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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,

And

Bruce A. Berlinsky, Intervenor.

FINAL REPLY BRIEF OF APPELLANT
TO MURIEL C. KENNEDY'S RESPONSE

July 5, 2021

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INTRODUCTORY STATEMENT

In this Reply Brief, Appellant addresses and replies only to those allegations and issues raised directly in the substance of Respondent Muriel C. Kennedy's (hereinafter "Kennedy") initial Brief. Appellants would assert that any issue or allegation raised in Appellants' Initial Brief, but not addressed by Respondent Kennedy in the body of her initial brief or addressed with only conclusory remarks is deemed conceded to and abandoned. *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) ("issues not argued in the brief are deemed abandoned"); *R& G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *Fields v. Fields*, 342 S.C. 182, 536 S.E.2d, 684 (Ct. App. 2000) (fn. 8: "she fails to argue the issue in the body of the brief and it is therefore deemed abandoned."); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003) (fn. 3: "Since the County failed to argue this issue in the body of its brief, the issue deemed abandoned."); *Muir v. CR Bard, Inc.*, 336, S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) (conclusory arguments are deemed abandoned); *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (an issue is deemed abandoned on appeal and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority).

In this case, Kennedy in her response brief did not address issues or allegations raised by Appellant in its initial brief including but not limited to, that 1) Kennedy raising the defenses of equitable estoppel, laches, waiver or unclean hands are not grounds upon which to grant a motion to dismiss because it is an abuse of discretion to resolve contests surrounding the facts, the merits of a claim or the applicability of defenses on a 12(b)(6) motion to dismiss; 2) Kennedy has not established through uncontroverted factual evidence the elements of equitable estoppel, namely

that Kennedy lacked knowledge of Appellant declining Inman's 2015 Deed Offer, that Kennedy justifiably relied to their detriment on Appellant declining the Deed offer and Kennedy was prejudiced by Appellant declining the Deed Offer; and 3) Kennedy has not present uncontroverted factual evidence that Appellant acted with unclean hands towards Kennedy in any manner prejudicial to Kennedy (App Int Brief pg. 29). Additionally, Kennedy in her response brief did not address the issues or allegations raised by Appellant in its initial brief and amended complaint that a confidential relationship exists between Kennedy and her mother Clarkin, that Kennedy exerted undue influence over her mother Clarkin and therefore the burden of proving the imposition of a constructive trust over the Disputed Funds and/or Apple Stock which are in Kennedy's possession should be shifted to Kennedy to rebut the presumption she did not acquire the Disputed Funds and/or Apple Stock through undue influence. (App Int Brief pgs. 23-24).

ARGUMENT

I. APPELLANT PLEAD ALL OF THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR EQUITABLE LIEN.

Appellant plead all of the necessary elements of a cause of action for equitable lien as set for in greater detail in Appellant's Initial Brief. (App Int Brief pgs. 24-26). Kennedy asserts in her brief that "Appellant cannot identify specific property to which the debt attached and an expressed or implied intent that the property serve as security for payment of the debt", because Kennedy asserts Appellant is equitably estopped from asserting that the parties "intent that sale proceeds serve as security for payment of the debt". Kennedy asserts Appellant's decline of Inman's Deed Offer in 2015, was a conscious and reasoned abandonment of any equitable right in the property or the proceeds of sale. Therefore, Kennedy asserts "Appellant cannot possibly prove the elements of an equitable lien, according to its own pleadings." (Kennedy In. Brief pgs. 7-8).

A. It is an Abuse of Discretion for the Court to Take into Consideration the Applicability of Defenses When Deciding a 12(B)(6), Motion to Dismiss.

This argument in Kennedy’s brief sounds in the nature of the assertion of equitable estoppel and/or laches as a defense. “Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim.” *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585 (2019) (citing: *Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (“A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.”)). “At the Rule 12 stage, therefore, the first decision for the trial court is to decide only whether the pleading states a claim. . . any plaintiff is—entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim.” *Id.* “The consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. . . However, the general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice. Most courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) ‘when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense.’” *Spence v. Spence*, 368 S.C. 106, 123-24, 628 S.E.2d 869 (2006).

In this case there are issues of fact raised by the affirmative defense of equitable estoppel. Kennedy claims Appellant cannot identify specific property to which the debt attached and an expressed or implied intent that the property serves as security for payment of the debt. However, Appellant plead the money was loaned to Inman to purchase Elrod and in paragraphs 80-86, of the

Amended Complaint. Appellant plead the parties intended for Elrod to stand as security for repayment by Inman of the funds specifically stating in Paragraph 86 of the Amended Complaint “Defendant [Inman], Kennedy, and Clarkin intended, expressly or impliedly, that the Subject Property [Elrod] serve as security for the payment of the obligation. (R.p. 273). Kennedy asserts Appellant should be equitably estopped from asserting a cause for equitable lien because Appellant declined Inman’s 2015 Deed Offer of Elrod. Though, record contains facts regarding the statement of offer and the decline response, technically speaking, the Amended Complaint is completely silent as to any allegations the Appellant declined the 2015 Deed Offer. Therefore, the allegations of the Amended Complaint do not completely disclose the relevant facts regarding the offer and decline. Further for equitable estoppel to apply Kennedy must show Kennedy and/or Inman lacked knowledge of Appellant declining the Deed Offer, that Kennedy and/or Inman justifiably relied to their detriment on Appellant declining the Deed offer and Kennedy was prejudiced by Appellant declining the Deed Offer. The Amended Complaint is completely silent as to any such factual allegations. For the forgoing reasons it was an abuse of discretion for the Court to consider Kennedy’s asserted affirmative defense of equitable estoppel in granting the Motion to dismiss.

B. Appellant is not Barred by the Doctrine of Laches and did Not Consciously Abandon a Known Right.

Kennedy in support of her assertion that the Court did not abuse its discretion in granting the Motion to Dismiss as to Appellant’s cause for an equitable lien asserts Appellant declining Inman’s 2015 Deed offer was a conscious and reasoned abandonment of any equitable right in the property or the proceeds and cites *Strickland v. Strickland* in support of that assertion. *Strickland*

was an action to enforce an alimony award were the court dismissed the claim finding it was barred by the doctrine of laches. 375 S.C. 76, 650 S.E.2d 465 (2007).¹

“Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant. . . Laches is an equitable doctrine which arises upon the failure to assert a known right. The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the voluntary and intentional relinquishment or abandonment of a known right. Both laches and waiver require a party to have known of a right, and known that the party was abandoning that right. . . Often confused with waiver, equitable estoppel focuses on a party's detrimental reliance on another party's conduct while a waiver analysis focuses on a party's "unequivocal intent to relinquish a known right. Nevertheless, this Court has acknowledged that "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations.” *Id.* at 83, 85-86.

In this case as noted above laches sounds as an affirmative defense and for the reasons noted above it would have been an abuse of discretion for the court to have taken into consideration a laches defense when ruling on the motion to dismiss. The amended complaint is silent as to factual allegations regarding Appellant declining Inman’s 2015 deed offer. The Amended Complaint is silent as to factual allegations regarding how Appellant declining the 2015 deed offer may have prejudiced Kennedy and/or Inman. Further the Amended Complaint contains no factual allegations on the part of Appellant to unequivocally relinquish a known right to payment or that

¹ Kennedy did not assert a defense of laches before the lower court though appellant acknowledges that as a respondent Kennedy is entitled to assert additional sustaining grounds in her brief on appeal.

Elrod stand as security for payment of the debt. The Amended Complaint does contain factual allegations that Inman continued to make monthly payments to Appellant for two years after 2015, only first ceasing to make monthly payments in May of 2017. (R.pp. 265-66 ¶¶ 15 and 32). Further Appellant alleged that after Inman sold Elrod in February of 2017, in April of 2017, Appellant requested Inman pay Appellant the proceeds of sale to be applied to the amount owed. This is factual allegation stands in conflict with Appellant having knowingly abandoned the right of Elrod serving as security for the amount owed by Inman.

Additionally, Kennedy falsely asserted in her brief in a conclusory remark without support that “Respondent Kennedy’s liability, if there be any, could only be derivative from the actions of Respondent Inman. (Kennedy Brief pg. 6). Derivative liability is “liability for a wrong that a person other than the one wronged has a right to redress.” *Blacks Law Dictionary* (3rd pocket ed. 2006). Appellant has not asserted an action against Kennedy which a third person has a right to redress. An equitable lien is an equitable cause of action. “Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. For one to have notice of an outstanding equitable interest, one need not know the identity of the third party or the extent of his interest. It is sufficient that one either knows or ought to know that some third-party interest exists.” *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 250-52, 715 S.E.2d 348 (Ct. App. 2011). Appellant plead that Kennedy and Inman knew Appellant claimed Inman still owed Appellant the remainder of the purchase money from Elrod when Inman made the Transfer of the Proceeds of Sale of Elrod to Kennedy.

For the forgoing reasons it would have been an abuse of discretion for the Court to consider the defense of laches in granting the Motion to dismiss.

II. APPELLANT PLEAD ALL OF THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR FRAUDULENT CONVEYANCE.

Appellant plead all of the necessary elements of a cause of action for fraudulent conveyance as set for in greater detail in Appellant's Initial Brief. (App Int Brief pgs. 14-17). Kennedy asserts in her brief that Appellant waived or is equitably estopped from asserting a claim for fraudulent conveyance because appellant declined Inman's 2015 Deed Offer. As set for above this is the assertion of a defense and it would have been an abuse of discretion for the court to have considered the applicability of the defense in granting the motion to dismiss. Kennedy even notes in her brief "It should also be noted that Appellant's claims against Respondent Inman are yet unproven *and disputed*. (Kennedy In. Brief p. 8)

Kennedy further asserts that Kennedy paid consideration for the Transfer of the \$85,000.00 of the proceeds of sale on September 2, 2017, because Kennedy paid for Inman's attorney's fees and costs to defend this action. Appellant plead in paragraph 115 that Kennedy paid no consideration for the Transfer.² Appellant also plead that Kennedy held the \$85,000.00 of the Proceeds of Sale from the Transfer for the benefit of Inman and that the funds remain Inman's according to Inman's own testimony (R.p. 274 ¶¶ 92-94).³ Two days after Inman was served with the summons and complaint in this matter, Kennedy, purchased roughly \$67,000.00 Apple, Inc. stock using the \$85,000.00 of the Proceeds of Sale (R.p. 274 ¶¶ 92-94). An inference can be drawn from the pleadings in the Amended Complaint found in ¶¶92-94, 105-109 (R.pp. 274-275), that Kennedy, contemporaneous with the purchase of the Apple, Inc., stock, used all or a portion of the remaining \$18,000.00 from the Proceeds of Sale in her Possession to pay for Inman to retain legal counsel to defend this matter. If Kennedy was holding the Proceeds of Sale for the benefit of and

² Though not within the four corners of the amended complaint Inman admitted in her amended answer filed on July 24, 2020 (six days prior to the Court filing 7/30/20 order denying Appellant's motion to reconsider the Order) that Kennedy paid no consideration for the transfer (R.p. 286 ¶ 66).

³ Inman admitted this as well in her amended answer filed on 7/24/20. (R.p. 285 ¶ 51).

on behalf of Inman, then using said funds to pay Inman's legal fees is not consideration for the for the Transfer. This is on its face a question of fact from which a reasonable inference of the allegations in the Amended Complaint could find that Kennedy paid no consideration for the Transfer, and Appellant plead allegations of all of the elements of fraudulent conveyance in the Amended Complaint.⁴

Finally, Kennedy alleges the court did not abuse its discretion in dismissing Appellants cause of action for fraudulent conveyance because Appellant plead Inman made the 2015 Deed Offer and further Appellant plead Inman testified in her 2019 deposition, two years into this ligation, that Inman offered the to pay appellant the Proceeds of Sale in April of 2017, and that Inman in her Deposition testified that she made that offer to help her grandmother. Therefore, Kennedy asserts those allegations negate the possibility that Appellant can prove intent to defraud. First as noted intent to defraud is not a necessary element, because no consideration was paid. Second, this a is question of fact and an application of the merits. Appellant plead the existence of five badges of fraud, Appellant plead all the elements of the cause, and Appellant plead that Kennedy and Inman had fraudulent intent to harm Appellant by the Transfer in September of 2017, and the subsequent transformation of most of those proceeds into stock. As Appellant noted above it is an abuse of discretion for a court to consider the merits of a cause of action on a motion to dismiss. The only determination to be made on such a motion is whether the plaintiff plead sufficient allegations to state a cause of action.

Additionally, Kennedy falsely asserted in her brief, in a conclusory remark without support that "Respondent Kennedy's liability, if there be any, could only be derivative from the actions of

⁴ As noted in Appellant's Initial brief since no consideration was paid for the Transfer the element of fraudulent intent is not required to prove fraudulent conveyance. However, as noted in Appellant's initial brief even if the element of fraudulent intent is required Appellant plead five badges of fraud showing such intent in the amended complaint. (App Int Brief pgs. 14-17).

Respondent Inman. (Kennedy Brief pg. 6). Derivative liability is “liability for a wrong that a person other than the one wronged has a right to redress.” *Blacks Law Dictionary* (3rd pocket ed. 2006). Appellant has not asserted an action against Kennedy which a third person has a right to redress. “Under § 27-23-10, a transfer made without valuable consideration will be set aside as a fraudulent conveyance if the grantor was indebted to the plaintiff at the time of the transfer and the grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect. If there is valuable consideration, the transfer will be set aside only where the grantor was indebted at the time of the transfer and had an actual intent to defraud creditors imputable to the grantee.” *Future Group, II v. Nationsbank*, 478 SE 2d 45, 48-49 (1996). The statute does not require a determination of derivative liability. Inman and Kennedy may be held jointly and severally liable for fraudulent conveyance.

For the forgoing reasons, the Court abused its discretion in granting Kennedy’s Motion to Dismiss Appellant’s cause of action for fraudulent conveyance.

III. APPELLANT PLEAD ALL OF THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR CIVIL CONSPIRACY.

Kennedy asserts in her Brief that the four corners of the Amended Complaint indicate that Appellant cannot possibly prove the second and third element of the tort of civil conspiracy namely intent to injure or harm and special damages. Again, as noted above a motion to dismiss is not the appropriate vehicle for making a factual determination on the merits of a cause of action. In support of Kennedy’s assertion that Appellant cannot prove the second element of civil conspiracy, intent to harm or injure, Kennedy asserts the following: 1) that Appellant declining Inman’s 2015 Deed Offer is the cause of its own harm because Kennedy alleges Appellant waived or is estopped from claiming such harm. Again, this is the assertion of a defense, which as addressed above is not appropriate for the court to take into consideration on a motion to dismiss. 2) That Inman and

Kennedy could not have intended to harm Appellant by the September 2017 Transfer and subsequent transformation of the Proceeds of Sale into stock because Inman claimed in April of 2019 during her deposition that in April of 2017 when she offered to pay Appellant the Proceeds of Sale, but did not do so, Inman made said offer for the benefit of her grandmother. Again, Appellant has already addressed above how Kennedy is asserting that Appellant cannot succeed upon the merits of the cause. However, if the court considered the merits of the cause on a motion to dismiss that would be an abuse of discretion.

Kennedy asserts that Appellant cannot prove the third element of civil conspiracy because attorney's fees cannot constitute special damages in a cause of action for civil conspiracy. However, as Appellant cited to its brief, its motion to reconsider, and its memorandum in opposition to the motion dismiss, attorney's fees can constitute special damages. *See. Benedict College v. Credit System*, 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012). Kennedy asserts that the only limited circumstance in which attorney's fees may be recovered as damages is a cause of action for equitable indemnification. Kennedy is correct that under a cause of action for equitable indemnification a plaintiff can recover attorney's fees as special damages. However, Appellant did not assert a cause of action for equitable indemnification and Kennedy is incorrect in stating that is the only cause of action under the laws of our state under which attorney's fees can be deemed special damages. In *Integrity Worldwide, Inc. v. International Safety Access Corporation*, No. 0:14-CV-0213-MBS, the Honorable Margaret B. Seymour in an order on multiple defendants' motion to dismiss Plaintiff's cause of action for civil conspiracy and to strike Plaintiff's request for attorney's fees under a cause of action for fraudulent conveyance addresses some the causes of action in South Carolina under which attorney's fees constitute special damages. *Id.* In *Integrity Worldwide*, the court noted that civil conspiracy is a cause of action where attorney's fees can

constitute special damages, citing to *Benedict College. Id.* The Court also noted that slander of title is another cause of action where attorney's fees can constitute special damages and cited to *Solley v. Navy Federal Credit Union, Inc.* 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012). *Id.* Further the court noted that equitable indemnification is a further applicable cause of action in this context and cited to *Town of Winnsboro v. Wiedman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500. *Id.* In *Integrity Worldwide*, the court struck Plaintiff's claim for attorney's fees under fraudulent conveyance citing to *Judy v. Judy*, 742 S.E.2d 672, 676 (S.C. Ct. App. 2013) to support the ruling. *Id.* Then the court went on to address Plaintiff's cause of action for civil conspiracy stating: "Defendants contend that Plaintiffs' claim for conspiracy to defraud creditors should be dismissed because Plaintiffs failed to plead special damages and additional acts in furtherance of the conspiracy. Specifically, Defendants contend that Plaintiffs' claim for conspiracy to defraud creditors is merely a restatement of their fraudulent conveyance claim. Plaintiffs counter that they did plead special damages and that the acts alleged in the complaint render the complaint sufficient to pass Rule 12(b)(6) muster." *Id.* The court went on to state: "Even though Plaintiffs' factual allegations for civil conspiracy are sufficient to survive a Rule 12(b)(6) motion to dismiss, this court must also examine whether Plaintiffs have properly pleaded special damages. Plaintiffs assert that they "sustained special damage, including (but not limited to) unnecessary delay and attorneys' fees incurred. . . Plaintiffs' request for attorneys' fees as special damages for their civil conspiracy claim simply mirrors Plaintiffs' request for attorneys' fees for their fraudulent conveyance claim. Ordinarily, the overlap in damages sought would result in dismissal of Plaintiffs' claim for civil conspiracy. Because the request for attorneys' fees associated with the fraudulent conveyance claim will be stricken by this court, as discussed above, the requests for damages no longer overlap and Plaintiffs' claim for special damages is sufficiently pleaded. Accordingly, Plaintiffs have stated

a claim for civil conspiracy for which relief can be granted.” *Id.* This case is analogous to *Integrity Worldwide*. In this case as in that one, Appellant asserted as cause of action for fraudulent conveyance, constructive trust and for civil conspiracy. In this case as in that one Appellant asserted special damages in the form of delay and attorney’s fees incurred. And in this case as in that one, Appellant’s request for attorney’s fees as special damages in its cause of action for civil conspiracy cannot overlap with its cause of action for fraudulent conveyance because Appellant cannot recover attorney fees under its cause of action for fraudulent conveyance.

Additionally, Kennedy falsely asserted in her brief in a conclusory remark without support that “Respondent Kennedy’s liability, if there be any, could only be derivative from the actions of Respondent Inman.” (Kennedy Brief pg. 6). Derivative liability is “liability for a wrong that a person other than the one wronged has a right to redress.” *Blacks Law Dictionary* (3rd pocket ed. 2006). Appellant has not asserted an action against Kennedy which a third person has a right to redress. In this cause, Appellant plead that Kennedy is directly liable for damage Appellant suffered from overt acts which Kennedy herself undertook in combination with Inman. Kennedy and Inman may be held jointly and severally liable for damages under civil conspiracy.

For the forgoing reasons it was an abuse of discretion for the court to have dismissed Appellants cause of action for civil conspiracy.

IV. APPELLANT PLEAD ALL OF THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR CONSTRUCTIVE TRUST.

Appellant plead all of the necessary elements of a cause of action for constructive trust as set for in greater detail in Appellant’s Initial Brief. (App Int Brief pgs. 21-24). Kennedy asserts in her brief the defense of either equitable estoppel, laches, or waiver estops Appellant from asserting a claim for constructive trust because Appellant declined Inman’s 2015 Deed Offer. As set for

above this is the assertion of a defense and it would have been an abuse of discretion for the court to have considered the applicability of the defense in granting the motion to dismiss.

In her brief Kennedy, without support, asserts a false and conclusory remark that Appellant did not plead allegations in the amended complaint from which it could be inferred that a confidential relationship exists between Kennedy and her mother Clarkin. (Kennedy In. Brief pg. 12, ¶ 1). “An issue is deemed abandoned if the argument in the brief is only conclusory.” *R& G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000). “[E]quity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust. Further, a constructive trust is permitted to be proved by parol evidence despite the statute of frauds.” *Whitmore v. Adams*, 273 S.C. 453, 457-58, 267 S.E.2d 160 (1979) “A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy.” *Doe v Doe*, 475 S.E.2d 783, 786-87 (Ct. App. 1996). As Appellant noted in its brief Appellant plead the existence of a principal and surety relationship between Kennedy and her mother Clarkin (R.p. 270). Kennedy during the motion hearing noted to the court that a landlord tenant relationship exists between Kennedy and Clarkin. (R.p. 384 lns. 14-22). Appellant plead as a result of the agreement between Kennedy, her mother Clarkin, and Inman, Kennedy owed duties to Clarkin regarding the agreement. (R.p. 273 ¶ 84).⁵ Taking all reasonable inferences in the favor of Appellant, the pleadings before the court evidence the existence of a confidential relationship between Clarkin and her daughter Kennedy (In. Brief pg. 23).

⁵ Additionally, at the time of the hearing on this motion there was already evidence in the record of the court that prior to the establishment of the conservatorship Kennedy had power of attorney over Clarkin. (R.pp. 536-538).

Kennedy, in her initial brief asserts “Appellant cannot possibly prove a beneficial ownership interest in the subject property or the proceeds of its sale. . . therefore the Amended Complaint alleges no actionable claim of constructive trust obligating Respondent Kennedy to Appellant” (Kennedy Brief p.12). As Appellant has noted throughout this Reply Brief, proving a cause of action is a determination of the merits and a consideration of the merits of a claim on a motion to dismiss is an abuse of discretion. Moreover, “a constructive trust is permitted to be proved by parol evidence despite the statute of frauds.” *Whitmore v. Adams*, 273 S.C. 453, 457-58, 267 S.E.2d 160 (1979). A beneficial interest is a “A right or expectancy in something, as opposed to legal title to that thing.” *Blacks Law Dictionary* (3rd pocket ed. 2006). Here Appellant plead that Clarkin loaned Inman money to purchase Elrod, and that Clarkin, Inman, and Kennedy, intended for Elrod to stand as security for the loan. Appellant plead Inman sold Elrod and transferred the majority to of the Proceeds of Sale to Kennedy who transformed a majority of the Proceeds of Sale which Kennedy received into Apple, Inc., stock, immediately upon Inman being served the summons and complaint in this matter (R.pp. 264-66, 270-73¶¶ 6-15, 25-32, 68-75, 79-86). Appellant plead Clarkin had a beneficial interest in the purchase money, Elrod, the Proceeds of Sale and the Apple Stock.

It should be noted however, Kennedy did not address Appellant’s assertion in its brief that as a result of undue influence on the part of Kennedy the burden of proving a constructive trust should not be shifted to Kennedy (Brief p. 23). Therefore, the issue should be deemed conceded to and abandoned by Kennedy. *See. First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994).

Additionally, Kennedy falsely asserted in her brief in a conclusory remark without support that “Respondent Kennedy’s liability, if there be any, could only be derivative from the actions of

Respondent Inman. (Kennedy Brief pg. 6). Derivative liability is “liability for a wrong that a person other than the one wronged has a right to redress.” *Blacks Law Dictionary* (3rd pocket ed. 2006). Appellant has not asserted an action against Kennedy which a third person has a right to redress. Constructive Trust is an action in equity. “A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it. . .” *McNair v. Rainsford*, 330 S.C. 332, 356-57, 499 S.E.2d 488 (Ct. App. 1998). The equitable cause does not require a determination of derivative liability.

For the forgoing reasons it was an abuse of discretion for the court to have dismissed Appellants cause of action for constructive trust.

V. APPELLANT PLEAD ALL OF THE NECESSARY ELEMENTS OF A CAUSE OF ACTION FOR UNJUST ENRICHMENT.

Appellant plead all of the necessary elements of a cause of action unjust enrichment as set for in greater detail in Appellant’s Initial Brief. (App Int Brief pgs. 19-21). Kennedy alleges in her brief that waiver, laches, or equitable estoppel bars Appellant from the relief sought as to its cause for unjust enrichment. As has already been addressed this is a defense which should not be considered on a motion to dismiss. A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.

“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 SE 2d 430 (2009). “To be conferred nongratuitously, the plaintiff must confer the benefit either (1) at the defendant's request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and the defendant understands or ought to understand that the plaintiff expects compensation and looks to him for payment.” *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221 (Ct. App. 2012).

Here Appellant Plead and it is undisputed that Kennedy is in possession of a majority of the Disputed Funds which are the subject of this matter. Kennedy acquired said funds through the Transfer of the Proceeds of Sale and then Kennedy transformed a majority of the funds into stock titled in her name which Kennedy has held now realizing the gains in that stock for the past three and a half years. However, Kennedy alleges no benefit was conferred on Kennedy by Appellant. (Kennedy Brief p.13) Though Appellant, the conservator may not have conferred a benefit upon Kennedy, Appellant stands in the shoes of Clarkin and Appellant pled in the amended complaint that Clarkin did confer a benefit unto Kennedy because Appellant plead that Kennedy, not Inman, requested that Kennedy's mother Clarkin loan Kennedy's daughter Inman money to purchase Elrod. Kennedy further told Clarkin she would guarantee repayment if Clarkin loaned Kennedy's daughter Inman the funds. (R.pp. 272-73 ¶¶ 80-85).⁶ Therefore, Kennedy is possession of money which in justice and equity belongs to Clarkin, which Kennedy originally requested Clarkin loan and which Clarkin agreed to loan on the condition that Clarkin could expect guarantee of payment from Kennedy. That is the definition of conferring a non-gratuitous benefit.

⁶ It is noteworthy that Inman in her Amended Answer filed 7/24/20, stated that she lacked sufficient information to form an opinion or belief as to Kennedy's Statements to Clarkin to entice Clarkin to loan Inman the money and statements that Kennedy would guarantee said funds. (R.p. 272 ¶ 80, R.p. 285 ¶ 43).

Kennedy goes on to state in her brief: “Neither does the Amended Complaint allege that Respondent Kennedy realized any personal benefit from the transfer of the proceeds.” (Kennedy Brief p. 14). However, Kennedy argued earlier in her brief that she did receive consideration for the Transfer (Kennedy Brief p. 8 ¶ 4 – p. 9 ¶ 2). At the heart of Kennedy’s arguments that the court did not abuse its discretion in dismissing Appellant’s cause of action for unjust enrichment are arguments on the merits of the case. It is an abuse of discretion for the court to have considered the merits in determining the motion to dismiss. These are unresolved factual issues, including, 1) what were Kennedy’s statements and covenants to Clarkin in requesting that Clarkin loan Inman the funds to purchase Elrod; 2) did Kennedy receive consideration for the Transfer; 3) what are the terms of the agreement between Inman and Kennedy in regard to the Transfer of the Proceeds of Sale and Apple, Inc., stock; 4) why did Inman and Kennedy make the Transfer contemporaneous with the filing of this action; 5) what is the gain Kennedy has realized as a result of having transformed the Proceeds of Sale into stock which has increased in value.⁷ These factual issues are not appropriate to have been determined on a motion to dismiss.

Additionally, Kennedy falsely asserted in her brief in a conclusory remark without support that “Respondent Kennedy’s liability, if there be any, could only be derivative from the actions of Respondent Inman.” (Kennedy Brief pg. 6). Derivative liability is “liability for a wrong that a person other than the one wronged has a right to redress.” *Blacks Law Dictionary* (3rd pocket ed. 2006). Appellant has not asserted an action against Kennedy which a third person has a right to redress. Unjust Enrichment is an action in equity. The court only need determine whether Kennedy

⁷ As a reasonable person would surmise the Apple, Inc. stock has increased in value over the last 3 and a half years. Upon information and belief that stock has more than doubled in value. However, that is a fact which would have to be proven at a trial on the merits.

has been unjustly enriched by retaining money which in justice and equity belong to Appellant as conservator for Clarkin.

For the forgoing reasons it was an abuse of discretion for the court to have dismissed Appellant's cause of action for unjust enrichment.

VI. APPELLANT HAS STANDING.

Appellant plead all the elements of standing as set for in greater detail in Appellant's Initial Brief. (App Int Brief pgs. 26-27). Kennedy asserts in her brief that there is no causal connection between Appellant's injury and conduct of Kennedy complained of by Appellant, because Kennedy asserts, Appellant caused its own harm by declining Inman's 2015 Deed Offer. As asserted throughout this Reply Kennedy is asserting both a defense and an argument upon the merits. Appellant plead sufficient allegations of harm caused by the conduct of Kennedy and to the extent the Court dismissed Appellant's causes of action against Kennedy based upon standing, such determination of the court was an abuse of discretion.

CONCLUSION

Based upon the foregoing arguments, the arguments contained in Appellant's Initial Brief and the lack of arguments set forth in Kennedy's initial response brief, Appellant would respectfully assert that this Court should undertake appellate review of the order granting Kennedy's motion to dismiss and reverse the lower court's order granting the motion.

SIGNATURE BLOCK TO FOLLOW

RESPECTUFLY SUBMITTED,

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