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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-5426
App. Case. No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin.................................Appellant,

v.

Bridget D. Inman, Muriel C Kennedy, and Patricia Clarkin Smith...................... Respondents.

APPENDIX TO RECORD ON APPEAL

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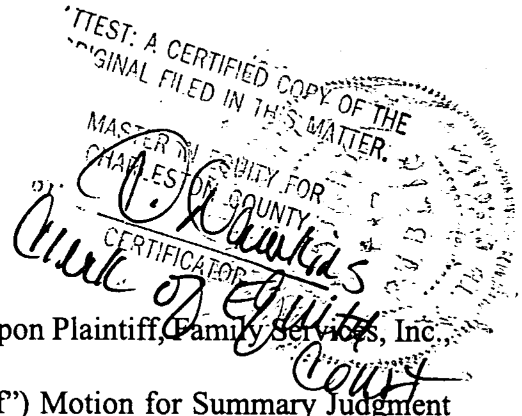
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO: 2017-CP-10-5427
	)	
Family Services, Inc., as Conservator For Muriel W. Clarkin,	)	
	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
Plaintiff,	)	
vs.	)	
Patricia Clarkin Smith and Wells Fargo Bank, NA.	)	
Defendant.	)	



This matter came before this Court on May 11, 2021, upon Plaintiff, Family Services, Inc., as Conservator for Muriel W. Clarkin's (hereinafter "Plaintiff") Motion for Summary Judgment schedule to be heard. Present at the hearing was Kelly Evans, case manager for Plaintiff, with Plaintiff's counsel David Conor Keys. The motion was scheduled to be heard at 12:00 p.m. The Defendant, Patricia Clarkin Smith (hereinafter "Defendant"), was properly noticed of the time and date of hearing and appeared pro se in the court room after this Court heard the motion and made a ruling on the motion from the bench. The Court began hearing the motion at or around 12:15 p.m. and concluded the hearing at or around 1:00 p.m. Thereafter, when Plaintiff and Plaintiff's counsel were packing up their belongings and this Court was beginning its next hearing, the Defendant appeared in the court room. This Court informed Defendant that the Court had already made a ruling in favor of Plaintiff as to the motion and that an order would follow.

PROCEDURAL HISTORY

Plaintiff filed the summons and complaint in this matter on October 20, 2017, asserting causes of action for Conversion, Unjust Enrichment, Money Had and Received, Promissory Estoppel, Quantum Meruit, Declaratory Judgment, Fraudulent Conveyance, and Quiet Title.

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Defendant through her then-counsel Alan D. Toporek filed an answer on November 28, 2017, which did not assert any defenses, claims or counterclaims. Defendant Wells Fargo Bank N.A., filed an answer on August 15, 2018. By consent order filed May 23, 2019, Karen DeJong was substituted as counsel for Defendant and Wells Fargo Bank, N.A. was dismissed from the matter without prejudice. The order further provided that the matter should be called for trial on or after July 31, 2019. Plaintiff moved to enforce a settlement agreement by motion filed July 10, 2019. By Order of the Honorable Roger M. Young, Sr., filed October 10, 2019, Karen DeJong was disqualified as counsel for Defendant and the Plaintiff's motion to enforce settlement was continued to give Defendant an opportunity to find new counsel. On November 1, 2019, Defendant filed a letter to the court informing the court that she would be proceeding pro se. The Motion to enforce settlement was scheduled to be reheard on December 16, 2019, but was continued upon the motion of Defendant filed November 27, 2019. The Motion was scheduled to be heard on January 27, 2020 but continued upon the motion of Defendant filed January 27, 2020. By order filed February 12, 2020, the matter was referred to the Master in Equity. On February 18, 2020 Defendant filed a motion to continue the motion to enforce settlement. On February 24, 2020, Plaintiff's counsel emailed this court attaching the Defendant to the email and requesting that Plaintiff's motion to enforce settlement be scheduled. On February 27, 2020, Defendant sent a response email to this Court's office requesting that Plaintiff's motion not be scheduled for medical reasons. Plaintiff's counsel responded to Defendant's email to the court and requested the motion be scheduled at or around March 31, 2020, giving Defendant an opportunity to address any medical concerns. The court scheduled the motion to be heard March 31, 2020. The motion was then continued as a result of the pandemic. The motion to enforce settlement was then rescheduled to be heard by this Court on June 25, 2020. The motion was heard remotely by this Court on June

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25, 2020, wherein the Defendant and Plaintiff both appeared. This Court filed a Form 4 Order on June 25, 2020, which stated this Court would take the matter under advisement and that Defendant had ten days to retain counsel, who would then have five days to file a written response to the motion on Defendant's behalf. Defendant retained M. Richardson Hyman, Jr. who filed a limited notice of appearance on behalf of Defendant for purposes of filing Defendant's written response to the motion. The Court filed an order denying Plaintiff's motion to enforce settlement on July 8, 2020. The Order further provided Mr. Hyman was relieved as counsel for Defendant and Defendant had 30 days to obtain new counsel and the matter shall proceed to trial within 90 days of the order. On October 6, 2020, Plaintiff filed this motion for summary judgment. On October 7, 2020, Plaintiff's counsel emailed this Court's office, attaching Defendant to the email and requested that the motion for summary judgment be scheduled. This Court's office responded to the email on the same date stating the matter could be scheduled to be heard remotely on November 5, 2020. On October 12, 2020, Defendant responded to the Court's email stating she was unavailable during the month of November to appear for a hearing, even a remote hearing due to medical issues. At the Defendant's request, this Court did not schedule the motion for summary judgment to be heard on November 5, 2020. On November 12, 2020, this Court emailed both parties that the motion for summary judgment would be scheduled to be heard on January 7, 2021. On November 12, 2020, Defendant responded to this Court's email requesting that, if the motion had to be scheduled at this time, that it be scheduled at the end of January. On December 24, 2020 Plaintiff filed a notice of hearing to Defendant and certificate of service for the notice of hearing. On December 28, 2020, Defendant emailed this Court and requested that the hearing on Plaintiff's motion for summary judgment be continued due to Defendant's medical issues. At the request of the Defendant, this Court continued the motion. On March 31, 2021, Plaintiff's counsel emailed

this Court's office attaching Defendant to the email and requested that the motion be rescheduled. On March 31,2021, Defendant responded to the email requesting the motion not be rescheduled at this time for medical reasons. On April 1, 2021, the Court responded to Plaintiff and Defendant's emails stating the motion for summary judgment would be scheduled to be heard on May 11, 2021 at 12:00 p.m. On April 16, 2021, Plaintiff's counsel emailed Defendant attaching this Court's office to the email as well and attached a notice of hearing to Defendant. On April 16, 2021 Plaintiff filed a notice of hearing to Defendant along with a certificate of service which stated the notice was provided to Defendant by first class mail and electronic mail. On Friday May 7, 2021 at 5:07 p.m., Defendant emailed this Court's office requesting the motion hearing be continued for medical reasons. On Monday 10, 2021, this Court responded to Defendant's email stating that the hearing would proceed forward on May 11, 2021, and that Defendant was welcome to appear either remotely or in person. On May 10, 2021, this Court's office spoke with the Defendant by telephone and to accommodate Defendant, switched the scheduled format of the hearing from remote to in person. On May 11, 2021, prior to the hearing scheduled to be heard at 12:00 p.m., this Court's office again spoke with the Defendant by telephone. On May 11, 2021, this Court was running slightly behind schedule in its hearing schedule and therefore did not begin to hear this matter until at or around 12:15 p.m. At 12:15 this Court began hearing Plaintiff's motion for summary judgment. Plaintiff and Plaintiff's counsel were present; however, Defendant did not timely appear either remotely or in person. Upon hearing Plaintiff's motion, this Court issued an order from the bench granting the motion for summary judgment and requested that Plaintiff's counsel draft a proposed order and submit it to the Court. The motion hearing was concluded and thereafter Defendant appeared for the first time in the court room. This Court stated to Defendant at that time the Court had already heard the motion, the hearing had concluded, this Court had

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granted Plaintiff's motion for summary judgment and that Plaintiff's counsel would be submitting a proposed order to the Court for review. This Court then instructed Plaintiff's counsel who was still present in the Court room to provide the Defendant with a copy of the proposed order at the same time Plaintiff provided it to the Court. This Court watched the Defendant, Plaintiff, and Plaintiff's counsel all walk out of the court room together while speaking with one another. On June 10, 2021, Plaintiff filed a supplemental affidavit of Kelley Evan's in support of the motion for summary judgement. In the Affidavit, Ms. Evans, as case manager for Plaintiff, stated that immediately upon leaving the court room she, Plaintiff's counsel and the Defendant sat down in the court conference room located just outside the court room. Ms. Evans testifies Plaintiff's counsel explained to the Defendant that this Court had granted Plaintiff's motion, that Plaintiff's counsel would draft a proposed order and email it to the Court and at that time he would also email the proposed order to Defendant and if she wished to comment on the proposed order she should provide a written response of her comments to this Court. In the Affidavit Ms. Evans further testifies that Defendant commented she was on the Cooper River Bridge eight minutes prior to 12:00 p.m., driving to the courthouse and then stated: "but you can't be late for the judge." Ms. Evans further testified that the Defendant made multiple specific comments regarding facts of the case while speaking with her and Plaintiff's counsel in the conference room. This Court finds that Ms. Evans's affidavit testimony provides further supporting evidence that the Defendant was aware that the hearing was scheduled for 12:00 p.m. and further understood at that time the importance of the hearing and the importance of timely appearing at the hearing.

FACTUAL HISTORY

Plaintiff was appointed conservator for the assets, affairs and estate of Muriel W. Clarkin by a temporary order dated January 16, 2015, and a permanent order dated March 27, 2015, in case

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number 2014-GC-10-0209, by the Honorable Tamara C. Curry, Charleston Count Probate Judge (hereinafter "Probate Matter"). Muriel W. Clarkin (hereinafter "Clarkin") is an eighty-eight year old widow who has four living children, and Clarkin requires finances and funds to provide for Clarkin's necessary assisted living care. Defendant Patricia Clarkin Smith (hereinafter "Defendant") is a daughter of Clarkin. On December 22, 2014, in the Probate Matter the Honorable Tamara C. Curry by Ex Parte Order made a preliminary finding of fact that Clarkin's physician had certified in writing that Clarkin is incapacitated and unable to make decisions for herself and in her best interest. Thereafter as a matter of law Judge Curry ordered Clarkin is adjudged to be an incapacitated person, as defined by South Carolina Probate Code §62-5-101(1). The Temporary Order was subsequently reconfirmed by orders dated 1/16/15 and 3/27/15. Defendant contested the Petition.

FINDINGS OF FACT

1. I find that Defendant was properly noticed of this motion hearing by both first-class mail and electronic mail.

2. I find that Defendant had actual knowledge that this hearing was scheduled for May 11, 2021, at 12:00 p.m.

4. I find that Defendant over the course of this matter has been represented by three different legal counsel and had adequate notice of this hearing to retain a fourth counsel to represent her in this matter at the hearing on the motion for summary judgment, but did not do so.

5. I find that Defendant has established a pattern and practice in this matter of seeking to postpone or delay hearings.

6. I find that Defendant had the capability to appear and defend the motion for summary judgment but did not do so.

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7. I find in or around October or November of 2014, prior to Defendant's sister Muriel Kennedy (hereinafter "Kennedy") filing a probate petition to appoint a conservator for Clarkin, Kennedy contacted Defendant regarding Clarkin's reduced mental capacity and requested that Defendant sign paperwork consenting to a finding of incapacity of Clarkin. Plaintiff presented evidence to this Court that Defendant testified at her Deposition, that in October or November of 2014, her sister Muriel Kennedy called Defendant and said:

> A. "You know Mama's memory is getting bad. And [Defendant] said: Yeah. Well she's in her 80's. Muriel Said: I want you to come –I'm paraphrasing. I'm definitely paraphrasing. Muriel called me wanting me to sign paperwork.
> Q. For what?
> A. Saying that Mama could not take care of herself.
> Q When was this?
> A. It was – it was October, November. Because that's when my warning lights went off. And I said. No, hell no" (Depo Excerpts pg. 81 ln 20 – pg 82 ln 10)

8. I find that on or about November 1, 2012, Defendant received $6,000.00 (hereinafter "11/1/12 $6,000") from Clarkin. I find Defendant has acknowledged she has an obligation to repay the 11/1/12 $6,000 but has not repaid said funds. Plaintiff presented this court evidence in support of this finding as evidenced by Exhibits A, B, and C attached to Plaintiff's motion.

9. I find that on or about August 21, 2013, Defendant obtained $1,500.00 (hereinafter "8/21/13 $1,500") from Clarkin which she agreed to repay Clarkin and Defendant has acknowledged she has an obligation to repay Clarkin for said funds but has not done so as evidenced by Defendant's admissions in her answer to Plaintiff's summons and complaint filed in this matter and further supported by evidence Plaintiff presented to this Court in Exhibit B attached to Plaintiff's motion for summary judgment.

10. I find that on July 30, 2013, Clarkin through her counsel attorney Gibson recorded a deed in RMC office of Charleston County in Book 0351 at Page 348 wherein Clarkin conveyed

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a half interest in real property Clarkin owned at 602 Atlantic St., Mt. Pleasant, SC 29464 (hereinafter "the Property") to Defendant as Joint Tenants with rights of survivorship.

11. I find that beginning in August of 2013 Defendant agreed to pay Clarkin monthly rent in the amount of $500 a month in exchange for residing the Property. I find Defendant made monthly rent payments to Clarkin in 2013 and 2014, but Defendant ceased making monthly rent payments to Clarkin once Plaintiff was appointed conservator for Clarkin in January of 2015. Plaintiff presented this Court evidence of this in the form of certified copies of probate court records for the Probate Matter including petitions for conservatorship and appointment of a temporary guardian filed in the Probate Matter, and further evidenced by Exhibits A, B, and E attached to Plaintiff's motion for summary judgment.

12. I find that Clarkin through her counsel attorney Gibson recorded a power of attorney in the Charleston County Register of Deeds in Book 0319 Pg 644 on March 27, 2013, which named Defendant's sister Kennedy as the attorney in fact and Defendant as successor attorney in fact in the event Kennedy was deceased or unable to serve.

13. I find that on November 12, 2014, Dr. Jacob Mintzer of the Alzheimer's Research Center of Roper St. Francis Hospital found that Clarkin lacked the mental capacity to give informed consent to for a standard clinical assessment as evidence by certified records of the Charleston County Probate Court for the Probate Matter which Plaintiff presented to this Court.

14. I find that on November 18, 2014, Defendant recorded a deed in the RMC office for Charleston County in Book 0441, Page 484 (hereinafter "November 18th Deed"), which is alleged to have been executed by Clarkin and which conveyed to Defendant, Clarkin's remaining half interest in the in the Property originally owned wholly by Clarkin. I further find that Defendant did not pay Clarkin any consideration for the November 18th Deed.

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15. I find based upon testimony of the Defendant in her deposition the reason Defendant caused the November 18th Deed to be drafted, executed and recorded was that she was concerned that Clarkin may be declared incapacitated and in which case Clarkin would not be able to sign a mortgage for the Property and therefore Defendant would not be able to get a loan in Defendant's own name secured by the Property. However, if Defendant owned the Property in whole, she would not require her mother's signature to undertake such a transaction.

16. I find that on November 18, 2014, Defendant caused Clarkin to withdraw $6,000.00 (hereinafter "11/18/14 $6,000") from Clarkin's account and provided it to Defendant. I further find Defendant has acknowledged that she has an obligation to repay Clarkin said funds but has not done so as evidenced by Exhibits A, C and G attached to Plaintiff's Motion for Summary Judgment.

17. I find that a medical record made by Dr. Michael Mikola of Roper St. Francis Hospital dated November 26, 2014, evidenced Clarkin was diagnosed with Alzheimer's dementia and that after Dr. Mikola examined Clarkin he was of the opinion: "I don't believe she should be making financial or other decisions for herself. I believe that underlying memory disorder will render her incompetent to make such decisions. . ." I make this finding based upon the evidence of certified records of the Charleston County Probate Court for the Probate Matter which Plaintiff presented to this Court.

18. I find that a certified record of the Charleston County Probate Court for the Probate Matter, in the form of the letter from Dr. Mikola dated January 7, 2015, further confirms that Clarkin had been diagnosed with Alzheimer's disease at the time and the doctor was of the opinion that a guardian and conservator should be placed over Clarkin.

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19: I find that on December 8, 2014 Defendant caused a subsequent power of attorney to be executed by Clarkin which named Defendant along with her sister Kennedy as dual attorneys in fact and Defendant then recorded the subsequent power of attorney in the Charleston RMC Office in Book 0445 at Pate 144.[1]

20. I find that by Temporary Order of the Charleston County Probate Court filed December 22, 2014, in the Probate Matter the Court declared Clarkin incapacitated.

21. In find that on December 23, 2014, Defendant, in the presence of Clarkin, was informed by law enforcement that the Probate Court had declared Clarkin incapacitated. I find that thereafter Defendant withdrew $10,000.00 (hereinafter "12/23/14 $10,000") from an account titled in Clarkin's name alone and Defendant subsequently used said funds to retain counsel to represent Defendant, not Clarkin. I further find that Defendant has acknowledged an obligation to repay Clarkin and/or Plaintiff said funds but has not done so. I make this finding based upon Defendant's deposition testimony as well as the evidence of Exhibits A and G attached to Plaintiff's Motion for Summary Judgment (hereinafter collectively the 11/1/12 $6,000, 8/21/13 $1,500, 11/18/14 $6,000, and the 12/23/14 $10,000 are referred to as the "Dispersed Funds").

22. I find that Defendant is a party to the Probate Matter and first made an appearance in the Probate Matter, through counsel, in January of 2015.

23. I take judicial notice of the findings of fact of the Honorable Tamara C. Curry in the Order dated March 27, 2015, in the Probate Matter wherein Judge Curry made the following finds of fact and conclusions of law:

> "FINDINGS OF FACT
> 2. Mrs. Clarkin was evaluated pursuant to Court Order by designated examiners Leonard W. Mulbry, Jr. MD, and Debra A. Dinolfo, M.A., LPC.

[1] The Charleston County Probate Court by order in the Probate Matter subsequently declared said power of attorney void ab initio.

3. Dr. Mulbry testified he diagnosed Mrs. Clarkin with Major Depressive Disorder and Neurocognitive Disorder, Mild.
4. Dr. Mulbry also testified these diagnoses render Mrs. Clarkin susceptible to undue influence.
5. Dr. Mulbry further testified that Mrs. Clarkin had a very difficult time providing information about her assets and liabilities. He testified that she had basically lost touch with her finances, with who was paying her bills and where her money was going.
6. Ms. Dinolfo testified that based on the evidence at the hearing she was of the opinion Mrs. Clarkin was unable to manage her finances.
7. Both examiners opined that Mrs. Clarkin lacked sufficient understanding or capacity to make responsible decisions concerning her finances and assets. The examiners recommended that a permanent Conservator be appointed for Mrs. Clarkin. . .

CONCLUSIONS OF LAW

1. The Court finds that there is clear and convincing evidence that Muriel W. Clarkin is incapacitated to such an extent that she lacks sufficient understanding or capacity to make or communicate responsible decisions regarding her property, finances and her person."

24. I find that Plaintiff has presented sufficient evidence in the record in this matter to find that Clarkin lacked sufficient mental capacity on November 18, 2014 to execute the November 18th Deed.

25. I find that on March 31, 2016, Defendant executed a deed to the Property to Patricia Clarkin Smith, Trustee of the Patricia Clarkin Trust Dated March 31, 2016 (hereinafter "Trust Deed"), which was Recorded on April 6, 2016 in Book 0545 at Page 374 (Exhibit I to Plaintiff's motion).

26. I find that Defendant as settlor and trustee of the Patricia Clarkin Trust dated March 31, 2016, took title to the Property through the Trust Deed without paying consideration for the Property, with knowledge the Property was encumbered by a mortgage recorded in the RMC office of Charleston County in Book 664 at Page 769, and with Defendant's further knowledge that Plaintiff claimed Defendant owed Plaintiff the amounts claimed owed as set forth in Plaintiff's Motion for Summary Judgement and the exhibit's attached thereto.

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27: I find that Defendant is obligated to repay Plaintiff as conservator for Clarkin the Dispersed Funds.

LEGAL ANALYSIS

STANDARD

"Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E. 2d 432 (2003).

I. DISBURSED FUNDS

A. Money Had and Received

"An action for money had and received exists where a defendant has money belonging to the plaintiff which in equity should be repaid to the plaintiff. In order to recover on a count for money had and received . . . the plaintiff must show he has equity and conscience on his side, and that he could recover in a court of equity. . . Once the requirements of an action for money had and received are proven, the equitable principles of unjust enrichment and restitution provide a remedy. An action for money had and received is based upon a quasi-contract or a contract implied in law. . . In addition, the court adopted the Scudder May test as the sole test for a quantum meruit/quasi-contract/implied by law claim. This test mandates: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Okatie River v. Southeastern Site Prep,* 353, S.C. 327, 334-35, 577 S.E.2d 468 (2003).

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"Because the applicable statute and case law do not exclude the award of prejudgment interest for a claim under the theory of quantum meruit, it appears that our appellate courts have implicitly recognized that such an award is permissible." *QHG of Lake City, Inc. v. McCutcheon,* 360 S.C. 196, 206, 600 S.E.2d 105 (2004).

In this case Plaintiff has presented sufficient evidence to establish that Defendant received all of the Dispersed Funds, that Defendant realized the benefit of receiving the Dispersed Funds and retention of the Dispersed Funds by Defendant without repaying Plaintiff as conservator for Clarkin would be inequitable. I further find that Plaintiff is entitled to award of prejudgment interest upon the dispersed funds from January of 2015 to the date of this Order at the current legal rate of interest of 7.25%. I find that a genuine issue of material fact does not exist with regard to the Dispersed Funds such that I find as a matter of law that Plaintiff is entitled to a judgment against Defendant in the amount of $23,500.00 for the Dispersed Funds, plus an award of prejudgment interest on that amount in the amount of $9,228.65 for a total judgment due with regard to the Dispersed Funds in the amount of $32,728.65.

B. Unjust Enrichment

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Dema v. Tenet Physician Services-Hilton,* 383 S.C. 115, 123, 678 S.E.2d 430 (2009). "In South Carolina pre-judgment interest may also be awarded in equity cases, conversion cases, and property cases." Vaugh Dev. v. Westvaco Development, Inc., 372 S.C. 576, 579, 642, S.E. 2d 757 (Ct. App. 2007)

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In this case I further find the Plaintiff has present sufficient evidence to establish in a court of equity an award of judgment against Defendant with regard to the Dispersed Funds under Plaintiff's cause of action for unjust enrichment. I further find that Plaintiff would be entitled to an award of prejudgment interest on its cause of action for unjust enrichment. However, this finding does not change or increase the amount of the final judgment awarded with regard to the Dispersed Funds which shall remain at the total amount of $32,728.65, including prejudgment interest as set forth above.

Finally, because the Plaintiff has established that it is entitled to an award of judgment for the dispersed funds, including an award of prejudgment interest on the judgment under its causes of action for money had and received and unjust enrichment this Court does not find the need to make a determination with regard to the dispersed funds as to Plaintiff's remaining asserted causes of action for conversion or quantum meruit.

II. DEFENDANT'S MONTHLY RENT MONEY OBLIGATION

A. Promissory Estoppel

"A contract and promissory estoppel are two separate and distinct legal theories. They are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other. Our courts recognize a remedy in equity if the claimant can prove: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. The applicability of the doctrine depends on whether the refusal to apply it would be virtually to sanction the perpetration of a fraud or would result in other injustice. Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise,

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its subsequent effect on the promisee . . ." *Satcher v. Satcher*, 351 S.C. 477, 483-84, 570 S.E.2d 535 (Ct. App. 2002). "In South Carolina pre-judgment interest may also be awarded in equity cases, conversion cases, and property cases." Vaugh Dev. v. Westvaco Development, Inc., 372 S.C. 576, 579, 642, S.E. 2d 757 (Ct. App. 2007)

In this case Plaintiff has presented sufficient evidence to establish in a court of equity that Defendant promised to pay Clarkin monthly rent payments of $500 a month in exchange for Defendant residing in the Property. Plaintiff presented evidence that Defendant made monthly rent payment to Clarkin in 2013 and 2014 but ceased making monthly rent payments once Plaintiff began acting as conservator for Clarkin in January of 2015. Plaintiff presented credible evidence to this Court that the current value of the Property is over $500,000 and that the current rental value of the property is over $2,500.00 a month. Plaintiff presented evidence that Clarkin reasonably relied upon Defendant paying Clarkin monthly rent for residing in the Property and that Clarkin's reliance on Defendant's promise to pay rent was reasonable, expected and foreseeable by Defendant. Further Plaintiff has presented sufficient evidence that Plaintiff standing in Clarkin's shoes as conservator was damaged by Defendant failing to continue to make the monthly rent payments she promised to pay. Therefore, this Court finds in equity that Plaintiff is entitled to a judgment for monthly back rent unpaid by Defendant from the January of 2015 when Plaintiff began serving as conservator through the month this Order is filed in May of 2021. This Court calculates said amount of back rent due at $500 a month for 77 months to equal $38,500.00. This Court further finds Plaintiff is entitled to an award of prejudgment interest upon the back rent due from January of 2015 to May of 2021 at the current legal rate of interest of 7.25%. This prejudgment interest is due and awarded upon each back rental payment from the month it became due through May of 2021. The total amount of prejudgment interest awarded on

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the back rent due is $8,255.88, with a total amount due for judgment with regard to the back rent being $46,755.88.

B. Unjust Enrichment

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Dema v. Tenet Physician Services-Hilton,* 383 S.C. 115, 123, 678 S.E.2d 430 (2009). "In South Carolina pre-judgment interest may also be awarded in equity cases, conversion cases, and property cases." *Vaugh Dev. v. Westvaco Development, Inc.*, 372 S.C. 576, 579, 642, S.E. 2d 757 (Ct. App. 2007)

In this case I further find the Plaintiff has presented sufficient evidence to establish in a court of equity an award of judgment against Defendant with regard to the back rent under Plaintiff's cause of action for unjust enrichment. I further find that Plaintiff would be entitled to an award of prejudgment interest on its cause of action for unjust enrichment. However, this finding does not change or increase the amount of the final judgment awarded with regard to the back rent which shall remain at the total amount of $46,755.88, including prejudgment interest as set forth above.

Finally, because the Plaintiff has established that it is entitled to an award of judgment for the back rent due, including an award of prejudgment interest on judgment under its causes of action for promissory estoppel and unjust enrichment this Court does not find the need to make a determination with regard to the back rent due as to Plaintiff's remaining asserted cause of action for quantum meruit.

III. 11/18/14 DEED

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A. Declaratory Injunctive Relief (Undue Influence)

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781 (1991). "An action to set aside a deed on the basis of undue influence is an action in equity." *Skipper v. Perrone*, 382 S.C. 53, 57, 674 S.E.2d 510 (Ct. App. 2009). "Generally, the party attacking a deed has the burden of proof. However, the Supreme Court held an inference of undue influence will arise upon a showing of great mental weakness of the grantor and gross inadequacy of consideration. The Court explained: It is not necessary, in order to secure the aid of equity, to prove that the deceased (grantor) was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that from her sickness and infirmities she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition of undue influence will be inferred. The Court recognized this inference applies even absent a confidential relationship." *Id.* at 57-58 (citations omitted). "Even absent a confidential relationship, this court has several times approved the principle that imposition or undue influence upon the grantor will be inferred from proof of great mental weakness, not amounting to incapacity to execute a valid deed, accompanied by gross inadequacy of consideration." *Brooks v. Kay*, 339 S.C. 479, 490, 530 S.E.2d 120 (2000) (citations omitted). "A confidential relationship arises when the grantor has placed his trust and confidence in the grantee, and the grantee has exerted dominion over the grantor. The essence of the relationship is the trust and confidence. Id. Mere friendship between the parties is not sufficient. The relationship must be one implying confidence. Some evidence is required that the grantor actually reposed trust in the grantee in the handling of her affairs." *Id.* at 488. (citations omitted). "Once a contestant has proven a confidential relationship

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existed at the time of conveyance, the burden shifts to the grantee to prove that the contestant's conveyance was not the product of undue influence." *Dixon v. Dixon*, 362 S.C. 388, 398, 608, S.E.2d 849 (2005). In *Brooks* the court voided a deed on the ground of undue influence stating: "Even if Brooks was mentally competent enough to execute a deed there is no doubt that she was rapidly approaching senility, if not already suffering from the Alzheimer's disease responsible for her commitment to the State Hospital only one year after the transaction in question." *Brooks* at 490.

In this case this Court finds Clarkin lacked capacity at the time of execution to execute the 11/18/14 Deed. Plaintiff has presented this Court sufficient evidence in the form of certified probate court records from the Probate Matter that Clarkin was incapacitated at the time of the execution of the 11/18/14 Deed. Plaintiff presented evidence that on November 12, 2014, just days prior to the execution of the Deed, Dr. Jacob Mintzer of Alzheimer's Research Center of Roper St. Francis Hospital found that Clarkin lacked the mental capacity to give informed consent to for a standard clinical assessment. Further on November 26, 2014, Dr. Michael Mikola of Roper St. Francis Hospital in a report, notes Clarkin was diagnosed with Alzheimer's dementia and that Dr. Mikola was of the opinion he did not believe Clarkin should be making financial or other decisions for herself and that her underlying memory disorder will render her incompetent to make such decisions. Thereafter, just a month later, by Ex Parte Order dated December 22, 2014, the Probate Court declared Clarkin an incapacitated person and appointed a temporary guardian and conservator for Clarkin. Then, after two court appointed medical examiners examined Clarkin, the Probate Court on March 19, 2015, held a formal hearing on the subject and the Probate Court by Order declared Clarkin permanently incapacitated and appointed Plaintiff permanent conservator for Clarkin. In its order the Probate Court noted that one of the examining doctors testified that he

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believed Clarkin's diagnosis rendered her susceptible to undue influence. Therefore, the 11/18/14 Deed is void ab initio.

However, even if this Court did not make a finding that Clarkin lacked the capacity to execute the 11/18/14 Deed, this Court would still find the Deed should be declared void based upon a lack of consideration paid by the Defendant companied with undue influence exerted by Defendant over her mother Clarkin.

This Court finds as a matter of law that a confidential relationship existed between Defendant and Clarkin at the time Clarkin executed the 11/18/14 Deed. Defendant conceded in her Complaint that Clarkin imposed a special confidence in Defendant. Defendant testified that her mother placed great trust and confidence in her (Exhibit "A" pg. 83, ln 24 – pg. 84, ln 4). Clarkin also imparted fiduciary responsibilities onto Defendant. On March 18, 2013, Clarkin executed a durable power of attorney which was record on March 27, 2013 in the RMC Office for Charleston County in BK 0319 at PG 644 (hereinafter "First POA"). The First POA named Defendant as the alternate successor attorney in fact. On December 8, 2014, Clarkin executed a second durable power of attorney, which named Defendant as a dual attorney in fact with her sister Muriel Kennedy. Therefore, there is sufficient evidence to establish the existence of a confidential relationship between Defendant and Clarkin.

This matter is analogous to *Brooks*. Here, the Court finds Defendant paid no consideration for the 11/18/14 Deed conveying Clarkin's remaining interest in the Property to Defendant. Further Plaintiff has presented this court sufficient evidence in the form of certified probate court records from the Probate Matter that Clarkin was suffering from a great mental weakness at the time of the execution of the 11/18/14 Deed. In *Brooks* the court voided the deed based on undue influence stating "Even if Brooks was mentally competent enough to execute a deed there is no doubt that

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she was rapidly approaching senility, if not already suffering from the Alzheimer's disease responsible for her commitment to the State Hospital only one year after the transaction in question." *Brooks* at 490. Here, due to her Alzheimer's diagnosis Clarkin was declared incapacitated contemporaneous with the transaction in question, rather than a year later, as was the case in *Brooks*. Therefore this Court would further declare the 11/14/18 Deed void ab initio even if this Court had not found that Clarkin lacked capacity to execute the 11/14/18 Deed because the Defendant paid no consideration for the Deed and exerted undue influence over her mother Clarkin who suffered a great mental weakness at the time of execution of the 11/18/14 Deed.

Plaintiff also requests an award of costs pursuant to S.C. Code §15-53-100. Plaintiff's counsel has presented this Court with an affidavit stating that Plaintiff has incurred legal costs in this matter in the amount of $1,664.60. I find Plaintiff is entitled to a judgment against Defendant for costs incurred in the amount of $1,664.60.

B. Fraudulent Conveyance

"The Statute of Elizabeth provides: Every gift, grant, alienation, bargain, transfer, and conveyance of lands ... for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken ... to be clearly and utterly void. In interpreting this statute, this Court has held conveyances shall be set aside under two conditions: First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration." *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). "Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides

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of the transaction by clear and convincing testimony. . . Fraudulent intent in such instances can usually be shown only by a consideration of the attendant facts and circumstances, a resort to which must usually be had in order to distinguish between transactions which are bona fide, and those which are not. The Courts frequently must resort to evidence or circumstances which are not properly explained, when such circumstances lead to the belief that a fraudulent intent was present. . . Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as "badges of fraud." The badges tend to excite suspicions as to the bona fides of a challenged conveyance. Unexplained, they may warrant an inference of fraud. Whether the inference is warranted depends in large measure on whether a satisfactory explanation is presented. The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property. Although it has been said that a single badge of fraud may stamp a transaction as fraudulent, it is more generally held that while one circumstance recognized as a badge of fraud may not alone prove fraud, where there is a concurrence of several such badges of fraud an inference of fraud may be warranted." *Coleman v. Daniel*, 261 S.C. 198, 208-210, 199 S.E.2d 74 (1973).

In this case the November 18th Deed and the Trust Deed constitute conveyance of lands for the purpose hindering others of their just and lawful actions. Both conveyances were without consideration, and the circumstances of the conveyances evidence multiple badges of fraud

including lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, and the transfer of the Clarkin's entire interest in the Property when Defendant already possessed a half interest with rights of survivorship in the Property.

Here, Defendant already possessed a fifty percent interest in the Property with rights of survivorship. Defendant testified that that her sister Kennedy came to her a month or two prior to the execution of the November 18th Deed and asked her to sign papers declaring Clarkin incompetent. Defendant testified that she did not know what Kennedy was up to, but she did not think it was good. Defendant testified that the reason she caused the November 18th Deed to be executed and recorded was because if her mother Clarkin was declared incompetent then Clarkin would not be able to sign a mortgage on the property securing a loan for the benefit of Defendant, but if Defendant was the sole titleholder to the Property she would not need her mother's signature. Defendant testified that she knew at the time that if full and complete title to the Property was transferred to her name, it could cause Wells Fargo to call the note secured by the mortgage on the property immediately due and owing (Exhibit "A" pg. 139, ln. 5 – 142, ln. 12). The November 18th Deed was not drafted or recorded by Attorney Mac Gibson who had historically and only a year prior had been Clarkin's usual attorney for drafting deeds, wills, and powers of attorney. Thereafter on December 8, 2014, Defendant caused the Second POA to be executed and recorded giving her power of attorney over her mother Clarkin and again not utilizing the services of Mac Gibson. These actions were undertaken in secrecy and concealment and without the knowledge of her sister Kennedy who had durable power of attorney over Clarkin at the time. These actions were taken a month or less before Kennedy filed her petition with the probate court to declare Clarkin incompetent and to appoint a conservator, and in her petition Kennedy referenced both the

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November 18th Deed and the Second POA as a basis for her petition. Thereafter, Clarkin was declared incompetent. Plaintiff was appointed conservator and began communicating with Defendant about repaying Clarkin for various improper transactions (See Exhibits C, E, and H to Plaintiff's Motion as well as the affidavit of Kelley Evans filed August 13, 2019 in this matter). Defendant contested the Probate Matter and as the very litigious and contested Probate Matter continued Defendant learned through filings, hearing, and mediations that Plaintiff did not believe the November 18th conveyance was a proper and valid conveyance. Thereafter on March 31, 2016, a year before this action, Defendant again conveyed the Property without consideration to a trust bearing her name and for which she is trustee with full knowledge that she owed Clarkin both funds and a half interest in the Property. I find Defendant as Settlor and Trustee of the Patricia Clarkin Trust dated March 31, 2016, did not take title to the Property as a bona fide purchaser for value, because Defendant as trustee paid no consideration for the transfer and took title to the Property through the Trust Deed with knowledge the property was encumbered by a mortgage and that Plaintiff claimed defendant was in debt to Plaintiff and the November 18th Deed was not a valid conveyance. S.C. Code Ann. § 62-7-106 states that principles of equity supplement the law of trusts in this state. S.C. Code Ann. § 62-7-103(14) defines a "Settlor" of a trust as a person who contributes property to a trust. Here Defendant contributed the Property to the trust which bears her own name, for which she is the trustee, and which the trust creation date and the date Defendant transferred the Property to the trust are the same. S.C. Code Ann. § 62-7-505 provides "during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

This Court finds as a matter of law that Plaintiff should prevail on its claim for fraudulent conveyance and both the November 18th Deed and the Trust Deed are void ab initio.

Quiet Title

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"An action to remove a cloud on and quiet title to land is one in equity." *Bryan v. Freeman*, 253 S.C. 50, 52, 168 S.E.2d 793 (1969) "In an action to quiet title, the plaintiff must recover on the strength of his own title, not on the alleged weakness of the defendant's title." *Hoogenboom v. City of Beaufort*, 433 S.E.2d 875, 880 (Ct. App. 1992)

In this case Clarkin obtained sole title to the Property by deed dated and recorded on January 5, 1998 and recorded in the RMC office for Charleston County in Book J-295 at Page 592. Thereafter Clarkin deeded a half interest in the Property to Defendant with Clarkin and Defendant possessing rights of survivorship as evidenced by the deed recorded in the RMC Office for Charleston County August 7, 2013 in Book 0351 at Page 348. Thereafter Defendant caused the November 18th Deed and the Trust Deed to be recorded both of which deeds this Court by this Order has now declared to be avoid ab initio. Therefore, this Court finds that fee simple title to the Property should be quieted such that clear title to 602 Atlantic St., Mt. Pleasant, SC 29464, bearing TMS# 532-06-00-129 as is more fully described in that certain deed executed by Muriel Walsh Clarkin on July 30, 2013 and recorded in the RMC Office for Charleston County August 7, 2013 in Book 0351 at Page 348 is once again vested in Muriel Walsh Clarkin and Patricia Clarkin Smith as joint tenants with rights of survivorship, not as tenants in common, their Heirs, Successors, and Assigns forever.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff, Family Services, Inc., as Conservator for Muriel Walsh Clarkin is awarded a judgement against the Defendant with regard to the Disputed Funds in the amount of $32,728.65.

2. Further, Plaintiff, Family Services, Inc., as Conservator for Muriel Walsh Clarkin is awarded a judgement against the Defendant with regard to the unpaid back rent in the amount of $46,755.88.

3. Further, Plaintiff, Family Services, Inc., as Conservator for Muriel Walsh Clarkin is awarded a judgement against the Defendant for costs pursuant to S.C. Code §15-53-100 in the amount of $1,664.60.

4. Therefore Plaintiff, Family Services, Inc., as Conservator for Muriel Walsh Clarkin is awarded a judgement against the Defendant Patricia Clarkin Smith, for a total amount of liquidated damages in the amount of $81,149.13

5. Further it is ordered that certain deed dated November 17, 2014, for the real property located at 602 Atlantic St., Mt. Pleasant SC, 29464, whereby Muriel Walsh Clarkin granted Patricia Clarkin Smith all of Mrs. Clarkin's remaining interest in the Property as evidenced by the recording of said deed on November 18, 2014, in the Charleston County Register of Deeds Office in Book 0441 at Page 484, is hereby declared void ab initio.

6. Further it is ordered that certain deed dated March 31, 2016, for the real property located at 602 Atlantic St., Mt. Pleasant SC, 29464, whereby Patricia Clarkin Smith granted Patricia Clarkin Smith, Trustee of the Patricia Clarkin Trust Dated March 31, 2016 all of Ms. Smith's interest in the Property as evidenced by the recording of said deed on April 6, 2016, in the Charleston County Register of Deeds Office in Book 0545 at Page 374, is hereby declared void ab initio.

7. Finally, fee simple title to the Property is quieted such that clear title to 602 Atlantic St., Mt. Pleasant, SC 29464, bearing TMS# 532-06-00-129 as is more fully described in that certain deed executed by Muriel Walsh Clarkin on July 30, 2013 and recorded in the RMC Office for

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Charleston County August 7, 2013 in Book 0351 at Page 348 is once again vested in Muriel Walsh Clarkin and Patricia Clarkin Smith as joint tenants with rights of survivorship, not as tenants in common, their Heirs, Successors, and Assigns forever.

____
The Honorable Mikell R. Scarborough
Master in Equity for Charleston County

June_____, 2021
Charleston, South Carolina

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Charleston Common Pleas

Case Caption:	Family Services Inc , plaintiff, et al VS Patricia Clarkin Smith , defendant, et al
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Type:	Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

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RECORDER'S PAGE

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-5426
App. Case. No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin……………………………Appellant,

v.

Bridget D. Inman, Muriel C Kennedy, and Patricia Clarkin Smith…………………. Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix to the Record on Appeal contains all materials proposed to be included by the parties in their designations of matter to be included and not any other material.

March 10, 2023.

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