. 517, line 1). As Appellant told the jury, "[M]y daddy was manipulated with five brain tumors." (R. p. 357, line 2).

When asked if she would ever let go of the will contest, Appellant testified: "I've asked for a retrial, an investigation into my – everything that's happened. And I've asked for it to – all the wills to be looked at . . . ." (R. p. 316, lines 11-18). As was summed up by Respondent in an answer to a question at trial:

Q: Did you hear the testimony from [Appellant] the other day that there is no Will, that's not decided yet?

A: And we will hear that forever. Yes, I heard that testimony.

(R. p. 679, lines 20-23).

Although Appellant argues she was the only plaintiff in the will contest so she could not possibly have conspired with Respondent White, the SISTERS repeatedly used the word "we" during the trial in reference to actions in the conduct of the will case. (*e.g.* R. p. 161, lines 8-12; p. 271, lines 10-19; p. 272, lines 10-19; R. p. 306, line 20 – p. 307, line 1). Importantly, as this dispute has lingered for a decade, the SISTERS have had use of the lake house that, in the will, goes to Respondent and Jordy. (R. p. 220, lines 5-18).

There was ample evidence presented to the jury that the SISTERS have continued to delay and frustrate the administration of the probate case to harm Respondent and prevent her (and her son) from enjoying their full inheritance. Although the will contest ended in 2017, the matter is still pending in the probate court today, more than ten years after Judge Lynch's death. (R. p. 1117). At trial, the jury heard Appellant's testimony that the reason Court Administration moved the probate case from Florence County to Lee County to Sumter County to Charleston County is because of Appellant's constant calls. (R. p. 309, line 2 – p. 311, line 18; p. 320, line 8 – p. 321, line 2; p. 460, line 20 – p. 461, line 3; p. 553, lines 2-10). While Appellant contends that the probate court delay is due to COVID and "motions filed by Respondent" (Initial Brief, p. 2), the Court can take judicial notice that COVID occurred in 2020 (7 years after Judge Lynch's death), and Appellant has provided no citation to

evidence presented at trial that Respondent caused any delay. The jury heard evidence that Respondent, for ten years, has not been able to fully enjoy the inheritance her father wanted for her and her son to enjoy.

Fear at Home

In or about 2014, Respondent, following her father's wishes, had no objection to the probate court's issuance of a partial distribution of personal property Judge Lynch had bequeathed to the SISTERS in the will. (R. p. 182, line 3 – p. 183, line 5). At the same 2014 probate hearing with the will dispute pending, the court allowed Respondent to temporarily live in the home left to her (and her son) in the will with the SISTERS given the right to visit the residential property and the lake property left to Respondent and her son.[5] (R. p. 185, line 17 – p. 186, line 2; p. 220, lines 5-18; pp. 1113-1116). Respondent presented evidence that she was not allowed by the SISTERS to live there in peace.

As set forth herein, there was evidence presented that the SISTERS made it known in the community that Respondent had exerted undue influence on Judge Lynch in procuring the will, had harmed him, "sent him to heaven early," and had stolen estate assets to include "50 pounds of gold bars," five million in cash in a duffle bag, and other assets. (R. p. 186, line 3 – p. 187, line 3; p. 377, line 3 – p. 378, line 14). Additionally, evidence was presented that the SISTERS called the Special Administrator appointed by the Probate Court to make the same accusations and to include that Respondent was digging up cylinder safes at the property. (R. p. 186, line 9 – p. 188, line 2). The SISTERS

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[5] Contrary to R. pp. 1117-1147, Appellant now disputes that the Will bequeaths this property to Respondent and her son. (R. p. 276, lines 4-6).

even brought in ground-penetrating radar looking for buried safes but no buried treasure was found. (R. p. 187, line 20 – p. 188, line 2; p. 717, lines 8-22). Their conduct was such that the probate court revoked the earlier order that had allowed the SISTERS access to the residential property. (R. 716, line 16 – p. 717, line 22).

As Respondent testified:

> Q: You talked about their search for gold. How did it make you feel that they were putting out here that you were – you had stolen $5 million in cash in a duffle bag and 50 pounds of gold and six bags of silver. Did that cause you any type of fear?
>
> A: Well, sure it did. I lived in a small town in the country by myself. And, you know, Timmonsville is a high-crime area. I worried, you know, who's coming on the property, you know? Who's going [to] try to go find that money? Again, I lived in fear.

(R. p. 718, lines 14-23).

As Respondent further testified:

> So many allegations. I took money. I locked them out of the house. I malnourished my father. I dehydrated my father. I mean, it was constant. Riding by my house, parking across the street taking pictures of my guests. Accusing me of inviting a guy that works for a propane company to cut into the floors in the house looking for gold. I mean it was never ending, the abuse, the harassment. It just – it just got so unbearable at times.

(R. p. 684, lines 10 – 18).

Not a Biological Daughter

The jury heard evidence that in one of Appellant's probate filings written by her on the subject of venue, Appellant stated that Respondent was not Judge Lynch's biological daughter, an allegation with no supporting foundation and no relevance to the venue motion. (R. p. 556, line 14 -p. 557, line 23). As with the other allegations,

Appellant admitted at trial to making this accusation and testified, "That's why we're here." (R. p. 557, line 16).

Grievances by the Dozen

At trial, there was evidence presented of the SISTERS' numerous complaints and grievances lodged against judges and attorneys alike. (R. p. 233, lines 8-21; p. 286, line 19 – p. 288, line 2; p. 291, lines 3-14; p. 292, line 22 - p. 294, line 3; p. 302, lines 5-22; p. 304, lines 3-6; p. 319, lines 2-3; p. 320, lines 8-11). Although neither sister "recalled" filing a grievance against Mr. Hoefer, he testified at trial that the SISTERS each filed a grievance against him both of which have been dismissed. (R. p. 615, line 16 – p. 617, line 17).

Appellant even accused *her own attorneys* of a "cover up to protect [Respondent]," having "swept evidence under the rug," doing things "underhanded," and conspiring to help Respondent because of her "being a magistrate" even though her appointment ended in 2014. (R. p. 291, lines 5-8; p. 292, lines 8-21; p. 304, lines 3-6; p. 306, line 20 – p. 307, line 1; p. 316, lines 11 – 21; p. 541, lines 21-25; p. 1032, lines 12 – 17; p. 1035, lines 14 – 19). As Appellant stated in a 2018 filing and in testimony at trial: "Below are my attorneys, hired and fired, due to not representing me in the best interest, not presenting my evidence, I believe to cover up and protect [Respondent], the magistrate." (R. p. 291, lines 3 – 14). As Appellant testified, "I believe the attorneys worked together to undermine **us**." (R. p. 306, line 20 – p. 276, line 1)(emphasis added).

At trial, Appellant even accused one of her many attorneys, Eric Poston, of leaving a threatening voicemail for Respondent in order *to help Respondent.* As

Appellant told the jury, her attorney "did that to sabotage me because he knows you [referring to Respondent's trial counsel]. He knows you and your aunt – or his aunt knows you is what he told me." (R. p. 286, lines 14-16). The jury was able to judge Appellant's credibility on this point as there was significant testimony on this issue as discussed in Section VI herein.

The Lost Decade

Respondent testified to the jury she did not influence her father to make the will, did not kill him, and has not stolen estate assets. (R. p. 718, lines 5-6; p. 719, lines 4-10). Respondent testified to the thousands of dollars she has expended in legal fees and expenses defending her father's Last Will and Testament and defending her nursing license. The jury heard testimony as to the nearly ten-years spent in probate court, all due to the SISTERS's actions. (R. p. 696, line 14 - p. 697, line 4).

The jury heard from Respondent over her fears related to physical safety. As Respondent testified:

> . . . It will never end. Even if – even if I walk away with a positive outcome in this, it will never end. . . . I've been badgered and I can't really go anywhere anymore without somebody bringing it up. You now, I've heard you killed your father. I've heard you got that – where's them gold bars buried? I've just almost become recluse. I mean there's time I do go out. But I don't enjoy being in crowds, especially people that I'm familiar with because it's going to come up.

(R. p. 721, lines 8-17). As Respondent further testified, "It continues and it continues and it continues. And you heard [Appellant] say that she'll never accept it. She's never going to accept it. . . . It will never end." (R. p. 722, lines 11-15).

II. *PROCEDURAL HISTORY*

Respondent filed the Complaint on February 8, 2016 in the Florence County Court of Common Pleas. *See* R. p. 14. The parties consented to and filed a motion pursuant to Rule 40(j) on February 7, 2018 with the matter restored to the docket on February 6, 2019. R. p. 3.

This matter was tried before a jury from April 25 – April 29, 2022. After a five-day trial, the jury found for Respondent as follows: As to Appellant, the jury awarded Respondent $60,000 in actual damages and $250,000 in punitive damages for defamation, civil conspiracy, intentional infliction of emotional distress, and abuse of process. As to Respondent White, the jury awarded Respondent $40,000 in actual damages and $250,000 in punitive damages on causes of action for civil conspiracy, intentional infliction of emotional distress, and abuse of process. The jury found in Respondent White's favor on the claim of defamation. At the end of the trial, Appellant's counsel asked the court for a new trial based on "failure of the evidence," and excessive damages.

On May 9, 2022, Appellant filed a motion for New Trial pursuant to Rule 59, SCRCP, arguing the evidence was insufficient to support civil conspiracy and damages and objecting for the first time to the verdict form. R. p. 25. The motion was denied by Order of Judge DeBerry on July 5, 2022. R. p. 6. This appeal followed with Appellant's Notice of Appeal filed on July 18, 2022. Appellant is not appealing the jury's verdict in favor of Respondent on the claims for defamation and abuse of process. Respondent White did not file a notice of appeal.

STANDARD OF REVIEW

Preservation for Appellate Review

As a general matter, "In order for an issue to be preserved for appellate review, the issue must have been timely raised by the appellant with sufficient specificity and ruled upon by the trial court." *Eades v. Palmetto Cardiovascular and Thoracic, PA*, 422 S.C. 196, 200 n.3, 810 S.E.2d 848, 850, n. 3 (2018). "[I]n order to be timely, an objection usually must be made at the earliest possible opportunity." *State v. Manning*, 400 S.C. 257, 269, 734 S.E.2d 314, 320 (Ct. App. 2012)(internal citations omitted); *see also In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.); *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, (Ct. App. 2006).

In preserving an issue for appeal, an appellant cannot rely on an objection made by a co-defendant or another party. *Tupper v. Dorchester County,* 326 S.C. 318, n. 3, 487 S.E.2d 187, n.3 (1997); *see also McCall v. State Farm Mut. Auto. Ins. Co.,* 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004).

Motion for Directed Verdict

"When reviewing the circuit court's ruling on a motion for a directed verdict or a JNOV, this court must apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 233, 743 S.E.2d 858, 859 (Ct.

App. 2013)(internal citations omitted); *see also* RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012).

"A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013). A motion for JNOV may be granted only if **no reasonable jury** could have reached the challenged verdict. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712 (1998).

"When considering a motion for JNOV, the trial court is concerned with the **existence** of evidence, not its weight." *Chakrabarti v. City of Orangeburg*, 403 S.C. at 313, 743 S.E.2d at 112)(emphasis added). "If there is **any evidence** to sustain the factual findings implicit in the jury's verdict, the appellate court will affirm." *Hilton Head Island Realty, Inc. v. Skull Creek Club*, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1985)(emphasis added).

In deciding such motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

<u>**Evidentiary Objections**</u>

"The standard of review for evidentiary rulings is very deferential. The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice." *In re Bilton*, 432 S.C. 157, 162, 851 S.E.2d 442 (Ct. App. 2020)(internal citations omitted). "An

abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

ARGUMENT

I. THE ISSUE OF WHETHER THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO THE CAUSE OF ACTION FOR CIVIL CONSPIRACY IS NOT PRESERVED FOR APPEAL.

As an initial matter, the Issue is not preserved for appellate review. Appellant moved for a directed verdict after the close of Respondent's [Plaintiff's] case, which motion was denied. (R. p. 869, line 16 – p. 878, line 19; p. 886, lines 2-10). Thereafter, Appellant presented witnesses (R. p. 911, lines 2-12) *but did not renew the motion* at the close of all the evidence. (*See generally* R. p. 911, line 2 - p. 988, line 17).

"[A]n objection to the sufficiency of the evidence cannot be raised for the first time in a motion for a new trial; a motion for a directed verdict is a prerequisite to a motion for a new trial on the ground that the evidence does not support the verdict." *Peay v. Ross*, 292 S.C. 535, 536, 357 S.E.2d 482, 483 (Ct. App. 1987)

"When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of all evidence." *Wright v. Craft*, 372 S.C. at 1, 640 S.E.2d at 496.

As this Court has stated:

> Where, on the trial of a civil action, the defendant at the close of the plaintiff's evidence moves for a verdict thereon in his favor, and on excepting to the decision of the court overruling such motion introduces evidence to support his grounds of defense, and rests without renewing the motion at the close of all the evidence, the exception is deemed to be waived and it is no longer a predicate for error in a reviewing court.

Freeman v. A. & M. Mobile Home Sales, Inc., 293 S.C. 255, 359 S.E.2d 532, 534 (Ct. App. 1987)(internal citations omitted).

"If a defendant presents evidence after the denial of his motion for a directed verdict motion at the close of the state's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence." *State v. Bailey*, 368 S.C. 39, 43 n. 4, 626 S.E.2d 898, 900 n. 4 (Ct. App. 2006); see also *State v. Rosemond*, 348 S.C. 621, 560 S.E.2d 636 (Ct. App. 2002), aff'd as modified 356 S.C. 426, 589 S.E.2d 757 (2003).

"The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a strict one." *Henderson v. St. Francis Cmty Hosp.*, 295 S.C. 441, 447, 369 S.E.2d 652 (Ct. App. 1988), rev'd other grounds, 303 S.C. 177, 399 S.E.2d 767 (1990); *see also Wright v. Craft*, 372 S.C. at 1, 640 S.E.2d at 496-497 ("Because Craft did not renew his motion for a directed verdict at the close of all evidence, there is no JNOV motion to review.")

Here, Appellant presented witnesses but did not renew her motion for a directed verdict at the close of all evidence. As such, this issue is not preserved for appellate review.

II. EVEN IF PRESERVED FOR APPELLATE REVEW, THE LOWER COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR DIRECTED VERDICT AS THERE WAS EVIDENCE PRESENTED TO SUPPORT THE JURY'S VERDICT AS TO THE CAUSE OF ACTION FOR CIVIL CONSPIRACY.

Even if the issue is preserved for appellate review, which it is not, the lower court did not err in denying Appellant's directed verdict motion as to civil conspiracy. As Judge DeBerry found, "The court finds that the record contains ample evidence to support the jury's verdict." R. p. 6. Viewing the evidence and all reasonable inferences in the light most favorable to Respondent [the nonmoving party], there was evidence to support the jury's findings. *See Hilton Head Island Realty, Inc. v. Skull Creek Club*, 339 S.E.2d 890, 891, 287 S.C. 530, 532 (Ct. App. 1985)("If there is **any evidence** to sustain the factual findings implicit in the jury's verdict, the appellate court will affirm.")(emphasis added).

The elements of a claim for civil conspiracy are: "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774, 780 (2021). "Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances." *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 57 (2004). "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence." *Island Car*

Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1986). "[T]he primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the plaintiff." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016).

Here, the standard on review is "any" evidence" in the light most favorable to Respondent, and there was more than sufficient evidence presented at trial from which a reasonable jury could find that Appellant civilly conspired to injure Respondent. The Court included specific interrogatories on the verdict form, which Appellant did not object to, specifically supporting the finding of a civil conspiracy against both of the SISTERS. Verdict Form. Respondent White did not appeal the civil conspiracy verdict against her and that judgment stands.

The jury heard five days of testimony, including but not limited to the following intentional and/or reckless acts which the jury, in the light most favorable to Respondent, could reasonably consider as evidence of the SISTERS near ten-year conspiracy to injure Respondent and not simply "a joint interest in looking out for the best interest of their father's Estate and his memory." (Appellant Initial Brief, p. 11):

- The SISTERS' baseless reports to friends, community members, police, hospitals, nurses, and others that Respondent, a registered nurse, was physically harming Judge Lynch. (Statement of Facts pp. 5-7).
- The SISTERS baseless reports to DSS (Adult Protective Services)[6] that Respondent was physically harming Judge Lynch knowing that a dying Judge Lynch would have to defend Respondent and the truth, which he did, during the social services investigation. (*Id.*)

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[6] While Appellant argues that "Respondent is unable to establish who actually made the report to DSS for elder abuse," Appellant admitted to making reports to DSS and "social services, and it is a reasonable inference that she did so. Statement of Facts, pp. 5-6. Similarly, Respondent need not prove that the SISTERS made the *initial* SCBON report as Appellant admitted to speaking to the SCBON investigator testifying "I have an obligation to report." (R. p. 371, lines 2-12; p. 372, line 24 – p. 373, line 4).

- The SISTERS unfounded claim that Respondent Lynch gave Respondent White a lethal dose of Ativan to give to Judge Lynch. *(Id.* p. 7).

- The SISTERS baseless reports to Coroner Von Lutcken that Respondent (a registered nurse) had "accelerated" Judge Lynch's death by starvation, dehydration, and morphine even though Judge Lynch died in a hospital and had been there 4 ½ weeks. (*Id.* pp. 6-7).

- The SISTERS telling Coroner Von Lutcken, in response to his assertions that the cause of death was natural, that "Wendy was a mean person and she's vindictive and that they honestly believed that she had done something to their father. They were adamant about that." (*Id.* p. 7).

- Appellant's baseless claim that Judge Lynch wasn't diagnosed with glioblastoma and did not die of glioblastoma even though she is aware of the death certificate certified by Dr. Fox. (R. p. 1148).

- The SISTERS nearly ten-year, public, widespread campaign accusing Respondent of stealing estate assets, items the jury could (and should) infer do not exist (50 pounds of gold, 5 million dollars of cash in a duffle bag), even though the SISTERS are the ones who hired a locksmith to drill into Judge Lynch's safe and admit to "securing assets" from the safe. (*Id.* pp. 9-10).

- Even at trial, the SISTERS accusing Respondent and the will attorney, Mr. Hoefer, of making up the will to help Respondent and both SISTERS filing attorney grievances against him. (*Id.* p. 11-12; 15).

- The SISTERS public refusal, even after the will contest was final, to acknowledge Judge Lynch's Last Will and Testament, instead continuing to make claims that Respondent unduly influenced her father and that he was incompetent. (*Id.* pp. 11-12).

- The SISTERS filing attorney and/or judicial grievances, claiming the attorneys were all helping Respondent, to frustrate the administration of the probate case to delay and prevent Ms. Lynch (and her son) from enjoying the inheritance Judge Lynch gave to them as his last act. (*Id.* pp. 15-16).

- Appellant using the judicial motions' process to spread irrelevant, baseless accusations that Respondent is not a "biological child" of Judge Lynch, bringing dishonor to their father. (*Id.* p. 14).

- The SISTERS driving by Respondent's residence, taking pictures of Respondent's guests, and causing such a disturbance generally at the residence that the probate court terminated the provision in the temporary order allowing the SISTERS' to visit the residential property. (*Id.* p. 13-14, 16).

As such, even if the issue had been preserved for appeal, the "any evidence" standard was met. In the light most favorable to Respondent, evidence supports the factual findings implicit in the jury's verdict. More than one reasonable inference could be drawn from the evidence. For these reasons, if the Court finds the issue is preserved for appeal, then this Court should find the lower court did not err in denying the directed verdict motion as to civil conspiracy. This Court should affirm the verdict.

III. THE ISSUE OF WHETHER THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO THE CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT PRESERVED FOR APPELLATE REVIEW.

As an initial matter, as with the civil conspiracy cause of action in Issue I, the question of whether or not the court erred in overruling Appellant's Motion for Directed Verdict is not preserved for appellate review. Appellant moved for a directed verdict after the close of Plaintiff's case, which motion was denied. (R. p. 869, line 16 – p. 878, line 19; p. 886, lines 2-10). Thereafter, Appellant presented witnesses *but did not renew the motion* at the close of all the evidence. (*See generally* R. p. 911, line 2 - p. 988, line 17). Similarly, Appellant did not raise the issue in the Motion for New Trial. (R. pp. 25-27); *see also* Respondent's Brief, Issue I.

As Appellant presented witnesses but did not renew the directed verdict motion at the close of all the evidence, this matter has not been preserved for appeal.

IV. EVEN IF PRESERVED FOR APPELLATE REVIEW, THE LOWER COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO THE CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS EVIDENCE WAS PRESENTED TO SUPPORT THE JURY'S VERDICT.

Even if the matter is preserved for appellate review, which it is not, the lower court, in the light most favorable to Respondent as non-moving party, did not err in denying the Appellant's initial motion for directed verdict. Evidence was presented to support the jury's verdict in Respondent's favor for intentional infliction of emotional distress.

In order to succeed on a claim of intentional infliction of emotional distress (IIED), a claimant must show: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the defendant caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 650 S.E.2d 68, 70 (2007).

Here, in the light most favorable to Respondent, there is ample evidence to support the jury's verdict for intentional infliction of emotional distress.[7] The jury had sufficient evidence to reasonably conclude that Appellant's almost <u>ten-year</u>, non-stop

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[7] The jury also returned a verdict for Respondent Lynch against Respondent White for IIED. As Respondent White has not appealed the verdict, this argument focuses on only Appellant for purposes of this appeal.

actions as set forth in the Statement of the Case met all the required elements for IIED. Appellant's conduct was not only intentional and/or reckless, but also extreme and outrageous as to exceed all bounds of human decency. It is extreme and outrageous to accuse someone, without basis, of killing their father, harming him, stealing from his Estate, fabricating his will, conspiring with attorneys and judges, and not being someone's biological child. Even after all of the investigations and decisions proving the Appellant's claims were baseless, Appellant *continued* making the same false accusations and repeated those claims to the jury.

There was evidence, in the light most favorable to Respondent, that Appellant did everything she could to harm Respondent's professional careers by false reports to physicians, nurses, social services, The Florence County Coroner, SCBON, and Senator Johnson. Appellant did everything she could to make Respondent fearful at home to include photographing and harassing guests, publishing to the community that Appellant has stolen and hidden millions of dollars in cash, silver, and gold on the property where Respondent lives, and engaging in behavior so extreme that the probate court ended the SISTERS' right to visit the property. Singularly and especially in combination, these acts are ones a jury could reasonably find as atrocious and utterly intolerable in a civilized society.

Respondent testified to her fear over her physical safety and the emotional "unbearable" trauma and anxiety of this lost decade. She has "almost become recluse" and hears continually from people, "where's them gold bars?" (R. p. 721, lines 8-17).

While Appellant argues in her brief that Respondent's counsel has somehow diluted Respondent's claim because of his references to Respondent as "tough" in closing argument, "arguments made by counsel are not evidence," *South Carolina Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003); (R. p. 1048, lines 12-14). The jury heard from Respondent and found the emotional distress to be severe such that no reasonable man could be expected to endure it. (Verdict Form, p. 3).

For these reasons, even if the issue is preserved for appeal, there is evidence to support the jury's verdict against Appellant for intentional infliction of emotional distress. This Court should affirm the verdict.

V. AS THE VERDICT FORM WAS APPROVED WITHOUT OBJECTION BY ALL PARTIES, THE TRIAL COURT DID NOT ERR IN ALLOWING THE VERDICT FORM TO BE SENT TO THE JURY.

Appellant's argument that the lower court erred in allowing the verdict form to be sent to the jury is not preserved for appeal. "In order for an issue to be preserved for appellate review, the issue must have been timely raised by the appellant with sufficient specificity and ruled upon by the trial court." *Eades v. Palmetto Cardiovascular and Thoracic, PA*, 422 S.C. 196, 200 n.3, 810 S.E.2d 848, 850, n. 3 (2018).

Specifically, a party must make a timely objection to the verdict form in order to raise it as an issue on appeal. *Gause v. Smithers,* 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013); see also *Dixon v. Dixon,* 362 S.C. 388, 608 S.E.2d 849 (2005)(holding that issue raised for first time in Rule 59, SCRCP, motion is not preserved for review).

Here, Appellant approved the very verdict form that she now disputes. (R. p. 945, lines 2-15). As the legal somnolence has been described, "one who sleeps on a right cannot then assert it." While Appellant cites *Day v. Kilgore*, 314 S.C. 365, 444 S.E.2d 515 (1994) in support of her argument, that matter did not involve verdict forms but rather active participation by jurors in questioning witnesses which absolutely did not occur here.

As such, the trial court did not err and the issue is not preserved for appellate review. This Court should affirm the verdicts.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE VOICEMAIL MESSAGE LEFT FOR RESPONDENT BY APPELLANT'S ATTORNEY TO BE ADMITTED INTO EVIDENCE AS THE VOICEMAIL WAS NOT HEARSAY.

During Appellant's cross-examination, she volunteered testimony that one of her many attorneys, Eric Poston, whom she had hired for her civil case, tried to "sabotage me by threatening [Respondent] on a telephone call that I had nothing to do with, and so I – I fired him." (R. p. 285, lines 22-24). As Appellant volunteered, "[The attorney] told [Respondent] not to call the police. He told her she needed to settle this matter with [the SISTERS]." (R. p. 286, lines 7-10). Inexplicably, Appellant further claimed, "He did that to sabotage me because he knows you [referring to Respondent's trial counsel]. He knows you and your aunt – or his aunt knows you is what he told me." (R. p. 286, lines 14-16). *Appellant* offered, in front of the jury, to play the voicemail. (R. p. 286, lines 4-5).

Thereafter, during the Respondent's testimony, she was asked about Appellant's testimony in regards to Mr. Poston's voicemail. (R. p. 701, line 4 – p. 702, line 9). She

described the substance of the call including but limited to Mr. Poston's identifying himself and stating he represented Appellant. (R. p. 701, line 14 – p. 702, p. 5). Late into this testimony wherein Respondent was relaying what Mr. Poston said in the voicemail, it appears Appellant's counsel objected to hearsay but did not move to strike any of Respondent's testimony describing the substance of the call. (R. p. 701, line 5 – p. 706, line 19).[8] Taking up Appellant's earlier invitation in front of the jury to play the voicemail, Respondent's counsel offered to let the court hear the voicemail. *Id.* Respondent's counsel replied that the voicemail (which was an original recording) was an "exception to the hearsay rule" as an admission of a party opponent. (R. p. 712, line 9 – p. 715, line 21); *see also* Rule 801(d)(2), SCRE. Appellant's counsel admitted, "I don't deny that the party's bound by the admissions, but again, that doesn't change the hearsay nature of the statement." (R. p. 712, lines 1-3).

After hearing the voicemail outside of the jury, Appellant's attorney objected to hearsay, and the lower court overruled the objection based on "evidence that's already been presented in this case and the law that's been argued here." (R. p. 714, line 25 – p. 715, line 3). Respondent returned to the stand and the voicemail was played with no further objection by Appellant's counsel.

Here, there is evidentiary support for the trial court's ruling under 801(d)(2) and the case law. Under Rule 801(d)(2), SCRE, a statement is not hearsay where it is offered against a party and is:

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[8] *See State v. Saltz*, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001)(When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility.). However, Appellant is appealing the voicemail, and not appealing Respondent's describing exactly what was said by Mr. Poston.

(A) The party's own statement in either an individual or a representative capacity;

(B) A statement of which the party has manifested an adoption or belief in its truth, or

(C) A statement by a person authorized by the party to make a statement concerning the subject, or

(D) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Id.

Attorneys are representatives of their clients and are authorized to make statements on behalf of their clients. As set forth in our case law: "Acts of an attorney are directly attributable to and binding upon the client." *Arnold v. Yarborough*, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984); *see also* Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007)("Any communication failure or mistake on the part of an attorney is directly attributable to his client.")

Here, Appellant was clearly aware of the voicemail as *she is the one who put the fact into evidence.* (R. p. 285, lines 22-24). While Appellant's counsel tried to argue that Mr. Poston was not representing Appellant at the time of the voicemail (as Appellant also does in her Brief, pp. 19-20), Appellant stated under oath that Mr. Poston <u>was</u> representing her and verbally corrected her trial counsel twice to confirm that Mr. Poston *was* representing her in the civil case. (R. p. 285, lines 22-24; p. 714, lines 2-6; p. 713, lines 14-25).

Moreover, the record supports testimony from both Appellant and Respondent as to the <u>substance</u> of the call, the words said by Mr. Poston. (R. p. 286, lines 7-10; p.

701, line 14 – p. 702, p. 5). Mr. Poston, advancing the interests of the conspiracy and the legal claims for which he had been hired by Appellant, left the voicemail on Appellant's behalf, stating he was representing Appellant, and advancing factual claims and conduct in the voicemail that Appellant herself has adopted during the conspiracy. (R. p. 701, line 15 – p. 702, line 5). Specifically, that the:

- "deed to the farm was not in [Respondent's] name"
- Appellant had "every right to be there"
- "They were coming and bringing the law with them"
- "if [Respondent] didn't agree this was going to be years in litigation,"
- "if you [Respondent] can afford years of litigation, then you must have taken something that wasn't yours."

Id.

Based on the trial record, there is evidentiary support for the trial judge's finding that the voicemail is an admission by a party opponent under any of the 801(d)(2) subsections. Appellant and Respondent both testified to the substance of the call. As Respondent had the original recording (the actual voicemail left on Respondent's phone), this constitutes the best evidence of what was said in the voicemail. *See* Rule 1002, SCRE ("To prove the content of a . . . recording, the original . . . recording is required, except as otherwise provided in these rules or by statute)(emphasis added). As such, the trial court's reasoned decision to allow the introduction of the recording was not a manifest abuse of discretion.

Moreover, there is no probable prejudice. "The materiality and prejudicial character of the alleged error" must be "determined in its relationship to the entire

case." *State v. Key*, 256 S.C. 90, 180 S.E.2d 888, 890-891 (1971). "Error is harmless when it could not reasonably have affected the result of the trial." *State v. Sims*, 661 S.E.2d 122, 126, 377 S.C. 598 (Ct. App. 2008).

Here, *Appellant herself* volunteered the fact of the voicemail and testified to the substance of the call, all in support of her *own theory* that her attorney was trying to *help Respondent by leaving the voicemail.* (R. p. 285, lines 22-24). Respondent testified to the substance of the call and that testimony is part of the record. She offered to play it. There is no evidence that the actual recording added or detracted from the trial testimony but was the best evidence of what was said.

Contrary to Appellant's claim in her brief that this was a "life threatening" threat (Initial Brief, p. 19), the threat established in the record was more time and legal expense if Respondent did not settle with her SISTERS. Moreover, although Appellant's trial counsel objected, he did not proffer the actual voicemail for the record. Given the overwhelming amount of evidence in the case as a whole, Appellant cannot show that the voicemail reasonably affected the rest of the trial. For all of these reasons, Appellant cannot demonstrate prejudice.

As an additional sustaining ground, Appellant "opened the door" to the testimony by her putting the fact of the voicemail into evidence, claiming the voicemail from her own attorney was an effort by him to help Respondent, and then offering to play the voicemail to the jury.

For all of these reasons, the judge did not abuse his discretion in allowing the playing of the voicemail and even if he did abuse his discretion, which he did not, no

prejudice resulted. As such, this Court should find that the trial court did not err in allowing the voicemail into evidence. This Court should affirm the verdicts.

VII. THE TRIAL COURT DID NOT ERR IN ALLOWING THE USE OF THE WORD "KILL" AS THERE WAS NO OBJECTION TO THE USE OF THE WORD AT TRIAL.

This issue is not preserved for appellate review as there was no objection at trial to use of the word "kill" or it's derivations (e.g. killing, killed). This is the first time the issue is being raised. *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)("An issue may not be raised for the first time on appeal.")

At the beginning of the trial, Appellant's counsel objected *in limine* to the Respondent using the word "murder." (R. p. 76, lines 14-22; R. p. 85, lines 16-24). The trial court agreed and then asked Appellant's counsel: "do you object to the term killing?" His response was, "No." (R. p. 82, lines 16-19). While Appellant's counsel goes on to recommend "use of the actual words," Appellant never objects to the trial court's decision to allow the use of the word "kill."

In fact, the court brings up the issue again and no objection is raised by Appellant's Counsel:

> Court: All right. With regard to the motion yesterday about the term murder, I've thought about it and I've tried to look it up. I think I'm going to stay with my ruling. Certainly we refer to the statement as an accusation that the plaintiff killed her father or along those lines. I'm just thinking that when we get into the term murder, you know, legal definitional term that might confuse or be more prejudicial than probative. All right.
>
> Counsel: Okay.

(R. p. 133, lines 10-18); see also *CFRE, LLC v. Greenville County* Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011)("A litigant cannot concede an issue at trial and then raise it on appeal.").

During opening argument, the word "kill" is used by Respondent's counsel, again without objection. (*See* R. p. 148, lines 9 and 15; p. 156, line 9); *see also State v. Somerset*, 276 S.C. 220, 277 S.E.2d 593 (1981)(appellant should object the first time a statement is made). Indeed, the word is used without objection by all parties during the trial. (e.g. R. p. 96, line 15; p. 323, lines 7-11, p. 328, lines 17-20; p. 537, line 4; p. 560, lines 13 and 25; p. 718, lines 9 and 12, p. 1000, line 11). As such, this objection is simply not preserved for appeal.

Even if an objection had been made, which it clearly was not, there was no manifest abuse of discretion and no prejudice. Appellant admitted to telling several individuals that Respondent tried to send their father "to heaven early," "accelerated his death," starved and dehydrated him, and that Judge Lynch died from starvation and dehydration. Statement of Facts pp. 5-7. Appellant told the jury that her father did not die of brain tumors (glioblastoma) and never had gliobastoma. *Id.* Although Appellant was quick to play word games at trial, defamation (which verdict Appellant did not appeal) includes inference, and there was evidence presented from which the jury could reasonably infer that Appellant accused Respondent of killing or trying to kill Judge Lynch. (R. p. 1056, lines 13-16).

Lastly, there is no probable prejudice as (1) the evidence of defamation presented at trial was overwhelming; (2) Appellant did not appeal the jury's award on

the defamation cause of action; and (3) each party used the word "kill" in varying contexts at trial, all without objection.

For these reasons, the issue is not preserved for appellate review. Even if it were, there was no abuse of discretion and no probable prejudice. This Court should find the trial court did not err in allowing the use of the word.

CONCLUSION

Therefore, for all of the reasons stated herein and those presented at any oral argument, this Court should affirm the jury's verdict.

Dated: June 21, 2023

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
THE HONORABLE H. STEVEN DEBERRY, IV., CIRCUIT COURT JUDGE

Appellate Case No.: 2022-001006

Wendy Lynch, Respondent,

v.

Elizabeth Langley and Rebecca White Lynch, Defendants,

of whom Elizabeth Langley is the Appellant and
Rebecca White Lynch is a Respondent.

CERTIFICATION BY COUNSEL

I certify that the Final Brief complies with Rule 211, SCACR.

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