THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case Nos. 2010-CP-04-1845 and 2012-CP-04-1433
Appellate Case No. 2012-213385

JAMES ROBERT MALLOY .....PLAINTIFF,

v.

SWAIN N. THOMPSON, JR. .....DEFENDANT.
In the Matter of: ESTATE OF ROBERT L. CHAMBLEE.

JAMES ROBERT MALLOY .....RESPONDENT,

v.

SWAIN N. THOMPSON, JR.,
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
JOSEPH T. ARGO, AND GREENE AND COMPANY, L.L.P. ..... DEFENDANTS,

Of whom MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. is the .....APPELLANT,
In the Matter of: ESTATE OF ROBERT L. CHAMBLEE.

FINAL BRIEF OF RESPONDENT

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INTRODUCTION

In this appeal Defendant-Appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") relies on a new legal argument not raised below in order to seek a dismissal of this case. In the lower court, Merrill Lynch moved to dismiss and compel arbitration claiming that broadly interpreted arbitration agreements between the late Robert L. Chamblee ("Decedent") and Merrill Lynch require the Plaintiff-Appellee James Robert Malloy ("Mr. Malloy") to arbitrate his case against Merrill Lynch. Merrill Lynch argued before the trial court that because the Complaint was intertwined with and dependent on the Merrill Lynch account agreements signed by Decedent which contained an arbitration clause, the Federal Arbitration Act compels Mr. Malloy as a non-signatory to arbitrate his claims against Merrill Lynch.

Mr. Malloy filed suit against Merrill Lynch for tortious interference with inheritance, aiding and abetting tortious interference with inheritance, and conspiracy to commit tortious interference with inheritance. He also seeks to set aside Decedent's revocable trust and the transfers into the revocable trust, which holds its financial assets at Merrill Lynch. He alleges that Decedent was incompetent and/or under undue influence, among other matters, when Decedent signed the last will, revocable trust and powers of attorney. Because Mr. Malloy seeks no direct benefit from Decedent's "Client Relationship Agreements" with Merrill Lynch, Mr. Malloy has no obligation to arbitrate his dispute with Merrill Lynch.

Since Merrill Lynch had no good grounds to force Mr. Malloy to arbitrate his claims, it resorted to a new argument on appeal. Merrill Lynch now seeks dismissal

on the merits asserting that Mr. Malloy has not properly pled a cause of action for tortious interference with inheritance. Alternatively, Merrill Lynch argues, as it did below, that Mr. Malloy's claim is derivative in nature and thus subject to the Client Relationship Agreement's arbitration clause.

In Argument I of its Initial Brief Merrill Lynch argued that the Complaint does not support causes of action related to tortious interference with inheritance. This argument was never raised to the trial court and should not be considered for the first time on appeal. Mr. Malloy's counsel pointed out to the trial court that counsel for Merrill Lynch failed to even mention the underlying claim in his arguments by stating:

> . . . the one thing he did not mention . . . is that we have sued them for tortious interference with an inheritance and – and a conspiracy. And
> . . . he doesn't bother to mention that in any of his papers . . .

(R. p. 349, lines 20-25).

The court then promptly asked counsel for each party, including Merrill Lynch, if there were anything else to discuss, and Merrill Lynch's counsel replied "No, Your Honor." (R. p. 350, line 10).

This failure to raise the issue below would prejudicially affect Mr. Malloy if considered now for the first time on appeal.

Even if Merrill Lynch had sufficiently challenged Mr. Malloy's tortious interference with inheritance claims in the lower court, the Supreme Court has not rejected the tort as Merrill Lynch implied in its Initial Brief. Consistent with the Supreme Court's adoption of the closely analogous tort of intentional interference with prospective contractual relations, this Court should recognize the tort of

interference with inheritance as have many state appellate courts that have considered it. Moreover, Mr. Malloy's Complaint properly sets out facts supporting his causes of action for tortious interference with inheritance, aiding and abetting the same, and conspiracy to tortiously interfere with inheritance. The arguments of Merrill Lynch to dismiss Mr. Malloy's case on the merits at the pleading stage should be denied.

Since Mr. Malloy and his claims against Merrill Lynch have nothing to do with the account-opening arbitration agreements between Merrill Lynch and Decedent, Merrill Lynch's motion to compel arbitration should likewise be denied.

STATEMENT OF ISSUES ON APPEAL

1. Did Merrill Lynch preserve for appeal with sufficient specificity its argument that Mr. Malloy has no claim for tortious interference with inheritance?

2. If Merrill Lynch properly preserved a motion to dismiss Mr. Malloy's claims related to tortious interference with inheritance, have the appellate courts of South Carolina rejected the tort of interference with inheritance?

3. If Merrill Lynch's challenge to Mr. Malloy's claims related to tortious interference with inheritance were properly preserved, does Mr. Malloy's Complaint sufficiently allege such causes of action?

4. Can Mr. Malloy, as non-signatory to any arbitration agreement, be compelled to arbitrate his tortious interference with inheritance and conspiracy claims against Merrill Lynch?

5. Should this Court sanction Merrill Lynch for filing a frivolous appeal under Rule 269, SCACR?

STATEMENT OF THE CASE

The history of the proceedings in the lower court is as follows:

1. Mr. Malloy commenced this action by filing, on April 16, 2012, a Complaint in the Court of Common Pleas, Tenth Judicial Circuit, Anderson County, South Carolina against Defendants Swain N. Thompson, Jr. ("Mr. Thompson"), Greene and Company, L.L.P. and Joseph T. Argo ("Mr. Argo"), and Merrill Lynch. (R. pp. 17-18: ¶¶ 1, 3-5).

2. In the Complaint, Mr. Malloy alleges that Merrill Lynch, along with Mr. Thompson and Mr. Argo, acted to disrupt Decedent's estate plan to divert Decedent's assets from Mr. Malloy to Mr. Thompson upon Decedent's death. Specifically, Mr. Malloy alleges:

   a. From 1984 to 1999, Decedent executed several wills naming Mr. Malloy, his godson, as his primary beneficiary. (R. p. 22: ¶ 29). Decedent also held a life insurance policy, annuities, a retirement plan and a trust account, each designating Mr. Malloy to receive the benefits thereof upon the death of Decedent. (R. pp. 24-25: ¶ 39 and pp. 29-30: ¶ 50).

   b. Beginning in 2001, Decedent began experiencing memory and mental performance ability problems. (R. p. 20: ¶ 18).

   c. From July 30, 2002 through August 20, 2002, Decedent was held against his will by the hospital staff at St. Luke's Roosevelt Hospital in his hometown of New York due to his lack of competency from Alzheimer's disease and his need for residential placement. (R. pp.

20-21: ¶¶ 21-24). Decedent's treating physicians stated in the hospital records that "PT [patient] is not competent & will need placement." (R. pp. 21-22: ¶¶ 23 and 27).

d. In August 2002, Mr. Thompson, Decedent's nephew, removed Decedent from St. Luke's Roosevelt Hospital and brought him to Anderson, South Carolina to reside at The Garden House – an assisted living facility specializing in care for senior citizens with mental infirmities such as Alzheimer's disease. (R. pp. 21-22: ¶¶ 25-27).

e. On September 16, 2002, Mr. Thompson coerced Decedent into signing a South Carolina power of attorney drafted by Mr. Thompson's attorney appointing Mr. Thompson as attorney in fact. (R. pp. 22-23: ¶ 31). On September 18, 2002, Mr. Thompson coerced Decedent to execute a second power of attorney, under New York law, likewise prepared by Mr. Thompson's attorney and appointing Mr. Thompson as attorney in fact. (R. pp. 22-23: ¶ 31). The September 16, 2002 power of attorney proscribed use of the powers to disrupt Decedent's estate plan and prohibited Mr. Thompson from appointing assets directly or indirectly to himself. The September 18, 2002 New York power of attorney specifically rejected the power of Mr. Thompson as agent to make gifts. (R. pp. 22-23: ¶ 31).

f. On December 11, 2002, Mr. Thompson coerced Decedent to execute a new will and a revocable trust ("2002 Trust"), both drafted by Mr.

Thompson's attorney, and both naming Mr. Thompson as the sole beneficiary. (R. p. 23: ¶ 32).

g. After the Thompson powers of attorney were executed in September 2002, a joint account and accounts in the name of the 2002 Trust were established at Merrill Lynch in which Merrill Lynch acted as the investment advisor and asset manager of the funds. Heather Sendler was the Merrill Lynch financial advisor from the Columbia office working with Mr. Thompson to set up the new 2002 Trust accounts. (R. pp. 26-27: ¶ 45).

h. Merrill Lynch was highly knowledgeable about the intricacies of the December 11, 2002 trust and Decedent's assets, possessed copies of the 2002 Trust, and knew or should have known Thompson was the sole beneficiary of the 2002 Trust upon Decedent's death. (R. pp. 26-27: ¶¶ 45-46). Specifically, Merrill Lynch knew (i) that Thompson was the sole beneficiary of the December 11, 2002 trust upon Decedent's death. (R. p. 27: ¶ 46); (ii) that Decedent's funds at Banco Popular were titled "Chamblee, Robert I.T.F. James R. Malloy" and worked to divert those assets to the Merrill Lynch account for the 2002 Trust (R. pp. 27-28: ¶¶ 47-48); and (iii) that Mr. Malloy was the beneficiary on Decedent's annuity with Nationwide Life Insurance when it liquidated the annuity at a deep discount to divert the proceeds to the 2002 Trust account at Merrill Lynch (R. pp. 28-29: ¶ 49).

i. Merrill Lynch obtained a misleading statement from Mr. Thompson's long-time attorney in order to convince Banco Popular to release Decedent's trust account, previously established for the benefit of Mr. Malloy, to the Merrill Lynch account for the 2002 Trust with Mr. Thompson as remainder beneficiary. (R. p. 28: ¶ 48). Merrill Lynch obtained a letter from The Garden House and submitted the same to Banco Popular without revealing that Decedent was residing in The Garden House's Alzheimer's unit. (R. p. 28: ¶ 48). Merrill Lynch submitted the attorney letter, The Garden House statement, and a Merrill Lynch cover letter omitting that the drafting attorney was actually Mr. Thompson's own attorney and the true nature of Decedent's residence in a facility for dementia. (R. p. 28: ¶ 48).

j. Merrill Lynch obtained annuity withdrawal forms from Nationwide Life Insurance Company and submitted same to Nationwide to divert the liquidated proceeds to the 2002 Trust account at Merrill Lynch. Prior to liquidation Merrill Lynch conferred with Nationwide and learned that Mr. Malloy was the beneficiary. Heather Sendler of Merrill Lynch e-mailed to Mr. Argo that the surrender of Decedent's annuity would be done "if we decide to . . ." Merrill Lynch submitted the withdrawal forms signed by Mr. Thompson as attorney in fact directing the surrender of Decedent's annuity while taking a $41,550 decrease in the surrender value from the death benefit value. (R. pp. 28-29: ¶ 49).

k. Merrill Lynch submitted invalid powers of attorney to third parties to effect the transfer of funds to the 2002 Trust. Merrill Lynch also included a false address of Decedent in its money transfer requests. Merrill Lynch prepared annuity surrender forms for GE Capital Life Insurance Company of New York, which forms were faxed to GE on Heather Sendler's behalf with Mr. Thompson signing as attorney in fact on January 21, 2003. (R. pp. 29-30: ¶ 50).

l. To induce the transfer of funds by third parties, Merrill Lynch falsified medallion signature guarantees by guaranteeing the supposed signature of Decedent on letters to multiple financial institutions without witnessing Decedent's signature. (R. pp. 30-31: ¶ 51).

m. Merrill Lynch provided substantial assistance in collecting Decedent's assets for Mr. Thompson including assistance in corralling assets from Nationwide Life Insurance, Banco Popular, GE Capital Life, HSBC Bank, JP Morgan/Chase Bank, and Apple Bank. (R. pp. 28-31: ¶¶ 49-53).

n. Merrill Lynch used the September 18, 2002 New York power of attorney, which specifically rejected the power of Mr. Thompson as agent to make gifts, to collect assets into the 2002 Trust for the benefit of Mr. Thompson. (R. p. 32: ¶ 54).

o. Merrill Lynch originated the idea to perform difficult and significant rollovers of tax qualified retirement assets into the Merrill Lynch account for the benefit of Mr. Thompson and to Mr. Malloy's

detriment. The tax qualified rollover ideas initiated by Merrill Lynch included rolling over Decedent's New York Teacher's Retirement Fund accounts and other IRAs with Mr. Malloy as beneficiary into the Merrill Lynch accounts with Mr. Thompson as beneficiary. (R. p. 32: ¶ 55). The diversion of assets away from Mr. Malloy to Mr. Thompson's control was done knowingly by Merrill Lynch. (R. p. 32: ¶ 56).

p. Mr. Malloy asserts claims against Merrill Lynch for (a) tortious interference with inheritance; (b) aiding and abetting tortious interference with inheritance; and (c) conspiracy to tortiously interfere with inheritance. (R. pp. 41-45: ¶ 105-121).

3. By motion dated May 29, 2012, Merrill Lynch moved to dismiss and compel arbitration based "on Plaintiff's claims against Merrill Lynch aris[ing] from a contractual relationship between [Decedent] and Merrill Lynch, in which [Decedent] and Merrill Lynch agreed to arbitrate all controversies involving any transactions in any of [Decedent's] accounts with Merrill Lynch." (R. p. 106). Merrill Lynch, in its Memorandum in Support of Motion to Dismiss and Compel Arbitration, included a Merrill Lynch durable power of attorney dated November 25, 2002 allegedly signed by Decedent, notarized by Heather Sendler of Merrill Lynch and witnessed by Thaddeus Roepke and Amanda Bailey. The notarization stated that Decedent was "personally known to me." (R. p. 196).

4. The lower court held a hearing on Merrill Lynch's Motion to Dismiss and Compel Arbitration on September 20, 2012 at the conclusion of which it denied the motion. (R. pp. 338-350). The lower court entered its formal order denying Merrill Lynch' Motion to Dismiss and Compel Arbitration on October 25, 2012. (R. pp. 277-280). The lower court found "that there are absolutely no good grounds on which to base an order to compel arbitration in this case." (R. p. 279).

5. Merrill Lynch filed no post-judgment motion to amend or ask for reconsideration of the trial court's Order of October 25, 2012.

ARGUMENT

I. MERRILL LYNCH'S ARGUMENT IN SECTION I CHALLENGING THE SUFFICIENCY OF THE PLEADING OF THE TORT OF INTERFERENCE WITH AN EXPECTANCY OF INHERITANCE WAS NOT RAISED IN THE TRIAL COURT AND SHOULD NOT BE CONSIDERED ON APPEAL.

Merrill Lynch in its Motion to Dismiss and Compel Arbitration made no mention that Mr. Malloy had supposedly improperly pleaded a claim for tortious interference with inheritance. Merrill Lynch confined its motion exclusively to whether there was an enforceable agreement to arbitrate under the case of Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, GMBH, 206 F.3d 411 (4th Cir. 2000). Merrill Lynch disputed only the forum in which Mr. Malloy could bring his case, but not the merits.

Merrill Lynch also made no mention of the claim for tortious interference in its Memorandum in Support of Motion to Dismiss. At oral argument, Merrill Lynch

again exclusively argued whether there was an enforceable arbitration agreement and made no mention of the underlying claim for tortious interference with inheritance. In fact, Mr. Malloy's counsel pointed out to the trial court during oral argument that counsel for Merrill Lynch did not discuss the tortious interference with inheritance claims at all to which Merrill Lynch counsel had no response when prompted by the judge for any follow-up. (R. p. 349, line 30 - p. 350, line 10) (see p. 2 above).

In the trial court's order no mention was made of whether Mr. Malloy had properly alleged facts supporting a cause of action for tortious interference with inheritance. Merrill Lynch filed no motion to reconsider. The first time this issue has been raised in this litigation is in the current appeal before this Court.

This court has held that it cannot address on appeal the trial court's failure to address a cause of action when a party fails to make a motion to reconsider the trial court's ruling. Rule 59(e), SCRCP. See Banks v. St. Mathew Baptist Church, 391 S.C. 475, 482, 706 S.E.2d 30, 34 (Ct. App. 2011), citing Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991)(finding that when a trial court fails to address the specific argument raised by appellant, appellant must make a motion to alter or amend pursuant to Rule 59(e) to obtain a ruling on the argument or it is not preserved for appellate review), see also Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

Even if Merrill Lynch had made a Rule 59(e) motion, it would have been error for the trial court to dismiss the case on the grounds of insufficiency of the pleadings since the issue was not raised in Merrill Lynch's motion, brief or oral argument before the trial court. See City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 230,

599 S.E.2d 462, 464 (Ct. App. 2004) (reversing a trial court's ruling that exceeded the limits and scope of the particular motion before it since it is error of law for court to decide case on a ground not raised in motion); see also Friedberg v. Goudeau, 279 S.C.561, 562, 309 S.E.2d 758, 759 (1983)(reversing grant of summary judgment because the ground for summary judgment not properly before trial court).

"At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge . . . Imposing such a requirement on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012), cert. denied, 132 S. Ct. 2436 (2012) (quoting I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)(internal citations omitted)). Thus, the next question becomes: Did Merrill Lynch raise to the trial court the issue of whether Mr. Malloy properly pled a cause of action for tortious interference with inheritance?

Merrill Lynch's Memorandum in Support of Motion to Dismiss and Compel Arbitration submitted to the trial court stated "[f]or purposes of this motion, the only issue is whether Plaintiff is making a claim to the account that was created under a contract that required arbitration of claims against Merrill Lynch." (R. pp. 151 - 152). No mention was made regarding the substantive claim of tortious interference with inheritance. Yet, Mr. Malloy directly sued Merrill Lynch for tortious interference with inheritance and gifts, aiding and abetting the same, and conspiracy as labeled in Plaintiff's Thirteenth and Fourteenth Causes of Action (and Sixteenth and Seventeenth Causes of Action in Amended Complaint in case number 2010-CP-04-

1845). If Merrill Lynch desired to challenge the sufficiency of the allegations for tortious interference with inheritance, aiding and abetting the same, and conspiracy to commit the same, the rules of issue preservation require that it should have raised that issue in its motion before the trial court.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007)(quoting Jean Hoefer Toal, et al, Appellate Practice of South Carolina, 57 (2d ed. 2002)); see also Walterboro Cmty. Hosp. v. Metcher, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2010) (holding that plaintiff's request that equitable indemnification test should be modified was not raised with "sufficient specificity" below where plaintiff only requested equitable indemnification but not modification of its criteria.)

Merrill Lynch in its conclusion to its Initial Brief attempted to justify raising the issue of the merits of Mr. Malloy's tortious interference with inheritance claims by stating:

> As stated in that motion "Plaintiff must claim to be a third-party beneficiary of the CRAs, under whatever theory he alleges, to have any hope of recovery. Otherwise, Merrill Lynch would have no duty to Plaintiff under any theory."

Appellant Initial Br. p. 16.

The two sentences Merrill Lynch quoted were actually from its lower court Memorandum in Support of Motion to Dismiss and Compel Arbitration, not in its Motion to Dismiss. (R. p. 153). Most important, those two sentences in no way

alerted Mr. Malloy or the trial court that Merrill Lynch was raising a Rule 12(b)(6) motion on the merits of the causes of action related to tortious interference with inheritance. Applying the Supreme Court's principle of issue preservation to motions before the lower court, "[e]very ground ... ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Herron v. Century BMW, 395 S.C. at 466, 719 S.E.2d at 643 (quoting Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)) (internal citation omitted). To discern everything that Merrill Lynch could have meant by those two sentences would leave the trial court and Mr. Malloy " 'grop[ing] in the dark' to ascertain the precise point at issue." Id. Since the issue of tortious interference with inheritance was not made sufficiently clear to the trial court below, it is not preserved for appellate review.

This failure to raise the issue below would prejudicially affect Mr. Malloy if considered now for the first time on appeal. For instance, Merrill Lynch claims on appeal that the Complaint fails to allege any acts that are independently tortious (Appellant Initial Br. p. 16) because "Merrill Lynch had no duty to independently assess Decedent's competence." (Id. at 11). Contrary to Merrill Lynch's assertion, though, the facts and South Carolina law hold differently.

South Carolina Code § 62-5-501(c) provides that a power of attorney is witnessed with the same formalities as a will. South Carolina law further provides that witnesses to a will (and by incorporation a durable power of attorney) attest to the sound mind of the testator and that he is free from undue influence. See S.C. Code Ann. § 62-2-503 (1988) (recognizing this rule for witnesses signing a self-proving

affidavit); see also Mordecai v. Canty, 86 S.C. 470, 68 S.E. 1049 (S.C. 1910) (holding that witness to a will are called upon to try, judge and determine whether the testator is of sound mind). The power of attorney submitted by Merrill Lynch to the trial court as an attachment to its Memorandum in Support of Motion to Dismiss and Compel Arbitration shows that it was notarized by Merrill Lynch employee Heather Sendler in Richland County and witnessed by Thaddeus Roepke and Amanda Bailey. These two witnesses therefore were attesting to the soundness of mind and about undue influence on Decedent on November 25, 2002 which predates the corralling of assets by Merrill Lynch as outlined throughout the Complaint. However, the Record on Appeal contains no evidence about the status of Thaddeus Roepke and Amanda Bailey in relation to Merrill Lynch.

Mr. Malloy's Complaint makes specific reference in paragraph 49 to a facsimile sent by Heather Sendler on February 13, 2003 which included a document signed by Defendant Thompson as attorney in fact. As a document specifically referenced in the Complaint, Mr. Malloy could have properly presented the facsimile to the lower court for consideration about the duty of Merrill Lynch to assess Decedent's competence. See Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (2009)(holding documents incorporated by reference are part of the pleading and may be considered on a motion to dismiss); see also Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993) (affirming trial court's consideration of documents attached to plaintiff's opposition to motion to dismiss since under Rule 12(b)(6) a court may consider documents sufficiently referred to in the complaint). See also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (stating that on a Rule

12(b)(6) motion to dismiss, courts ordinarily examine documents incorporated into the complaint by reference). Since Rule 210(c), SCACR provides that "the Record shall not, however, include matter which was not presented to the lower court or tribunal," the February 13, 2003 facsimile cannot now be presented for the first time on appeal. See Beverly S. v. Kayla R., 395 S.C. 399, 402, 718 S.E.2d 224, 226 (Ct. App. 2011) (quoting Rule 210(h), SCACR that "the appellate court will not consider any fact which does not appear in the Record on Appeal.").

The forum in which such documents should be first addressed is the trial court. Since Merrill Lynch failed to raise below the issues of independent tortious acts and the duty to assess Decedent's competency, Mr. Malloy had no opportunity to fully respond to the newly raised arguments or make a record of relevant facts for use on appeal.

Because of the prejudicial effect on Mr. Malloy by Merrill Lynch presenting a new issue on appeal and the appellate court's long standing practice of requiring issues on appeal to be raised in the lower court, this Court should not hear the arguments of Merrill Lynch related to the sufficiency of a claim for tortious interference with inheritance.

II. THE SOUTH CAROLINA SUPREME COURT HAS NOT REJECTED THE ADOPTION OF THE TORT OF TORTIOUS INTERFERENCE WITH AN INHERITANCE BUT RATHER SUPPORTS THE ASSERTION OF MR. MALLOY'S CLAIMS.

Assuming *arguendo* that this Court should hear Merrill Lynch's arguments about the validity of Mr. Malloy's tortious interference with inheritance claims, South Carolina law supports the assertion of Mr. Malloy's claims. The allegations against

Merrill Lynch are based on tortious interference with inheritance and gifts. In Douglass v. Boyce, the South Carolina Supreme Court ruled in favor of the attorneys who were being sued for malpractice because those attorneys represented a personal representative and thus owed no duty to an alleged child beneficiary. Douglass v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (2001) The Supreme Court did not decline to adopt the tort of tortious interference with an inheritance[1] because it did not need to consider the viability of that cause of action to decide the case. Rather, having already disposed of the claim against the attorneys because of the attorneys' professional immunity from liability to the child, the Court stated that it did not need to decide whether to recognize tortious interference with an inheritance. The Court deferred that determination to another day, and this should be that day.

A. The South Carolina Supreme Court Has Effectively Indicated a Willingness to Recognize Tortious Interference with an Inheritance.

Compellingly, the Douglass court essentially invited an aggrieved plaintiff to sue for tortious interference with an inheritance. The Court observed that South Carolina recognized tortious interference with prospective contractual relations and that tortious interference with an inheritance was based on closely analogous elements:

> We have adopted the closely analogous tort of intentional interference with prospective contractual relations. Crandall Corp. v. Navistar Int'l

[1] Merrill Lynch quoted only part of the sentence from Douglass addressing the tort of intentional interference with inheritance. (Appellant Br. pp. 2, 9). The full sentence makes it clear the Supreme Court has neither adopted nor rejected tortious interference with inheritance, wherein it stated: "We have not adopted the tort of intentional interference with inheritance, however, we need not decide whether to recognize this cause of action here since we find Tort Attorneys owed Child no duty as a matter of law." Douglass v. Boyce, 344 S.C. at 9-10, 542 S.E.2d at 717.

> Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990); see also Allen v. Hall, 328 Or. 276, 974 P.2d 199 (1999) (intentional interference with inheritance closely analogous to intentional interference with economic relations). Most jurisdictions adopting the tort of intentional interference with inheritance have required the plaintiff to prove the following elements: (1) the existence of an expectancy (2) an intentional interference with that expectancy through tortious conduct (3) a reasonable certainty that the expectancy would have been realized but for the interference and (4) damages.

Douglass v. Boyce, 344 S.C. at 9, 542 S.E.2d at 717 n.4.

It would be counterintuitive to presume that the Douglass Court, observing that it did not need to decide in that case whether to adopt tortious interference with an inheritance, would nevertheless go to the otherwise unnecessary exercise of explaining that South Carolina recognized an intentional tort – intentional interference with prospective contractual relations – having the same elements as tortious interference with an inheritance unless the Court would look favorably on adopting tortious interference with an inheritance when presented with the right case, such as this one.

Merrill Lynch takes the position that, because our Supreme Court has yet to recognize tortious interference with an inheritance, such a claim can never be brought. Under Merrill Lynch's flawed logic, no one will ever be able to bring such a claim, even though our Supreme Court has never rejected the adoption of that intentional tort. By extrapolation, Merrill Lynch's position would preclude anyone from ever bringing a new cause of action in South Carolina, even if it had not yet been rejected by our Supreme Court.

Moreover, Merrill Lynch is asking this Court to allow an issue of novel impression to be rejected on a motion to dismiss. Unless there is no dispute on the

underlying facts and development of the record would not aid in the resolution of the issues, important questions of novel impression should not be decided on a motion to dismiss. Evans v. State, 344 S.C. 60, 67-68, 543 S.E.2d 547, 551 (2001) (holding trial court erred by dismissing novel issue under Rule 12(b)(6) where testimony would have clarified the issues in dispute). Even if this Court were not inclined to adopt the tort at this time, it should not dismiss Mr. Malloy's claims either. As noted above, the alleged tortious acts of Merrill Lynch, such as the extent of its knowledge about the parties and Decedent and its role in transferring Decedent's assets, could be further delineated by discovery. The development of the record of the alleged tortious conduct could aid in setting the contours of the tort.

B. Mr. Malloy's Complaint Sufficiently Alleges the Elements of Tortious Interference with an Inheritance.

Merrill Lynch contends that, even if South Carolina recognizes tortious interference with an inheritance, Mr. Malloy's claim must fail because he "has failed to allege that Merrill Lynch owed him any duty, *i.e.*, the gravamen of tortious conduct..." (Appellant Initial Br. p. 12). However, Merrill Lynch misapprehends or misrepresents the elements of tortious interference with an inheritance, as analogized by our Supreme Court in Douglass, because — fatal to Merrill Lynch's position — *a duty to the plaintiff is not one of the elements of tortious interference with an inheritance.* In fact, comment a to § 774B of Restatement (Second) of Torts cited by Merrill Lynch, recognizes that tortious interference would not apply if the tortfeasor owed a duty to the victim. Restatement (Second) of Torts § 774B cmt. a (1979).[2]

[2] "This Section represents an extension to a type of noncontractual relation of the principle found in the liability for intentional interference with prospective contracts

Thus, tortious interference with an inheritance is designed to cover those situations when the tortfeasor *does not owe* a duty to the victim, as in this case.[3]

Mr. Malloy alleges numerous instances supporting his claims that Merrill Lynch tortiously interfered with his inheritance and gifts, aided and abetted tortious interference with his inheritance and gifts, and engaged in a civil conspiracy to tortiously interfere with his inheritance and gifts, including:

- Merrill Lynch's direct involvement in diverting assets from Banco Popular titled in trust for Mr. Malloy;
- Merrill Lynch's direct involvement in transferring to Merrill Lynch a Nationwide Life Insurance annuity naming Mr. Malloy as beneficiary (with a Merrill Lynch employee stating to Mr. Argo that the surrender of that annuity would be done "if we decide to");
- Merrill Lynch's direct involvement in certifying Decedent's signature to multiple financial institutions for transferring Decedent's assets;
- Merrill Lynch's direct involvement in originating and implementing the plan to rollover retirement assets, originally naming Mr. Malloy as beneficiary, to Merrill Lynch;
- Merrill Lynch's activities in obtaining and completing forms and document requests to financial institutions holding Decedent's funds while using a false address for Decedent.

Mr. Malloy's allegations in his Complaint and the Record on Appeal demonstrate that Merrill Lynch had actual and constructive notice that Decedent was incompetent and that Mr. Malloy was the beneficiary of the assets that Merrill Lynch

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stated in § 766B. It does not purport to cover liability for negligence when the actor, in attempting to effectuate an inheritance or gift, breaches a duty to use reasonable care that he owes to the donee as well as the donor." Restatement (Second) of Torts § 774B cmt. a (1979).

[3] Other causes of action would apply when the tortfeasor does owe a duty to the victim.

transferred. For example, as noted above in Argument I, Merrill Lynch cannot use a power of attorney it assisted in obtaining while denying any responsibility to ascertain Decedent's capacity. Nor, for example, can it use powers of attorney (the New York and South Carolina powers) to assist in its transfer of assets while denying any responsibility to honor the language in those powers of attorney that prohibited the disruption of Decedent's estate plan and prohibited Mr. Thompson from appointing assets directly or indirectly to himself. If Merrill Lynch had its way, it would never be liable for the improper use of powers of attorney while transferring assets to itself and its clients; according to Merrill Lynch, it is entitled to use the power but with responsibility to no one.

As another example, Merrill Lynch provided Medallion signature guarantees for multiple documents purportedly signed by Decedent, even though the documents were not executed in Merrill Lynch's presence. The documents were then submitted by Merrill Lynch and others to various financial institutions instructing the recipients to transfer funds to Merrill Lynch resulting in Decedent's assets being transferred to the 2002 Trust accounts at Merrill Lynch. (R. pp. 30-31: ¶ 51).

Merrill Lynch has submitted in this appeal that "[c]ertainly, Merrill Lynch had no duty to independently assess Decedent's competence." (Appellant Initial Br. p. 11). However, South Carolina Code Section 36-8-306 provides the effect of guaranteeing signatures as follows:

> A person who guarantees a signature of the originator of an instruction warrants that at the time of signing: (1) the signature was genuine ... and (3) the signer had legal capacity to sign.

S.C. Code Ann. § 36-8-306(b) (2003).

It is reasonably inferable that Merrill Lynch falsely represented paragraphs (1) and (3) of S.C. Code § 36-8-306 when it submitted the medallion signature guarantees on purported signatures of an incompetent person not in their presence in order to induce the transfer of assets out of Decedent's personal estate. See Overcash v. S.C. Elec. & Gas, 364 S.C. 569, 614 S.E.2d 619 (2005) (stating motion to dismiss should be denied if reasonably deducible inferences from facts alleged would entitle plaintiff to relief on any theory of the case). These acts and others described above state independent intentional tortious conduct by Merrill Lynch damaging Mr. Malloy's reasonably expected inheritance.

Mr. Malloy has alleged the elements for tortious interference with an inheritance as analogized by our Supreme Court in Douglass:[4] (1) he clearly had an expectancy, both through the will and nonprobate transfers of Decedent; (2) Merrill Lynch and others engaged in intentional tortious acts – such as transferring assets – that deprived him of his expectancy; (3) those intentional tortious acts – such as transferring assets – were the direct and proximate cause of his loss of the realization of his expectancy; and (4) he is damaged because he lost his expectancy.

The claims of aiding and abetting and civil conspiracy are likewise related. The gravamen of aiding and abetting is defendant's knowing participation in the underlying tort. See Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45,

[4] Merrill Lynch cites comment c to the Restatement (Second) of Torts, §774B, for additional gloss on its argument: that an independent tortious act is required. Interestingly, Merrill Lynch cites this additional gloss although no such statement was made when the Douglass court gave its analogized elements. Nevertheless, as discussed above, the record shows numerous independent tortious acts committed by Merrill Lynch. Moreover, the cited Restatement comment simply explains that some interference may be tortious and other interference may not be.

50 (1996); see also Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). Here, for instance, Merrill Lynch assisted in liquidating the Banco Popular account that was titled in trust for Mr. Malloy ("account... titled 'Chamblee, Robert I.T.F. James R. Malloy' ") (R. pp. 27-28: ¶ 47). Merrill Lynch also knew regarding the Nationwide annuity that "the beneficiary is James Malloy". (R. pp. 28-29: ¶ 49). With such knowledge, Merrill Lynch participated in the tortious transfer of those assets out of Decedent's personal estate. See Patteson v. Horsley, 29 Gratt. 263, 70 Va. 263, 276 (1877) (holding that defendant's assistance and participation with notice, actual or constructive, in co-defendant's breach of trust rendered him liable for all damages sustained in consequence of breach).

As discussed above, Merrill Lynch's involvement in numerous acts – such as transferring assets – constitutes tortious conduct based on the circumstances. Merrill Lynch knowingly participated in tortious acts, such as transferring Decedent's assets, despite the actual and constructive knowledge of Decedent's incapacity and Decedent's designation of Mr. Malloy as beneficiary of those assets. Mr. Malloy has properly alleged facts to support his claims of tortious interference with inheritance.

III. MERRILL LYNCH HAD NO AGREEMENT TO ARBITRATE WITH MR. MALLOY, AND NO AGREEMENT ENFORCEABLE AGAINST MR. MALLOY EXISTS.

Mr. Malloy's claims against Merrill Lynch are not derivative of Decedent. The claims stem directly from Merrill Lynch's tortious conduct which interfered with Mr. Malloy's inheritance and gifts. Since his claims do not derive from Decedent,

Mr. Malloy is not bound by Decedent's arbitration agreement with Merrill Lynch even if Decedent had been competent when he signed them.

The first requirement necessary to force a party into arbitration is a determination that the parties had an agreement to arbitrate that dispute. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). In Merrill Lynch's Statement of the Case, it references Client Relationship Agreements it claims Decedent executed on November 25, 2002 and January 24, 2003, which incorporated a mandatory arbitration clause. Critically and fatally for Merrill Lynch's arbitration argument, Mr. Malloy never signed any of these documents. Nor is there any allegation that Mr. Malloy had any involvement with the Client Relationship Agreements signed by Decedent and Merrill Lynch.

The United States Supreme Court has long held under the Federal Arbitration Act ("FAA") that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steel Workers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960); see also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001) ("the FAA does not require parties to arbitrate when they have not agreed to do so . . ."). While the federal policy under the FAA favoring arbitration applies in determining *the scope* of an arbitration agreement, the pro-arbitration policy goals do not apply when determining the threshold question of whether a non-signatory agreed to arbitrate its claims. See EEOC v. Waffle House, 534 U.S. 279, 294 (2002); see also Sherer v. Green Tree Servicing, LLC, 548 F.3d 379, 381 (5th Cir. 2008) ("We apply the federal policy favoring arbitration when addressing ambiguities regarding whether

a question falls within an arbitration agreement's scope, but we do not apply this policy when determining whether a valid agreement exists."). Therefore, this Court should decide the question of whether Mr. Malloy is bound to arbitrate without any deference to the FAA's pro-arbitration policy on the scope of an arbitration agreement.

It is undisputed Mr. Malloy never signed an arbitration agreement with Merrill Lynch. Ordinarily, under the FAA and fundamental contract principles, a plaintiff cannot be required to arbitrate its claim when it did not personally agree to arbitrate. Courts, however, have recognized at least five theories arising out of common law principles of contract and agency law for binding non-signatories to the arbitration agreement of others: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. Thomson-CSF, S.A. v. Am. Arb. Ass'n,, 64 F.3d 773, 776 (2d Cir.1995). Other courts have added the principle of third-party beneficiary as a sixth ground for binding a non-signatory. See Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 356 (5th Cir. 2003).[5] A review of the cases cited by Merrill Lynch in its Initial Brief shows that none of the above theories are applicable to this case.[6]

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[5] Most federal courts list only the first five theories, omitting third-party beneficiary, since some courts do not recognize third-party beneficiary as a separate ground. See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Custom Air Sys., Inc., 357 F.3d 266, 268 (2d Cir. 2004); Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1076 (5th Cir. 2002); Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2001); Bel–Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 446 (3d Cir.1999); Int'l Paper Co., 206 F.3d at 417; but see Comer v. Micor, Inc., 436 F.3d 1098, 1102-03 (9th Cir. 2006) (rejecting third-party beneficiary principle for compelling non-signatory arbitration "[b]ecause the Third Circuit's 'arises out of' test is not grounded in any principles of contract or agency law...").

[6] The federal Second Circuit Court of Appeals defined "incorporation by reference"

A. Principle Of Equitable Estoppel Does Not Compel Mr. Malloy To Arbitrate His Claims Against Merrill Lynch.

Four of the cases cited by Merrill Lynch apply equitable estoppel to compel arbitration by a non-signatory. The estoppel principle is inapplicable to the facts and allegations developed in Mr. Malloy's tortious interference with inheritance claims against Merrill Lynch.

Under the theory of estoppel, a party "knowingly exploiting [an] agreement [with an arbitration clause can be] estopped from avoiding arbitration despite having never signed the agreement." MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC, 268 F.3d 58, 61 (2d Cir. 2001) (quoting Thomson-CSF, S.A. v. Am. Arb. Ass'n,, 64 F.3d at 778) (alterations in original). Under ordinary principles of contract and agency, where a party " 'knowingly accepted the benefits' of an agreement with an arbitration clause, even without signing the agreement, that [party] may be bound by the arbitration clause." MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC, 268 F.3d at 61 (alterations added) (quoting Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993).

In the Fourth Circuit case cited by Merrill Lynch, the court explained:

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause

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as when a party seeking to enforce arbitration entered into a separate contractual relationship with the non-signatory incorporating the existing arbitration clause. "Assumption" applies to hold that in the absence of a signature, a non-signatory party may be bound by an arbitration clause if its subsequent conduct indicates it is assuming the obligation to arbitrate. Thomson-CSF, S.A. v. Am. Arb. Ass'n,, 64 F.3d at 777. None of the cases cited by Merrill Lynch apply "incorporation by reference" or "assumption", and Merrill Lynch makes no argument that they have any relevance to this case. Nor is there any factual basis for their application here.

when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d at 418.

Courts have developed two different branches of equitable estoppel to compel arbitration between a signatory and a non-signatory to an arbitration agreement, depending on who is seeking the arbitration – the signatory or the non-signatory party. Since Merrill Lynch, the signatory, is seeking to compel Mr. Malloy, the non-signatory, to arbitration, the version of equitable estoppel at issue in this case is the "direct benefit" test. See Id. at 418 ("A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a 'direct benefit' from a contract containing an arbitration clause.' ") (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). [7] Courts have applied ostensibly stricter rules to make it more difficult to compel a non-signatory to arbitrate its claims than vice versa, the rationale being that arbitration is fundamentally a matter of contract and it is unfair to require a party to arbitrate when it has not agreed to do so.

[7] The second version of equitable estoppel, "alternative equitable estoppel" or "intertwined" claims theory, applies when the plaintiff's claims " 'rely on' and have an 'intimate... and intertwined' relationship with the contracts" at issue. In Re Wholesale Grocery Prod. Antitrust Litig., 707 F.3d 917, 924 (8th Cir. 2013); see Michael A. Rosenhouse, Application of Equitable Estoppel To Compel Arbitration by or Against Nonsignatory – State Cases, 22 A.L.R.6th 387, §§ 2 & 10 (2007). This version of estoppel "estop[s] a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the signatory has signed." E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 201-02 (3d. Cir. 2001); see also Pearson v. Hilton Head Hosp., 400 S.C. 281, 293, 733 S.E.2d 597, 603 (Ct. App. 2012). Since Mr. Malloy was a non-signatory to the Client Relationship Agreements with Merrill Lynch, the "intertwined" claims theory is not applicable to this case.

Michael A. Rosenhouse, Application of Equitable Estoppel To Compel Arbitration by or Against Nonsignatory – State Cases 22 A.L.R.6th 387, § 2 (2007).

The "direct benefits" doctrine estops a non-signatory "from refusing to comply with an arbitration clause when it [is seeking or] receives a direct benefit from a contract containing an arbitration clause." R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 161 (4th Cir. 2004) (alteration in original) (quoting Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, GMBH, 206 F.3d at 418). "The benefits must be direct – which is to say, flowing directly from the agreement... By contrast, the benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relation of parties to an agreement, but does not exploit (and thereby assume) the agreement itself." MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC, 268 F.3d at 61. Receipt by a non-signatory of an indirect benefit from a contract is insufficient to estop a non-signatory from avoiding arbitration since a direct benefit is required. See Thomson-CSF, S.A. v. Am. Arb. Ass'n,, 64 F.3d at 779.

In this case, Mr. Malloy is not seeking to recover funds from accounts in the Decedent's name at Merrill Lynch or from the accounts held there in the name of the 2002 Trust. Nor is he asking the court to enforce any term in the Client Relationship Agreements. He is seeking damages for the actions of Merrill Lynch for tortious interference with inheritance, aiding and abetting tortious interference with inheritance and conspiracy to commit the same. See Ellen v. A.C. Schultes of Md., Inc., 172 N.C. App. 317, 615 S.E.2d 729, 733 (2005) (denying signatory's arbitration request where plaintiffs' allegations of tortious interference with prospective business

advantages did not depend on the contracts containing the arbitration clause since claim was dependent on legal duties imposed by North Carolina law outside of contract law).

Mr. Malloy is not seeking a direct benefit from Decedent's account agreement with Merrill Lynch, and is actually seeking no benefit at all from the Merrill Lynch accounts. In fact, Mr. Malloy is seeking to have the transfers to the 2002 Trust declared "invalid and of no legal effect..." (R. p. 45: ¶ B). As the trial court stated at oral argument, Mr. Malloy is trying "to abolish the Trust." (R. p. 346, line 13). Mr. Malloy's claims derive from Decedent's 1999 Will and non-probate transactions Decedent made prior to the Merrill Lynch accounts – *e.g.*, Banco Popular trust (R. pp. 27-28: ¶¶47-48), Nationwide annuity (R. pp. 28-29: ¶ 49) and GE annuity (R. pp. 29-30: ¶50). He is not attempting to exploit the Client Relationship Agreements or accept any benefits from them. In other words, Mr. Malloy is not seeking a direct benefit, nor even an indirect benefit, from the Client Relationship Agreements.

The cases cited by Merrill Lynch in its Initial Brief that applied estoppel to a non-signatory are not analogous. In Graves v. BP Am., Inc., the heirs of a deceased employee filed a wrongful death suit against the contractor for whom the decedent worked and against BP America, the customer of the contractor. Graves v. BP Am., Inc., 568 F.3d 221, 223 (5th Cir. 2009). The decedent's employment contract with his employer specifically stated that any "claim for personal, physical, or economic injury" must be submitted to arbitration. Graves v. Rental Serv. Corp., 3:07-cv-00183 (S.D. Tex. 5/5/2008). Texas law provides that a wrongful death action is entirely derivative of decedent's rights. Because the non-signatory plaintiffs "stand in the

decedent's legal shoes", they are bound by his agreement. The direct benefits the heirs were seeking to receive from the employment agreement estopped them from "from knowingly exploiting an agreement containing the arbitration clause... while at the same time avoiding its arbitration clause." Graves v. BP Am., Inc., 568 F.3d at 223. In contrast, Mr. Malloy is not seeking to exploit the Customer Relationship Agreements, but to have the transfers declared null and void.

Merrill Lynch cites the Fourth Circuit case of Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, GMBH for the proposition that non-signatories may be compelled to arbitrate. The Fourth Circuit in a later case summarized its holding in Schwabedissen as follows:

> ... International Paper sued Schwabedissen in district court, alleging "breach of contract ... and breach of warranties" based on the Wood-Schwabedissen contract... Because International Paper was seeking to gain a direct benefit from certain provisions in the Wood-Schwabedissen contract, we held that it was estopped from avoiding the contract's arbitration provision.

R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d at 161 (internal citations omitted) (emphasis added).

In R.J. Griffin & Co., the Fourth Circuit, distinguishing that case from Schwabedissen, refused to compel arbitration where the plaintiff was suing under South Carolina tort law and implied warranties rather than breach of the express contract. R.J. Griffin & Co, a contractor, entered a construction contract containing an arbitration provision with a developer/owner. The subsequent homeowner's association sued Griffin the contractor for negligence and breach of the implied warranty of good workmanship. In finding that the benefits were only indirectly related to the contract, the court stated:

> Under South Carolina common law the legal duties Griffin allegedly violated arise from its role as the builder of the Beach Club condominium; these duties are not dependent on the terms of the general contract.... It is true that the formation of the contract meant that Griffin would construct the condominium, thereby assuming the common law duties South Carolina places on a builder. Griffin's assumption of these duties benefited the Association, but the benefit flowed from South Carolina law, not from the construction specifications of the general contract.
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> * * * *
>
> Accordingly, the Association, in asserting its claims, is not seeking a direct benefit from the provisions of the general contract it did not sign, and the doctrine of equitable estoppel cannot be used to force the Association to arbitrate.

R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d at 162-64 (internal citations omitted).

Similarly Mr. Malloy's claims are premised on the tort of tortious interference with inheritance. His claims do not hinge on any rights under the Client Relationship Agreements. He is not attempting to hold Merrill Lynch to any term in the Client Relationship Agreements while simultaneously avoiding the arbitration clauses.

In the case of McCutcheon v. THI of SC at Charleston, LLC, the estate of the decedent claimed it was not bound by an arbitration agreement that was part of the decedent's admission agreement into the defendant nursing home. McCutcheon v. THI of SC at Charleston, LLC, 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). The plaintiff who was the decedent's surviving husband and personal representative of her estate actually signed the arbitration agreement as an attorney in fact for his wife. The court held that the plaintiff as attorney in fact signing the arbitration agreement was equitably estopped from later denying his own authority under the power of attorney.

This case is a far cry from the facts in McCutcheon. Mr. Malloy was certainly not a beneficiary of the contracts signed by Decedent with Merrill Lynch. In fact, the accounts set up in the name of the Decedent for the 2002 Trust were used to totally cut out Mr. Malloy as a beneficiary of Decedent's estate. The Defendants transferred Decedent's assets into the Merrill Lynch accounts with Thompson being the sole remainder beneficiary to the complete exclusion of Mr. Malloy. (R. p. 28: ¶ 48). Therefore, there is no arguable claim at all that Mr. Malloy is knowingly exploiting the Client Relationship Agreements to seek a direct benefit from them.

The case of Barrowclough v. Kidder, Peabody & Co. provides no support to Merrill Lynch's arbitration claim either. Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985). In Barrowclough, an employee stockbroker sued to enforce his employer's deferred compensation plan for employees. The stockbroker had personally entered into agreements with the New York and American Stock Exchanges requiring him to arbitrate all disputes arising out of his employment.[8] The plaintiff, though still living, joined his contingent beneficiaries to the plan as plaintiffs. The court found that the contingent beneficiaries' claims were inseparable from the plaintiff's claims. With the contingent beneficiaries' claims being derivative, they were subject to the plaintiff's arbitration agreement.

Unlike Mr. Barrowclough, Mr. Malloy did not sign the arbitration agreements. Unlike the contingent beneficiaries, Mr. Malloy is not trying to enforce the account agreements Decedent signed.

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[8] Since the plaintiff had personally entered into the arbitration agreement, the court applied the FAA's pro-arbitration policy to determine the scope of the arbitration agreement. Barrowclough v. Kidder, Peabody & Co., 752 F.2d at 937-38.

A case cited by Merrill Lynch that could be construed to apply equitable estoppel is Bank of the Commonwealth v. Hudspeth, 714 S.E.2d 566 (Va. 2011). In Hudspeth, the defendant bank was moving to require a former broker-dealer to abide by the arbitration requirements required of broker-dealers under the FINRA Customer Code regulating FINRA-licensed broker-dealers. The court held the FINRA Customer Code constituted an "agreement in writing" binding a broker-dealer to arbitrate disputes with customers, including the bank. In that case the non-signatory was moving to hold the signatory to the terms of the signatory's arbitration provisions – the complete reverse of this case. Bank of Commonwealth v. Hudspeth, 282 Va. 216, 223, 714 S.E.2d 566, 570 (2011). With Mr. Malloy being a non-signatory, Hudspeth is inapplicable.

The final case cited by Merrill Lynch that applied the principles of estoppel to compel arbitration was the case of Smith Barney, Inc. v. Henry, 775 So.2d 722 (Miss. 2001). Though the facts of that case have some similarities to this case, the pertinent facts are significantly different, rendering it inapposite.

In Henry, the plaintiff was a beneficiary of a testamentary trust in a deceased account holder's estate. She sued the brokerage firm for allegedly converting funds in decedent's account and transferring the funds to other unauthorized accounts for the benefit of the testamentary trustee. The decedent had an arbitration agreement with the brokerage firm to arbitrate controversies related to transactions with decedent's accounts at the brokerage firm. The arbitration agreements stated they were binding on the decedent's "heirs, successors and administrators..." Smith Barney, Inc. v. Henry, 775 So.2d at 727. The court held that the plaintiff as an estate beneficiary was

a successor to decedent and therefore bound by the terms of the arbitration agreement.

In this case, Mr. Malloy is not suing for any transactions that occurred within the accounts. He is suing Merrill Lynch for its actions taken before the funds were transferred to Merrill Lynch – *i.e.*, its efforts in corralling the assets. (*e.g.*, R. pp. 29-30: ¶ 50 and p. 42: ¶ 111). Mr. Malloy is not seeking to recover the funds in the Decedent's account or the 2002 Trust accounts. He is seeking damages for the actions of Merrill Lynch for tortious interference with inheritance, aiding and abetting tortious interference with inheritance and conspiracy to commit the same. Mr. Malloy is not pursuing a direct benefit from Decedent's account agreement with Merrill Lynch since he is seeking to have the transfers to the 2002 Trust declared "invalid and of no legal effect..." (R. p. 45: ¶ B). The relief Mr. Malloy requests in this suit is the antithesis of the Client Relationship Agreements since he seeks to abolish them. Mr. Malloy's claims therefore do not even "rely on" or have an "intimate and intertwined" relationship with the Client Relationship Agreements. In Re Wholesale Grocery Prod. Antitrust Litig., 707 F.3d at 924.

Another critical difference between the Henry case and the one *sub judice* comes from the language of the arbitration agreements at issue in each case. One version of the Merrill Lynch Client Relationship Agreements states:

> Arbitration is final and binding on you and Merrill Lynch... You agree that all controversies that may arise between us shall be determined by arbitration...

(R. p. 176: ¶ 6) (emphasis added).

The Client Relationship Agreement also defines "you" as "each person who has agreed to the terms of this Client Relationship Agreement." (R. p. 176). The agreement does not state that it is binding on Decedent's successors or his estate.

In contrast, the Henry court based its ruling on the facts that (1) "[t]he arbitration agreements plainly state that they are binding on [decedent's] "heirs, successors and administrators..."; and (2) plaintiff was "a successor under the terms of [decedent's] will, and as such, she is specifically covered by the [arbitration] agreement." Smith Barney, Inc. v. Henry, 775 So.2d at 727. In the present case, the terms of the Client Relationship Agreements do not bind successors or devisees; therefore, Mr. Malloy is not bound to the arbitration agreement by its terms.[9]

B. Agency Law Principles Do Not Apply To Compel Mr. Malloy To Arbitrate With Merrill Lynch.

"Traditional principles of agency law may bind a nonsignatory to an arbitration agreement." Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d at 777.

There are no allegations in the Complaint or reasonable inferences to establish an agency relationship between Mr. Malloy and Decedent, his god-father. See Johnson v. Arbabi, 355 S.C. 64, 584 S.E.2d 113 (2003) (ruling that a spouse is not automatically an agent of the other spouse; agency relationship must be established expressly or impliedly). Also, Mr. Malloy has not sued an employee of an entity with which he had an arbitration agreement.

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[9] A second form of the Client Relationship Agreement refers to Decedent as "I" and provides that " 'I', 'my' and 'me' mean any person signing below." (R. p. 167: Intro. ¶) (emphasis added). That Client Relationship Agreement further provides: "I agree that all controversies that may arise between us shall be determined by arbitration..." (R. p. 168: ¶ 11). Since Mr. Malloy indisputably did not sign the Client Relationship Agreement, he is not bound by the terms of this version either.

In the Pritzker case cited by Merrill Lynch, the trustees of a corporate pension plan sued Merrill Lynch, as the brokerage firm handling the pension plan accounts, and a Merrill Lynch employee. The account opening documents were signed by the plaintiff trustees and contained an arbitration clause mandating arbitration of all controversies between the trustees and Merrill Lynch. The court held that agency principles required the trustees to arbitrate their dispute with the Merrill Lynch employee, despite no arbitration agreement specifically between the trustees and the Merrill Lynch employee, since the employee was an agent of Merrill Lynch. Pritzker v. Merrill Lynch, 7 F.3d 1110, 1122 (3d Cir. 1993).

At oral argument in the lower court Merrill Lynch asserted that agency theory applied because Mr. Malloy wrote in opposition to Defendant Mr. Thompson's Motion to Dismiss: "Since [Mr. Malloy] as beneficiary under Decedent's estate plan may derivatively bring an action on behalf of the trust, he is a real party in interest under Rule 17(a)." (R. p. 216). Mr. Malloy filed the above-stated memorandum in response to a motion to dismiss filed by co-defendant Mr. Thompson that asserted Mr. Malloy did not have standing and was not the real party in interest in Counts Five through Ten of the Complaint. (R. pp. 130-132: ¶¶ f, h, j, l, n, p).

Complaint Counts Five through Ten are causes of action against Mr. Thompson for fraud, conversion, *quantum meruit*, constructive trust, resulting trust and breach of fiduciary duty. (R. pp. 35-39: ¶¶ 70-95). Mr. Malloy's breach of fiduciary duty claim alleged violations by Mr. Thompson for failing to marshal estate assets, investigate himself and remove himself as personal representative of Decedent's estate. (R. pp. 37-39: ¶¶ 87-95). At issue in Mr. Thompson's motion was

whether Mr. Malloy in Counts Five through Ten had standing to bring the causes of action against Mr. Thompson as the appointed personal representative of Decedent's estate. Mr. Malloy posited that as a beneficiary of Decedent's proper estate, he may derivatively bring an action under Rule 17(a), SCRCP to remove Mr. Thompson as personal representative.

None of the claims in Counts Five through Ten are against Merrill Lynch. Most important for arbitration purposes, none of these causes of action involve Decedent's Client Relationship Agreements with Merrill Lynch. These counts against Mr. Thompson did not include any claims for breach of contractual duties. In seeking to remove Mr. Thompson, Mr. Malloy is not recognizing the validity of the 2002 Trust or bringing an action to enforce the terms of the 2002 Trust's account agreements with Merrill Lynch. Comparing Mr. Malloy's request to remove Mr. Thompson as personal representative to Mr. Malloy's tortious interference with inheritance claims against Merrill Lynch is comparing apples to oranges. Counts Five through Ten against Mr. Thompson do not involve a direct benefit to Mr. Malloy under the Client Relationship Agreements, nor are they intimately founded in and intertwined with the agreements. See In Re Wholesale Grocery Prod. Antitrust Litig., 707 F.3d at 924 (stating that proper focus in motion to compel arbitration is on the relationship between the claims of the signatory and non-signatory and the contract containing the arbitration clause, and not on the relationship between the parties).

Since Mr. Malloy has neither sued an agent of Merrill Lynch nor is he an agent of Decedent who allegedly signed an arbitration agreement with Merrill Lynch, Pritzker has no relevance to this matter. Because Mr. Malloy is not an agent of

Decedent regarding the Merrill Lynch accounts, Mr. Malloy is not bound to arbitrate with Merrill Lynch under agency theory.

C. Veil Piercing/Alter Ego Principles Do Not Apply To Compel Mr. Malloy To Arbitrate With Merrill Lynch.

Veil piercing/alter ego applies when non-signatory and signatory corporate parties have a relationship justifying piercing the corporate veil and requiring the counterparty to the arbitration agreement and the non-signatory corporate affiliate of the signatory corporate party to arbitrate. See Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d at 777. In the case *sub judice*, no affiliate of Merrill Lynch is involved as a party. In Pritzker, the court applied alter ego principle as a ground for requiring the plaintiffs to arbitrate with a non-signatory sister corporation of Merrill Lynch. Again, the facts and legal principles of that case have no relevance to this lawsuit.

D. Third Party Beneficiary Principles Do Not Bind Mr. Malloy To Decedent's Arbitration Agreement.

A third party beneficiary may be bound by a contract's arbitration terms where its claim "arises out of" the underlying contract to which it was an intended third party beneficiary. See DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001); see also McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) (unpublished) (holding that personal representative and attorney in fact who signed arbitration agreement on behalf of spouse was required to arbitrate wrongful death claim against defendant nursing home since the decedent was the intended third-party beneficiary of the arbitration agreement signed by the plaintiff).

In R.J. Griffin & Co., the Fourth Circuit applying South Carolina law analyzed a defendant contractor's third-party beneficiary claim to compel arbitration by reference to a deed containing an arbitration provision. In that case the defendant contractor had contracted with a developer/owner of real estate. The developer/owner subsequently conveyed real property to a successor homeowner's association by a deed which contained an arbitration clause. The court in denying a motion to compel the homeowner's association to arbitration explained:

Under South Carolina law,

> Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person. *Goode v. St. Stephens United Methodist Church,* 329 S.C. 433, 494 S.E.2d 827, 833 (1997). In order to determine whether the parties intended Griffin to be a third-party beneficiary, we must look within "the four corners of the deed." *Gardner v. Mozingo,* 293 S.C. 23, 358 S.E.2d 390, 392 (1987).

R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d at 164 (4th Cir. 2004).

The Fourth Circuit held there was nothing in the deed that indicates directly or indirectly that the plaintiff homeowner's association intended to arbitrate disputes with third parties such as the contractor. The court summarized: "We 'cannot [read words] into a contract which impart intent wholly unexpressed when the contract was executed.' " Id. at 165 (quoting Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767, 769 (1976) (alteration in original). Likewise in this case, it would require reading words

into the Client Relationship Agreements to find an intent to extend the arbitration provisions to Mr. Malloy.

In McCutcheon, the nursing home admission agreement signed by a husband for his wife's nursing home admission was explicitly for the benefit of the plaintiff's wife. The contract named the wife specifically and spelled out the duties of the nursing home to her. The court held the plaintiff's wife was therefore a third-party beneficiary. When the wife's estate sued the nursing home, her estate was bound as a third-party beneficiary to the arbitration clause in the admission agreement. McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575, at *3.

In contrast to McCutcheon, Mr. Malloy is not mentioned anywhere in the Client Relationship Agreements. There is also no mention of duties or rights of any persons or class of persons that would encompass Mr. Malloy. See Fleetwood Enter., Inc. v. Gaskamp, 280 F.3d 1069, 1075-76 (5th Cir. 2002) (denying arbitration on third-party beneficiary doctrine where the intent to make someone a third-party beneficiary was not clearly written or evidenced in the contract).

As noted above, the 2002 Trust and its accounts operated to divert Decedent's estate away from Mr. Malloy and to Mr. Thompson. Thus, Mr. Malloy was not a third-party beneficiary and cannot be bound by the Client Relationship Agreements.

IV. THE APPEAL OF MERRILL LYNCH IS FRIVIOLOUS OR TAKEN SOLELY FOR THE PURPOSES OF DELAY SUCH THAT THIS COURT SHOULD IMPOSE SANCTIONS ON MERRILL LYNCH OR ITS ATTORNEYS UNDER RULE 269, SCACR.

The trial court stated correctly in its order that there were absolutely no good grounds on which to base an order to compel arbitration in this case. Merrill Lynch is

obviously aware that Mr. Malloy was not a party to the Client Relationship Agreement between Decedent and Merrill Lynch. It is also patently obvious that there is no other basis for a claim of arbitration based on any derivative or alter ego theory as Mr. Malloy seeks to declare the whole trust and its contracts null and void. Because of the obvious fallacies in its arbitration arguments, Merrill Lynch had to resort to a newly created argument based on an insufficiency of the underlying tort claim in the Complaint. This new argument was raised for the first time on appeal despite no word of it ever being mentioned in the lower court. Mr. Malloy's counsel even pointed out to the court that Merrill Lynch was making no argument whatsoever about the tortious interference with inheritance claim to which counsel for Merrill Lynch did not disagree or make any argument when prompted by the court. There just has been no basis for this appeal.

Mr. Malloy submits that this appeal is frivolous and has done nothing but delay this action. Rule 269 states:

> Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may, upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 269, SCACR.

This case fits squarely within in Rule 269. Mr. Malloy therefore asks this Court to consider the imposition of such sanctions as this Court determines the circumstances of the case require to discourage like conduct in the future.

CONCLUSION

The issues in this appeal are not complicated and are very straight forward. The only complication to this appeal is the extent to which Merrill Lynch is stretching its claimed duty to arbitrate. The lower court's Order denying arbitration should be affirmed. Should the Court choose to rule on the sufficiency of Mr. Malloy's tortious interference with inheritance claims, it should recognize them as properly pled, with the case remanded for further proceedings in the Court of Common Pleas.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Dated: July 26, 2013
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Case Nos. 2010-CP-04-1845 and 2012-CP-04-1433
Appellate Case No. 2012-213385

JAMES ROBERT MALLOY, ...PLAINTIFF,

v.

SWAIN N. THOMPSON, JR., ...DEFENDANT.

In the Matter of: ESTATE OF ROBERT L. CHAMBLEE.

JAMES ROBERT MALLOY, ...RESPONDENT,

v.

SWAIN N. THOMPSON, JR., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., JOSEPH T. ARGO, AND GREENE AND COMPANY, L.L.P., ... DEFENDANTS.

Of whom MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. is the .....APPELLANT.

In the Matter of: ESTATE OF ROBERT L. CHAMBLEE,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **FINAL BRIEF OF RESPONDENT** and **CERTIFICATE OF COUNSEL** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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