

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

RECEIVED

JUN 18 2015

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas**

SC Court of Appeals

Stephanie P. McDonald, Circuit Court Judge

Case No: 2015-001179

**Kimberlee Tavino, Individually
and as Personal Representative of
the Estate of Betty Jane Jackson,
and Catherine Springfield, Appellants,**

v.

Christine Scheriff and Frank Scheriff, Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' APPEAL**

**Antonia T. Lucia, Esquire
SC Bar No. 71696
VAUX MARSCHER BERGLIND, P.A.
16 William Pope Drive, St. 202
Bluffton, SC 29909
(843) 705-2888 (o)
(843) 705-2889 (fax)
Attorney for Respondents**

Other Counsel of Record:

**Robert M.P. Masella, Esquire
SC Bar No. 8655
Masella Law Firm, P.A.
917 Calhoun Street
Columbia, SC 29201
(803) 748-9990 (o)
Attorney for Appellants**

**John S. Nichols, Esquire
SC Bar No. 4210
Bluestein, Nichols, Thompson & Delgado, LLC
P.O. Box 7965
Columbia, SC 29902
(803) 799-7599
Attorney for Appellants**

TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS.....	1
LEGAL STANDARD.....	6
ARGUMENT.....	9
I. ORDERS GRANTING PARTIAL SUMMARY JUDGMENT ARE NOT IMMEDIATELY APPEALABLE UNDER EITHER THE “INVOLVING THE MERITS” OR “SUBSTANTIAL RIGHT” CATEGORIES OF SOUTH CAROLINA CODE OF LAWS §14-3-330 (1) and 2(c).....	9
A. Seventh Cause of Action for Fraud and Eighth Cause of Action for Constructive Fraud	10
B. Ninth Cause of Action for Intentional Infliction of Emotional Distress.....	10
C. Tenth Cause of Action for Civil Conspiracy.....	10
D. Eleventh Cause of Action for Intentional Interference with Interference.....	11
E. Twelfth Cause of Action for Breach of Contract and Fourteenth Cause of Action for Breach of Contract Accompanied by Fraudulent Act.....	11
II THE ORDERS GRANTING PARTIAL SUMMARY JUDGMENT DID NOT DENY PLAINTIFFS A MODE OF TRIAL SINCE THE PLAINTIFFS MADE NO DEMAND FOR AND THEREFORE WAIVED THE RIGHT TO TRIAL BY JURY.....	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES:	Page:
<i>Adickes v. Allison & Bratton</i> , 21 S.C. 245, 259 (1883).....	9
<i>Baldwin Constr. Co. v. Graham</i> , 357 S.C. 227, 593 S.E.2d 146 (2004).....	8
<i>Ex Parte U-Drive-It, Inc.</i> , 369 S.C. 1, 630 S.E.2d 464 (2006).....	8
<i>Good v Hartford Accident & Indem. Co.</i> , 201 S.C. 32, 21 S.E.2d 209.....	8
<i>Hagood v. Sommerville</i> . 362 S.C. 191, 607 S.E.2d 707 (2005).....	8
<i>Lebovitz v. Mudd</i> , 289 S.C. 476, 347 S.E.2d 94 (1986).....	7
<i>Link v. School District of Pickens County</i> , 302 S.C. 1, 393 S.E.2d. 176 (199).....	8
<i>Mid-State Distribs., Inc. v. Century Importers, Inc.</i> , 310 S.C. 330, 426 S.E.2d 777 (1993)..	9
<i>Minter vs. GOCT, Inc.</i> , 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996).....	11
<i>Truluck v. Snyder</i> , 362 S.C. 108, 606 S.E.2d 792 (Ct. App. 2004).....	13
<i>Watson v. Underwood</i> , 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014).....	9
STATUTES:	
SCRCP Rule 38(b) and (d).....	12
SCRCP Rule 54(b).....	6
South Carolina Probate Code §62-3-1101.....	2
South Carolina Probate Code §62-3-1102.....	2
South Carolina Code of Laws §14-3-330.....	7
Supreme Court Administrative Order 2007-08-23-01.....	3

The Defendants, Christine Scheriff and Frank Scheriff, hereby submit this Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Appeal.

STATEMENT OF FACTS

The decedent, Betty Jane Jackson, died on May 4, 2008. Pursuant to the terms of her Revocable Living Trust Agreement, the beneficiaries of her estate are her three surviving children, Kimberlee Tavino, Christine Scheriff, and Catherine Springfield.

Prior to her death, Betty Jane Jackson, in May of 2005, sold her home at 11 Governor's Lane, Hilton Head Island, South Carolina. Betty Jane Jackson was then 80 years old. The check for the proceeds of that sale in the amount of \$739,792.13 was given to decedent's daughter, Christine Scheriff.

In June of 2005, Christine Scheriff and Frank Scheriff purchased a home at 2 Rosebud, Bluffton, South Carolina for the amount of \$740,000.00. This property was titled in the name of Christine Sheriff and Frank Sheriff, as joint tenants with right of survivorship. This home was occupied by the decedent together with Christine Scheriff and Frank Scheriff until the date of decedent's death.

In January of 2009, Kimberlee Tavino petitioned the Probate Court for the County of Beaufort to appoint her as Personal Representative of the estate of Betty Jane Jackson. This Petition was granted.

In March of 2010, Kimberlee Tavino, individually and as the Personal Representative of the Estate of Betty Jane Jackson, together with Catherine Springfield, commenced an action against Christine Scheriff and Frank Scheriff. The complaint

contained multiple causes of action which sought to set aside the deed for the property located at 2 Rosebud, Bluffton, South Carolina, or alternatively, to impose a resulting or constructive trust on this property. (A copy of said Complaint is annexed hereto and marked as Exhibit "1".)

In December of 2010, the parties took part in mediation. In March of 2011, the Plaintiffs moved to compel the settlement allegedly agreed to during that mediation. The Plaintiffs' Notice of Motion stated:

This motion is pursuant to South Carolina §§62-3-1101 and 62-3-1102, as well as Rule 6(a) of Supreme Court Administrative Order 2007-08-23-01 re: Probate Court Pilot Mediation Program.

South Carolina Probate Code Sections 62-3-1101 and 62-3-1102 provide (with emphasis) as follows:

62-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate, if approved by the court after hearing, is **binding** on all the parties including those unborn, unascertained, or who could not be located. An approved compromise is **binding** even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. A compromise approved pursuant to this section is not a settlement of a claim subject to the provisions of Section 62-5-433.

62-3-1102. Procedure for securing court approval of compromise.

The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parties acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identify cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) **Upon application to the court and after notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement.** Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. **Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.**

As noted, Plaintiffs' motion to compel the settlement referred to Supreme Court Administrative Order 2007-08-23-01 re: Probate Court Pilot Mediation Program (a copy of which is attached hereto and marked as Exhibit "2") which confirms the requirement of Probate Court approval of any mediation agreement as follows:

Rule 6(h).Agreement in Probate Court. Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. It is the obligation of the parties to seek approval of the agreement by the Probate Court.

By Order of the Probate Court dated September 8, 2011 (a copy of which is attached hereby and marked as Exhibit "3"), and affirmed upon the Court's reconsideration by Order dated September 26, 2011, (a copy of which is attached hereby

and marked as Exhibit “4”), the Honorable Kenneth E. Fulp, Jr. denied the Plaintiffs’ motion and refused to approve the alleged mediation agreement. In reaching its decision, the Court was faced with evidentiary constraints since the alleged agreement was the result of mediation. The Court reasoned:

The exclusion of evidence of compromise negotiations is imperative and proper. Rule 408 compels it; moreover, the admission of such evidence would undesirably “chill” settlement negotiations, mediation, and other alternative dispute resolution.

Nevertheless, that exclusion, together with the other evidentiary constraints noted above, make it inappropriate for this Court to grant the relief requested by Plaintiffs in their Motion, either as a motion to compel the settlement or to approve it under § 62-3-1102. To do so would, in effect, amount to a judgment for money and enforcement of a contract – in final resolution of the underlying action and substitution for the relief requested in Plaintiffs’ Complaint – without consideration of evidence that might be relevant and should be considered before awarding such relief.

In addition, it should be noted that approval of the subject agreement under §§ 62-3-1101 and 62-3-1102 appears inappropriate in this case, where one side of the purported compromise registered their “disagreement” by Motion filed a month before Plaintiffs’ Motion to Compel (the Motion for Approval under §§ 62-3-1101 and 62-3-1102 being filed three months later). Sections 62-3-1101 and 62-3-1102 set forth a process for Court *approval* of a compromise to which all relevant parties have agreed, not a process to *compel* agreement – except to the extent that the Court may direct “all fiduciaries subject to its jurisdiction to execute the agreement.” S.C. Code *Ann* § 62-3-1102(3).

(See Exhibit “3”, pages “4” and “5”.)

The Plaintiffs subsequently interposed an Amended Complaint (a copy of which is attached hereto and marked as Exhibit “5”) which retains the original causes of action and further includes the following causes of action:

- fraud
- constructive fraud
- intentional infliction of emotional distress/outrage

- civil conspiracy
- intentional interference with inheritance
- breach of contract
- breach of contract accompanied by fraudulent act

Based on the Amended Complaint, the Plaintiffs moved and were permitted to remove this matter to Circuit Court. Upon removal, Defendants moved for partial summary judgment upon the ground that there is no issue of fact with regard to the following:

1. The Seventh Cause of Action for fraud and the Eight Cause of Action for constructive fraud are predicated upon inconsistent allegations which contradict the Plaintiff, Kimberly Tavino's prior sworn testimony and which should be rejected pursuant to the "competing affidavit" or "sham affidavit" rule;
2. The Ninth Cause of Action for intentional infliction of emotional distress cannot be sustained where the Plaintiffs have a remedy in other causes of action pled in the Amended Complaint;
3. The Tenth Cause of Action for civil conspiracy cannot be sustained since the Plaintiffs have failed to cite any special damages separate and apart from the damages pled in other causes of actions contained in the Amended Complaint;
4. The Eleventh Cause of Action for intentional interference with inheritance is not recognized in the State of South Carolina;

5. The Twelfth and Fourteenth Causes of Action for breach of contract and for breach of contract accompanied by fraudulent act are not predicated upon a binding contract; and
6. The Fourteenth Cause of Action for breach of contract accompanied by a fraudulent act cannot be sustained since the Plaintiffs have failed to allege a fraudulent act separate and distinct from the acts allegedly constituting the breach of contract.

The Defendants were granted partial summary judgment and this matter was remanded to probate court by Order of the Honorable Stephanie McDonald entered on October 21, 2014 (a copy of said Order is attached hereto and marked as Exhibit "6"). The Plaintiffs' subsequent motion for reconsideration was denied by Order dated April 30, 2015 (a copy of said Order is attached hereto and marked as Exhibit "7"). Plaintiffs filed a Notice of Appeal from both Orders on June 1, 2015 (a copy of said Notice of Appeal is attached hereto and marked as Exhibit "8").

LEGAL STANDARD

SCRCP Rule 54(b) provides:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties,

and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

This process of entering judgment on less than all claims is known as **certification**.

If certified, such a judgment is immediately appealable. *Lebovitz v. Mudd*, 289 S.C. 476, 478, 347 S.E.2d 94, 95 (1986). Absent certification, an order is not final, and therefore is subject to review at any time before final judgment on all claims.

Accordingly, under SCRCP Rule 54(b), the uncertified orders at issue herein are not final, and are therefore not immediately appealable.

Nevertheless, an uncertified interlocutory order may be immediately appealable if it fits into one of the categories listed in the Supreme Court's jurisdictional statute (South Carolina Code of Laws §14-3-330) which provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, modifying, or refusing the appointment of a receiver.

Orders granting partial summary judgment may be immediately appealable under either the “involving the merits” or “substantial right” categories of §14-3-330(1) and 2(c). *Link v. School District of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d. 176, 179 (1990).

“The phrase ‘involving the merits’ is narrowly construed...An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” *Ex Parte U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467-68 (2006). “The provisions of [s]ection 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial. *Hagood v. Sommerville*. 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

Similarly, “An order affects a substantial right and is immediately appealable when it ‘(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action.’ ” *Hagood v. Sommerville*, 362 S.C. at 195, 607 S.E.2d at 709.

An order is not immediately appealable when appellants “have not ‘arrived at the end of the road’ and [would] be able to appeal the decision after the trial [wa]s finished.” *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). The supreme court has noted “if the question involved will be inherent in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal.” *Good v Hartford Accident & Indem. Co.*, 201 S.C. 32, 41, 21 S.E.2d 209, 212.

In keeping with these holdings, if the matters at issue in the appeal are intertwined with those to be determined at trial, the interlocutory order is not appealable until final judgment has been rendered. *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155, 164 (Ct. App. 2014).

Both subsections §14-3-330 (1) and 2(c) speak to finality.

“Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final.” *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1883); *see also Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (“South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.”)(*citations omitted*).

ARGUMENT

I. ORDERS GRANTING PARTIAL SUMMARY JUDGMENT ARE NOT IMMEDIATELY APPEALABLE UNDER EITHER THE “INVOLVING THE MERITS” OR “SUBSTANTIAL RIGHT” CATEGORIES OF SOUTH CAROLINA CODE OF LAWS §14-3-330 (1) and 2(c)

In granting Defendants’ Motion for Partial Summary Judgment, Judge McDonald analyzed each cause of action as follows:

A. Seventh Cause of Action for Fraud and Eighth Cause of Action for Constructive Fraud

The Court noted that Kimberly Tavino, in her prior deposition taken on January 13, 2010, made a statement which contradicted paragraph “8” of the Amended Complaint which formed the basis of the fraud and constructive fraud causes of action.

B. Ninth Cause of Action for Intentional Infliction of Emotional Distress

The Court noted that this is the same tortious conduct which forms the basis of the causes of action for breach of fiduciary duty, conversion, setting aside the deed, equitable lien, resulting trust, and constructive trust, all of which are contained in the original Complaint and are not the subject of the Defendants’ Motion for Partial Summary Judgment.

C. Tenth Cause of Action for Civil Conspiracy

The Court recognized that in order to properly plead a cause of action for civil conspiracy, the Plaintiffs must allege special damages beyond those set forth in other causes of action. However, all of the damages asserted by the Plaintiffs in their cause of action for civil conspiracy “are either actual or consequential damages which have been demanded in the breach of fiduciary duty and conversion causes of action...”

D. Eleventh Cause of Action for Intentional Interference with Inheritance

Judge McDonald confirmed that “South Carolina courts have not yet recognized intentional interference with inheritance rights as a valid cause of action.”

E. Twelfth Cause of Action for Breach of Contract and Fourteenth Cause of Action for Breach of Contract Accompanied by a Fraudulent Act

Judge McDonald started her analysis by noting:

In June of 2011, Plaintiffs moved for approval of the alleged mediation agreement which is the subject of the Twelfth and Fourteenth Causes of Action. The Plaintiffs’ Notice of Motion stated: “This motion is pursuant to South Carolina sections 62-3-1101 and 1102, as well as Rule 6(a) of Supreme Court Administration Order 2007-08-23-01 re: Probate Court Pilot Mediation Program.”

Judge McDonald’s decision goes on to cite in full South Carolina Probate Code §62-3-1101 and §63-3-1102 as well as Supreme Court Administrative Order 2007-08-23-01 Rule 6(h) which confirms the requirement of court approval.

Based on these statutory and administrative directives, Judge McDonald held that:

The Probate Court declined to approve the mediation agreement so as to convert it to a binding contract, and no action for breach of contract or breach of contract accompanied by fraudulent act may be maintained in the absence of a contract, supported by the meeting of the minds.

Moreover, in order to recover for breach of contact accompanied by fraudulent act, the Plaintiffs must establish not only that the breach was accomplished with a fraudulent intention, but more importantly, that the beach was accompanied by a fraudulent act. *See Minter vs. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996). The Plaintiffs have not pled any fraudulent action on the part of the Defendants separate and apart from the alleged breach of contract. Accordingly, the Fourteenth Cause of Action cannot be sustained.

(See Exhibit “6”, page “9”.)

It is particularly of note that the Court’s analysis of the Twelfth and Fourteenth Causes of Action started with an acknowledgement that the alleged mediation agreement is

the subject of the Twelfth and Fourteenth Causes of Action. Were the Plaintiffs to have admissible evidence to show that the alleged agreement is fair and reasonable, the Plaintiffs would be able to move to compel approval in the Probate Court. Moreover, the Plaintiffs would be under that same burden, i.e., showing that the agreement is fair and reasonable, in the context of the breach of contract actions asserted in the Amended Complaint.

Finally, in directing that this matter be remanded to Probate Court, Judge McDonald acknowledged that the "Plaintiffs, in seeking removal, predicated their motion on the causes of action for breach of contract and intentional infliction of emotional distress". As already noted, Judge McDonald's decision recognized that the Ninth Cause of Action for Intentional Infliction of Emotional Distress alleges the same tortious conduct as forms the basis of the causes of action pled in the original Complaint and which survive the granting of partial summary judgment. Similarly, the Court recognized that the breach of contract actions are nothing more than an attempt to enforce the mediation agreement which can be done within the context of the Probate Court action.

II. THE ORDERS GRANTING PARTIAL SUMMARY JUDGMENT DID NOT DENY PLAINTIFFS A MODE OF TRIAL SINCE THE PLAINTIFFS MADE NO DEMAND FOR AND THEREFORE WAIVED THE RIGHT TO TRIAL BY JURY

In opposing Defendants' Motion for Partial Summary Judgment, Plaintiffs argued that they would be denied a mode of trial if that motion were granted.

The right to trial by jury is governed by South Carolina Code of Laws Rule 38 which provides in subsections (b) and (d) as follows:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days

after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).

Neither the Amended Complaint (Exhibit "5") nor the Defendants' Answer to the Amended Complaint (a copy of which is attached hereto and marked as Exhibit "9") was endorsed with a demand for jury trial. Such an endorsement of a probate pleading is proper and required to preserve a party's right to trial by jury upon removal to circuit court. *Truluck v. Snyder*, 362 S.C. 108, 606 S.E.2d 792 (Ct. App. 2004). Absent such an endorsement, as in the case at bar, the right to trial by jury is waived.

CONCLUSION

This action seeks to set aside the deed to 2 Rosebud, Bluffton, South Carolina, as well seeking alleged damages. The tortious conduct set forth in the causes of for intentional infliction of emotional distress, intentional interference with inheritance, and civil conspiracy are identical to that pled in causes of action contained in the original Complaint. The damages sought in causes of action for fraud and constructive fraud, intentional infliction of emotional distress, civil conspiracy, and intentional interference with inheritance are likewise demanded in the original Complaint and survive the granting of Defendants' Motion for Partial Summary Judgment.

Moreover, the causes of action for breach of contract and breach of contract accompanied by a fraudulent act are merely further attempts to enforce the mediation

agreement. As already noted, were the Plaintiffs able to provide admissible evidence in support of their position that the alleged agreement was fair and reasonable (a standard that would also apply in sustaining a breach of contract action), the Plaintiffs could enforce the mediation agreement in the Probate Court.

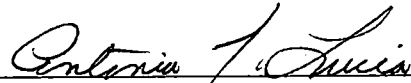
Given the facts of this case, the orders at issue are not final interlocutory Orders in any sense. To begin with, the Orders were not certified under SCRCR Rule 54(b). In addition, each of the Plaintiffs' allegations and demand for damages is protected in the original Complaint which survives the Orders at issue. There are certainly additional acts which must be done by the trial court prior to a determination of the parties' rights. More importantly, the issues in this appeal are inextricably intertwined with the issues yet to be decided by the Probate Court. Appellants have not arrived at the end of the road and would be able to appeal the Orders at issue from a final judgment.

It is respectfully submitted that the dismissal of this appeal would be consistent with the narrow construction to be afforded both subsections §14-3-330 (1) and 2(c), and would serve the ends of justice and avoid piecemeal appeals.

And finally, the Orders granting partial summary judgment did not deny Plaintiffs a mode of trial since the Plaintiffs made no demand for and therefore waived the right to trial by jury.

WHEREFORE, Defendants request that this Court dismiss Appellants' Appeal from the Orders entered on October 21, 2014 and dated April 30, 2015, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,



Antonia T. Lucia, Esquire
SC Bar No. 71696
VAUX MARSCHER BERGLIND, P.A.
16 William Pope Drive, St. 202
Bluffton, SC 29909
(843) 705-2888 (o)
(843) 705-2889 (fax)
Attorney for Respondents

Bluffton, SC
June 17, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
Kimberlee Tavino, individually and)
as Personal Representative of the)
Estate of Betty Jane Jackson, and)
Catherine Springfield,)
)
Plaintiff,)
)
v.)
)
Christine Scheriff and Frank Scheriff,)
)
Defendants.)
)

IN THE PROBATE COURT

Case No.: 08-ES-07-00384

SUMMONS

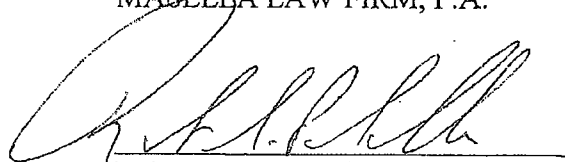
2010 MAR 25 AM 10:52
PROBATE COURT
BEAUFORT COUNTY, SC

FILED

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint, a copy of which is hereby served upon you, and to serve a copy of your Answer to the Plaintiff's attorney at his office located at 917 Calhoun Street, Columbia, South Carolina, 29201, within thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by Default against you for the relief demanded in the said Complaint.

MASELLA LAW FIRM, P.A.



Robert M. P. Masella
917 Calhoun Street
Columbia, South Carolina 29201
(803) 748-9990, Fax (803) 748-9948
Attorney for Plaintiffs

Columbia, South Carolina

This 23rd day of March, 2010.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 Kimberlee Tavino, individually and)
 as Personal Representative of the)
 Estate of Betty Jane Jackson, and)
 Catherine Springfield,)
)
 Plaintiff,)
)
 v.)
)
 Christine Scheriff and Frank Scheriff,)
)
 Defendants.)
)

IN THE PROBATE COURT

Case No.: 08-ES-07-00384

COMPLAINT

2010 MAR 25 AM 10:52
 FILED
 PROBATE COURT
 BEAUFORT COUNTY, SC

The Plaintiffs, complaining of the Defendants herein, would respectfully allege and show unto this Honorable Court:

1. The Plaintiff, Kimberlee Tavino, is a citizen and resident of the County of Beaufort, State of South Carolina, is the daughter of Betty Jane Jackson, and is the Personal Representative of the Estate of Betty Jane Jackson.

2. The Plaintiff, Catherine Springfield, is a citizen and resident of the County of Hamilton, State of Ohio, and is the daughter of Betty Jane Jackson.

3. That the Defendant, Christine Scheriff, also a daughter of Betty Jane Jackson, is a citizen and resident of the County of Beaufort, State of South Carolina.

4. That the Defendant, Frank Scheriff, husband of Christine Scheriff, is a citizen and resident of the County of Beaufort, State of South Carolina.

5. That on May 4, 2008, Betty Jane Jackson (referred to hereinafter as the "decedent") died in Beaufort County, South Carolina. With full knowledge of the uncertainty of life, and the certainty of death, decedent executed a Last Will and Testament, properly witnessed, and dated September 23, 1994. This Will nominated Christine Scheriff as Personal

Representative of decedent's estate. The decedent's Last Will and Testament is attached hereto, incorporated herein by reference, and made a part of these pleadings.

6. That on August 11, 1993 the decedent executed a Durable Power of Attorney appointing Christine Scheriff as her Attorney in Fact.

7. That on April 3, 2009, by Order of the Probate Court of Beaufort County, Kimberlee Tavino was appointed and qualified as the personal representative of the decedent's estate, case number 08-ES-07-00384. Said order is attached hereto, incorporated herein by reference, and made a part of these pleadings.

8. That as decedent's Attorney in Fact, the Defendant Christine Scheriff, in breach of her fiduciary duty, purposefully, intentionally, willfully, maliciously, and negligently misapplied and converted property that decedent devised to Plaintiffs to Defendants' own personal use and used said property for their own benefit. The Plaintiffs are informed and believe that the Defendants have converted and misapplied property approximately in excess of \$900,000 of decedent's estate.

9. That decedent further demonstrated her trust and confidence in Defendant Christine Scheriff by nominating her as personal representative of her estate under her Last Will and Testament.

10. The Plaintiffs are informed and believe that Plaintiffs are entitled to an injunction restraining and enjoining the Defendant from allocating, disposing, encumbering, mortgaging, selling, hypothecating, wasting away, or otherwise disposing of the assets of the decedent's estate, some of which may be currently titled in Defendants' name. The Plaintiffs are informed and believe that said injunction is reasonably necessary to preserve assets so that the Defendants will have a means of reimbursing the Plaintiffs in the event the Plaintiffs are entitled to a recovery in the action herein. Plaintiffs are informed and believe that the injunction is necessary

in order to protect the rights of the Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty)

11. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

12. That the Defendant, Christine Scheriff, by and through her fiduciary position as decedent's Attorney in Fact, had a fiduciary duty to decedent and to all those entitled to devise in accordance with the terms of decedent's Last Will and Testament and inter vivos trust. Specifically, said Defendant had a fiduciary duty to the decedent and the Plaintiffs.

13. That said Defendant breached said fiduciary duty to the decedent and the Plaintiffs by misappropriating Plaintiffs' property, thereby acting in bad faith.

14. That as direct and proximate result of the breach of fiduciary duty, Plaintiffs have suffered great monetary loss.

15. Plaintiffs are informed and believe that they are entitled to an award of restitution from the Defendants.

AS A SECOND CAUSE OF ACTION
(Conversion)

16. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

17. That Defendant Christine Scheriff while serving as decedent's fiduciary has wrongfully taken property from the Plaintiffs and converted it to her and her husband's own use, all to the damage of Plaintiffs. Plaintiffs pray that the trier of fact determine the amount converted under the circumstances, and award them a judgment for restitution and disgorgement in an appropriate amount.

AS A THIRD CAUSE OF ACTION
(Setting Aside Deed)

19. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

20. That Defendants misappropriated the proceeds from the sale of decedent's real property at 11 Governors Lane, Hilton Head South Carolina 29928 and improperly used said proceeds to purchase real estate titled in their names at 2 Rosebud, Bluffton, South Carolina 29910.

21. Plaintiffs are informed and believed that they are entitled to an order of this Court setting aside said deed into Defendants' names and titling said real estate in the name of decedent's estate.

FOR A FOURTH CAUSE OF ACTION
(Equitable Lien)

22. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

23. Plaintiffs are informed and believe that they are entitled to an equitable lien imposed on the Defendants' property for all misappropriated property and any benefit therefrom.

FOR A FIFTH CAUSE OF ACTION
(Resulting Trust)

24. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

25. Plaintiffs are informed and believe that they are entitled to a resulting trust imposed on the Defendants for all misappropriated property and any benefit therefrom.

FOR A SIXTH CAUSE OF ACTION
(Constructive Trust)

26. That each and every allegation contained herein above is reiterated as fully as if

set forth herein verbatim.

27. Plaintiffs are informed and believe that they are entitled to a constructive trust imposed on the Defendants for all misappropriated property and any benefit therefrom.

FOR A SEVENTH CAUSE OF ACTION
(Attorney fees and Costs)

28. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim

29. Because of the actions of the Defendants, Plaintiffs have been forced to obtain the services of an attorney and expert to defend themselves from the actions of the Defendants.

30. The Plaintiffs are informed and believe that they are entitled to an Order from this court commanding Defendants to pay for the costs, including those of their expert, and attorneys' fees they have incurred due to the actions of the defendants.

WHEREFORE, the Plaintiffs, having set forth their Complaint against the Defendants herein, would respectfully pray for an Order as follows:

A. For an order of this Court requiring restitution and disgorgement from Defendants of any and all benefits received from the misappropriation and conversion of decedent's property and the breach of fiduciary duty, a constructive trust imposed against said property, a resulting trust imposed against said property, and/or an equitable lien imposed against said property;

B. For an order of this Court setting aside the deed titled in the name of the Defendants' for the real property purchased with decedent's property;

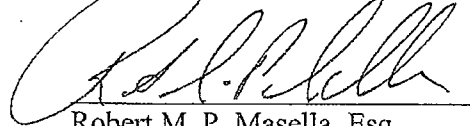
C. For an injunction restraining, enjoining, and prohibiting the Defendants from selling, encumbering, mortgaging, hypothecating, wasting away, or otherwise disposing of any assets received as a result of their misappropriation and conversion of decedent's property;

D. For an order of this Court assessing, costs, and attorneys' fees against

Defendants;

E. For such other relief as the Court may deem just and proper.

MASELLA LAW FIRM, PA



Robert M. P. Masella, Esq.

917 Calhoun Street

Columbia, South Carolina 29201

(803) 748-9990

ATTORNEY FOR THE PLAINTIFFS

Columbia, South Carolina

Dated: March 23, 2010

The Supreme Court of South Carolina

RE: PROBATE COURT PILOT MEDIATION PROGRAM

ADMINISTRATIVE ORDER

Pursuant to the provisions to Article V, §4 of the South Carolina Constitution, the Court adopts the attached procedures and forms for the Probate Court Pilot Mediation Program. This Probate Court Pilot Mediation Program may be implemented by County Probate Courts. The program has the support of The Commission on Alternative Dispute Resolution, S.C. Probate Judges Association, S.C. Bar Probate Estate Planning and Trust Section Council, S.C. Bar Elder Law Committee and the S.C. Bar Alternative Dispute Resolution Section Council. This Order is effective upon the date of my signature.

As soon as possible after January 1, 2009, the S.C. Commission on Alternative Dispute Resolution will issue an assessment of the pilot program to the Supreme Court.

IT IS SO ORDERED.

s/Jean H. Toal _____ C.J.

s/James E. Moore _____ J.

s/John H. Waller, Jr. _____ J.

s/E. C. Burnett, III _____ J.

s/Costa M. Pleicones _____ J.

August 23, 2007

Columbia, South Carolina

PROCEDURES FOR THE PILOT PROGRAM FOR PROBATE COURT MEDIATION

1. General. These procedures and forms govern the conduct of the Pilot Program for Probate Court Mediation ("Pilot").

a. Unless otherwise specifically set forth in section 4 hereof, the default procedures and forms applicable to this Pilot are those set forth in Rules 1 10, Rules 14 20, and Appendices B and C of the Court Annexed Alternative Dispute Resolution (ADR) Rules ("ADR Rules") as those Rules apply to South Carolina Circuit Courts in civil suits.

b. References in the ADR Rules to Circuit Courts, Circuit Court Judges, and Clerks of Court shall be construed for purposes of this Pilot as referring to Probate Courts, Probate Court Judges, and Probate Court staff, as applicable. ADR Forms may be re titled to refer to the applicable county

d. In the event that an applicable procedure does not address a specific situation, Probate Court Judges are expected to exercise their discretion in a manner consistent with the purposes of these procedures and forms as set forth in the following section.

2. Background and Purposes. Probate Courts in South Carolina are unique in that they present a combination of traits not found elsewhere in this State's judicial system. As with our other courts, any case may confront a Probate Court Judge with the need to decide a broad range of factual, legal, and equitable issues. Unlike most of our other courts (with the notable exception of Family Courts), Probate Courts focus upon the best interests of those demographic elements of South Carolina's population least able to protect and express themselves including the very young, the very old, the incapacitated, and decedents. Further, Probate Court Judges are elected by the people and paid for by each of our State's 46 counties. With the passage of time, inevitable population growth, and the impact of unavoidable demographic trends, case loads and the needs of Probate Court "clients" have been rising, while the availability and application of funding is forcing ever more difficult choices among competing priorities. Against this background, these procedures are intended to furnish a basis for examining the utility of mediation in the Probate court context in order to

- a. Permit Probate Courts and contesting parties the opportunity to save time, effort, and money;
- b. Permit contesting parties the opportunity to exercise greater control over the outcome of their own contested Probate Court cases and issues;
- c. Allow the Probate Courts to focus their resources and attention on those cases that cannot be settled voluntarily by contesting parties; and
- d. Furnish a basis for future decisions as to the efficacy and broader implementation of mediation in Probate Courts.

3. ADR Mode(s). These procedures are intended to address the scope and application of mediation in the Probate Courts. These procedures are not intended to address in any way the subject of arbitration in the Probate Courts.

4. Procedures Specifically Applicable to Probate Court. The following procedures shall apply to the conduct of Probate Court mediation notwithstanding any inconsistent or contradictory procedures set forth in the ADR Rules (In each instance, numbering refers to the applicable ADR Rule):

Rule 3(a). Mediation. Subject to Rule 3(b), Exceptions, all contested issues in civil cases within Probate Court jurisdiction are subject to Court ordered mediation, as follows:

(1) Absent good cause shown, mediation is required for all contested issues in guardianship and/or conservatorship cases; and

(2) Upon motion of any contesting party or of the Probate Court, mediation may be ordered for contested issues in all other classes of cases at the discretion of the Probate Court Judge.

Rule 4(c). Appointment of Mediator by Probate Court. In probate court cases subject to ADR, early mediation is encouraged. Unless the Probate Court is advised that contesting parties have selected and appointed a mediator beforehand,

(1) For contested guardianship and/or conservatorship cases, absent good cause shown, the Probate Court Judge shall appoint a primary mediator and a secondary mediator from the Roster of Certified Neutrals as soon as it is known to the Probate Court that the disagreement of the parties will result in a contested case, but in no event later than the earlier to occur of a hearing

(2) For all other classes of Probate Court cases, the Probate Court Judge may appoint a primary mediator and a secondary mediator from the Roster of Certified Neutrals at any time following the filing of an application/petition for appointment as Personal Representative, whether for informal or formal proceedings, or upon the filing of any other application or petition with the court, if the Probate Judge, in his or her discretion, determines that issues have been or may be raised which may be resolved through mediation.

(3) An initial mediation conference must occur within forty-five (45) days of appointment by the Probate Court, and the parties must complete mediation and file a Proof of ADR with the Probate Court before a merits hearing can be scheduled.

Rule 5(h). Scheduling in Probate Court. The parties shall cooperate with the mediator to schedule mediation, and the mediator may recess a mediation conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference. The case shall not be scheduled for hearing in the Probate Court until a Proof of ADR is filed.

Rule 6(a). Duty to Inform. In cases subject to mediation under these procedures, notice of a mediation settlement conference shall be given to all interested parties in accordance with section 62-1-401 of the South Carolina Probate Code.

Rule 6(b). Attendance. The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Probate Court Judge:

(1) The mediator;

(2) All contesting individual parties; or an officer, director or employee having full authority to settle the claim for a contesting corporate party; or in the case of a contesting governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision making body of the agency; and all other interested persons who have filed with or made known to the Probate Court an application or petition or objection, irrespective of the form thereof, concerning the issues to be mediated;

(3) The party's counsel of record, if any; and

(4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

In addition, while not required to do so, though not a contesting party, an interested party who has or should have received notice of a mediation settlement conference pursuant to Rule 6(a) above may attend such mediation settlement conference with that party's counsel of record.

Rule 6(h). Agreement in Probate Court. Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. It is the obligation of the parties to seek approval of the agreement by the Probate Court.

Rule 9(b). By Court Order - Mediation. When the mediator is appointed by the Probate Court, if the Probate Judge determines that the mediation was conducted for the benefit of the incapacitated person or estate, the mediator shall be compensated from the funds of the incapacitated person or estate. Should the Probate Judge find that such payment is not proper, or if no or insufficient funds are available to cover these costs, the mediating parties shall equally bear the reasonable costs of mediation, subject to the approval of the Probate Judge. The

reimbursement at the discretion of the Probate Court Judge. An appointed mediator may charge no more than \$175 for cancellation of a mediation settlement conference.

5. The Probate Court and Parties to the Mediation. The participants of the Mediation Program will complete the pilot assessment forms attached and submit to the Commission on ADR. The final report will be submitted to the Court at the end of the Probate Court Pilot Mediation Program by the Commission on Alternative Dispute Resolution.

FORMS FOR THE PILOT PROGRAM FOR PROBATE COURT MEDIATION

Acrobat	Word	315PC	Final Report
Acrobat	Word	316PC	Court Report and Evaluation
Acrobat	Word	317PC	Participant Report and Evaluation

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE PROBATE COURT
CASE NO. 2008ES0700384

2011 SEP - 8 PM 3: 25
PROBATE COURT
BEAUFORT COUNTY, SC

FILED

KIMBERLEE TAVINO, Individually)
and as Personal Representative of the)
Estate of Betty Jane Jackson, and)
CATHERINE SPRINGFIELD,)

Plaintiffs,)

v.)

CHRISTINE SCHERIFF and FRANK)
SCHERIFF,)

Defendants.)

**ORDER DENYING MOTIONS
TO COMPEL AND/OR APPROVE
SETTLEMENT**

This matter came before the Court for a hearing, following proper notice, on July 20, 2011, on Plaintiffs' Motion to Compel Settlement, dated March 9, 2011, and Motion for Approval of Settlement, dated June 6, 2011. Present at the hearing were: Plaintiffs Kimberlee Tavino and Catherine Springfield, represented by Reynolds H. Blankenship, Jr., Esquire, and Robert M. P. Masella, Esquire; and Defendants Christine Scheriff and Frank Scheriff, represented by Antonia T. Lucia, Esquire.

After due consideration of the testimony and other admissible evidence presented at the hearing, the arguments of counsel, the record, and the applicable law, the Motions are denied, as set forth below.

FACTUAL/PROCEDURAL BACKGROUND

Betty Jane Jackson ("Decedent") died on May 4, 2008, and her daughter, Kimberlee Tavino, was appointed by this Court as Personal Representative of Decedent's estate on March



30, 2009. Decedent also was survived by her other children, Christine Scheriff and Catherine Springfield, parties herein. Defendant Frank Scheriff is the husband of Christine Scheriff.

This action was commenced by Summons and Complaint of Plaintiffs, filed March 25, 2010. The Complaint requests, *inter alia*, restitution and disgorgement from Defendants of property of Decedent allegedly misappropriated by Defendants to their own use and benefit.

Defendants' Answer to the Complaint, as well as their Motion for Dismissal or in the Alternative for Removal to the Circuit Court, were filed April 7, 2010. After successive hearings, Defendants' alternate Motions were denied by Orders of this Court entered, respectively, on June 8 and July 28, 2010. Further proceedings in the action were held in abeyance for the next six months, on the advice of Defendants' counsel, by letters of August 12 and October 14, 2010, that the parties were trying to negotiate or mediate a settlement.

By letter of January 31, 2011, Plaintiffs' counsel filed with the Court a copy of a written agreement purportedly signed by Plaintiffs, Defendants, and their respective counsel, which Plaintiffs' counsel described, in his letter, as the "Agreement which was reached at Mediation on December 8, 2010."

On February 10, 2011, Defendants' counsel filed a Notice of Motion and Motion to Set Aside Agreement. On March 11, 2011, Plaintiffs' Notice of Motion and Motion to Compel Settlement (a subject of the within Order) was filed. Defendants' Notice of Motion and Motion to Set Aside Agreement subsequently was withdrawn, with Defendants nevertheless maintaining opposition to Plaintiffs' Motion to Compel.

After consideration of the parties' written arguments, submitted at the Court's request, on issues relating to the propriety of the Court hearing the Motion to Compel,¹ the Court determined to set a hearing on the Motion for July 20, 2011. On June 9, 2011, Plaintiffs' Notice of Motion

¹ See this Court's letter to counsel, dated April 14, 2011.

and Motion for Approval of Settlement was filed. The latter Motion asks for Court approval of the agreement under S.C. Code §§ 62-3-1101 and 62-3-1102, and Rule (a) [sic²] of Supreme Court Administrative Order 2007-08-23-01, Re: Probate Court Pilot Mediation Program ("PCPMP"), in the alternative to the relief requested in the Motion to Compel. On June 29, 2011, the Court gave notice, by letter, to the parties' respective counsel that a consolidated hearing on Plaintiffs' Motions would be held on July 20, 2011, at 10:30 a.m.³

At the hearing, the Court heard the testimony of the four parties, all called as witnesses by Plaintiffs' counsel, and two witnesses called by Defendants' counsel. The evidence shows that the subject agreement was negotiated and signed, by all parties and their respective counsel, at the voluntary mediation session held on December 8, 2010, in the offices of the mediator, James A. Grimsley, III, Esquire.

ANALYSIS/DISCUSSION

Were either of Plaintiffs' Motions granted, the ruling presumably would amount to a judgment that would end the underlying action commenced by Plaintiffs' Summons and Complaint. Such a comprehensive judgment would be based on limited evidence.

Before the hearing was set, the parties' respective counsel agreed that evidence of compromise negotiations would not be offered, as the admission of such evidence would appear to violate Rule 408, SCRE. At the hearing, Plaintiffs' counsel further argued that, to the extent the alternate Motion asked for Court approval of the subject agreement under § 62-3-1102, the Court need find only that the "contest or controversy" purportedly settled by the agreement "is in good faith," as required by §62-3-1102(2). Plaintiffs' counsel asserted that none of the parties to

² Rule 6(a) appears inapplicable. Rule 6(h) addresses the subject of Court approval of a mediation agreement.

³ The Court's notification also advised counsel that Defendants' Motion for Leave to File and Serve an Amended Answer, dated May 27, 2011, would be heard at the consolidated hearing on July 20. However, Defendants' Motion was not heard at that time, is not a subject of this Order, and remains pending for determination.

the agreement are "represented by fiduciaries," and, as such, there is no requirement that the Court find "the effect of the agreement" to be "just and reasonable" under § 62-3-1102(2).

The Court maintained at the hearing that a determination of fairness was necessary, in part because Plaintiff Kimberlee Tavino, as Personal Representative of Decedent's estate, has a fiduciary relationship with the other parties who are estate beneficiaries. Also, the Complaint in the underlying action requests the restitution and disgorgement of property to Decedent's estate, under the administration of the Personal Representative, and judicial approval of the subject agreement apparently would substitute for the relief requested in the Complaint. Finally, "[t]here exists in every contract an implied covenant of good faith and fair dealing." *Time Warner Cable v. Condo Services, Inc.*, 381 S.C 275, 285, 672 S.E. 2d 816, 820 (Ct. App. 2009).

Because the scope of the hearing was limited to the Motions to compel and/or approve the settlement negotiated at mediation, on December 8, 2010, the Court sustained Plaintiffs' objections to evidence of post-mediation developments, including later valuations of the subject real property, on relevance grounds. In retrospect, those constraints appear to have forced the exclusion of evidence that might have been relevant to the fairness of the subject agreement.⁴

The exclusion of evidence of compromise negotiations is imperative and proper. Rule 408 compels it; moreover, the admission of such evidence would undesirably "chill" settlement negotiations, mediation, and other alternative dispute resolution.

Nevertheless, that exclusion, together with the other evidentiary constraints noted above, make it inappropriate for this Court to grant the relief requested by Plaintiffs in their Motion, either as a motion to compel the settlement or to approve it under § 62-3-1102. To do so would, in effect, amount to a judgment for money and enforcement of a contract -- in final resolution of

⁴ That observation is made without regard to affidavit Ms. Lucia proffered with her post-hearing letter of July 22, 2011. As noted in my letter of August 10, 2011, that affidavit should not have been submitted as it was, and its contents have not been considered by this Court.

the underlying action and substitution for the relief requested in Plaintiffs' Complaint -- without consideration of evidence that might be relevant and should be considered before awarding such relief.

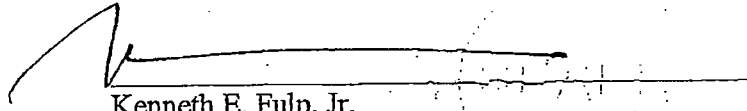
In addition, it should be noted that approval of the subject agreement under §§ 62-3-1101 and 62-3-1102 appears inappropriate in this case, where one side of the purported compromise registered their "disagreement" by Motion filed a month before Plaintiffs' Motion to Compel (the Motion for Approval under §§ 62-3-1101 and 62-3-1102 being filed three months later). Sections 62-3-1101 and 62-3-1102 set forth a process for Court *approval* of a compromise to which all relevant parties have agreed, not a process to *compel* agreement -- except to the extent that the Court may direct "all fiduciaries subject to its jurisdiction to execute the agreement." *S.C. Code Ann.* § 62-3-1102(3).

The alternate approval process relied on by Plaintiffs, under Rule 6(h), PCPMP, appears to apply only to Court-ordered mediation. *See* Rule 3(a), PCPMP. The subject agreement apparently resulted from mediation in which the parties engaged voluntarily, on their own initiative or that of their counsel, without having been ordered by this Court to mediate.

RULING

For the foregoing reasons, Plaintiffs' Motion to Compel Settlement and Motion to Approve Settlement are DENIED. The underlying action on the causes of action asserted in Plaintiffs' Complaint remains pending for adjudication.

AND IT IS SO ORDERED.



Kenneth E. Fulp, Jr.
Associate Judge
Beaufort County Probate Court

Beaufort, South Carolina

September 8, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE PROBATE COURT
CASE NO. 2008ES0700384

KIMBERLEE TAVINO, Individually)
and as Personal Representative of the)
Estate of Betty Jane Jackson, and)
CATHERINE SPRINGFIELD,)

Plaintiffs,)

v.)

CHRISTINE SCHERIFF and FRANK)
SCHERIFF,)

Defendants.)

ORDER

FILED
2011 SEP 26 PM 12:56
PROBATE COURT
BEAUFORT COUNTY, SC

This Court has before it, for determination, Plaintiffs' *Motion to Reconsider Order Denying Motions to Compel and/or Approve Settlement* ("Motion to Reconsider"), dated September 13, 2011, and Defendants' *Motion for Leave to File and Serve an Amended Answer* ("Motion to Amend"), dated May 27, 2011. In addition, a hearing on the merits in this action should be scheduled. Each item is addressed below.

Plaintiffs' Motion to Reconsider

"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 52(a), SCRPC. The Motion to Reconsider is not a Rule 41(b) motion.

Having duly considered Plaintiffs' Motion to Reconsider and the arguments set forth therein, as well as the arguments in *Defendants' Opposition to Plaintiffs' Motion to Reconsider Order Denying Motions to Compel and/or Approve Settlement*, dated September 16, 2011, this

Court AFFIRMS its *Order Denying Motions to Compel and/or Approve Settlement*, entered September 8, 2011.

Defendants Motion to Amend

The letter of Plaintiffs' counsel, dated September 21, 2011, notifies this Court and (by copy) Defendants' counsel of the withdrawal of Plaintiffs' opposition to the Motion to Amend.

Leave to amend a pleading "shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRPC. Defendants' Motion seeks amendment of their Answer to assert certain affirmative defenses, argues that Defendants should "be permitted to amend their Answer so as to accord them a fair opportunity to defend this matter," and includes a copy of the proposed Amended Answer. Plaintiffs' counsel states, in his September 21 letter, "[w]e have no objection to the amendment."

Accordingly, good cause exists to allow the requested amendment, and the Motion to Amend is GRANTED. Defendants' Amended Answer shall be served no later than ten (10) days from the date of this Order. Any pleading in response to the Amended Answer shall be served no later than fifteen (15) days after Plaintiffs' counsel is served with a copy of the Amended Answer.

Procedure for Scheduling Merits Hearing

Within fifteen (15) days after receipt of a copy of this Order, counsel for the respective parties shall advise this Court, in writing, which of the following dates are *not* available to them for the hearing on the merits in this action: November 8, 2011; November 9, 2011; November 16, 2011 (at 10:00 a.m. each date). Based on the responses of counsel (a failure to timely

respond being deemed to indicate that all proposed dates are available), the merits hearing will be set and all counsel notified accordingly.

AND IT IS SO ORDERED.



Kenneth E. Fulp, Jr.
Associate Judge
Beaufort County Probate Court

Beaufort, South Carolina

September 26, 2011

RECEIVED
1/24/12

STATE OF SOUTH CAROLINA)

IN THE PROBATE COURT

COUNTY OF BEAUFORT)

Case No.: 08-ES-07-00384

Kimberlee Tavino, individually and)
as Personal Representative of the)
Estate of Betty Jane Jackson, and)
Catherine Springfield,)

Plaintiff,)

AMENDED SUMMONS

v.)

Christine Scheriff and Frank Scheriff,)

Defendants.)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint, a
~~copy of which is hereby served upon you, and to serve a copy of your Answer to the Plaintiff's~~
attorney at his office located at 917 Calhoun Street, Columbia, South Carolina, 29201, within
thirty (30) days after service of this Summons upon you, exclusive of the day of service. If you
fail to answer the Complaint within that time, the Plaintiffs shall apply to the Court for a judgment
by Default against you for the relief demanded in the said Amended Complaint.

MASELLA LAW FIRM, P.A.



Robert M. P. Masella, Esq.
Reynolds H. Blankenship, Jr.
917 Calhoun Street
Columbia, South Carolina 29201
(803) 748-9990, Fax (803) 748-9948
Attorney for Plaintiffs

Columbia, South Carolina

This 20th day of January, 2012.

STATE OF SOUTH CAROLINA)

IN THE PROBATE COURT

COUNTY OF BEAUFORT)

Case No.: 08-ES-07-00384

Kimberlee Tavino, individually and)
as Personal Representative of the)
Estate of Betty Jane Jackson, and)
Catherine Springfield,)

Plaintiff,)

AMENDED COMPLAINT

v.)

Christine Scheriff and Frank Scheriff,)

Defendants.)

The Plaintiffs, complaining of the Defendants herein, would respectfully allege and show unto this Honorable Court that:

1. ~~The Plaintiff, Kimberlee Tavino, is a citizen and resident of the County of~~ Beaufort, State of South Carolina, is the daughter of Betty Jane Jackson, and is the Personal Representative of the Estate of Betty Jane Jackson.

2. The Plaintiff, Catherine Springfield, is a citizen and resident of the County of Hamilton, State of Ohio, and is the daughter of Betty Jane Jackson.

3. The Defendant, Christine Scheriff, also a daughter of Betty Jane Jackson, is a citizen and resident of the County of Beaufort, State of South Carolina.

4. The Defendant, Frank Scheriff, husband of Christine Scheriff, is a citizen and resident of the County of Beaufort, State of South Carolina.

5. On or about April 2005, Christine, Kimberlee and Cathy's father, William L. Jackson ("Father"), passed away leaving the parties' mother, Betty Jane Jackson, ("Mother") alone. The parties' Mother was highly dependent, throughout her life, on Father. The parties' Mother had no understanding of finances, did not pay bills, did not make financial decisions, or

concern herself with any financial matters.

6. Father and Mother chose Christine to be both their attorney-in-fact, by executing Powers of Attorney naming Christine as their attorney-in-fact, and also chose in their Wills to have Christine act as the personal representative in their respective estates.

7. Frank and Christine agreed to move in with Mother after Father passed away, however, for reasons of their own, they required Mother to sell her home located on Governors Lane in Sea Pines Plantation and move with them to Bluffton, South Carolina. Father and Mother's estate plan provided for the house, and its proceeds, along with other property of their estates, to eventually be divided equally among the three daughters.

8. After the closing of the sale of the Governors Lane home, Christine secretly converted the proceeds to her own use and placed these funds into her own account. Those funds were used by Defendants to purchase a new home which Christine and Frank had titled in their names, telling Kimberlee it was easier to do it that way but not disclosing to her that they would later claim they owned the property. Cathy had no knowledge of this.

9. Furthermore, after the purchase of the new home on Rosebud in Bluffton, the Defendants continued to take for their own use and benefit, Mother's property, including money she received from Social Security and other assets she held.

10. All three sisters were equal beneficiaries under their parents' respective estate plans, and each expected to receive one-third of their Mother's estate, to include the value of Mother's real estate.

11. After Mother died, the parties discussed how to handle Mother's estate and how the house on Rosebud would be divided between Mother's heirs. Frank said nothing was going to be divided, and Christine said out loud that she felt as though she and Frank were "bandits".

12. Christine filed Mother's Will with the Probate Court and did nothing more.

13. On April 3, 2009, Kimberlee petitioned the court to appoint her as the Personal Representative for Mother's estate, and the Court granted the petition.

14. On March 25, 2010, Kimberlee, in her capacity as Personal Representative and individually, along with Cathy, brought this action in the Probate Court for various causes of action to resolve their differences.

15. The parties agreed to attempt to resolve their differences, and on December 8, 2010, the parties attended mediation at the office of William Clark, Defendants' attorney. After a full day of negotiations during the mediation, the parties came to an agreement which they memorialized in writing. The writing laid out the agreement reached during mediation, and the written agreement is incorporated herein and made a part of this Amended Complaint.

16. All parties executed this contract along with their attorneys, and the contract specified each of the parties' obligations necessary to perform.

17. On January 8, 2011, the date Defendants were to make their initial payment to Plaintiffs under the settlement contract, the Defendants refused to perform.

18. Furthermore, Defendants continue with their joint venture to interfere with Plaintiffs rights to inherit what was rightfully theirs when Defendants converted the proceeds from the only true asset held by Mother, the net proceeds from the Governors Lane home in the amount of \$739,793.13, and purchased a home in their own name, with no intent to relinquish these assets.

19. As a result of Defendants' actions in interfering with the Plaintiffs' inheritance, and as a result of Defendants' failure to abide by their contractual agreement, the Plaintiffs have incurred additional actual and consequential damages.

20. As Mother's Attorney-in-Fact, the Defendant Christine Scheriff, in breach of her fiduciary duty, purposefully, intentionally, willfully, maliciously, and negligently misapplied and

converted property that decedent devised to Plaintiffs to Defendants' own personal use and used said property for their own benefit. The Plaintiffs are informed and believe that the Defendants have converted and misapplied property approximately in excess of \$900,000.00 of Mother's estate.

21. The Plaintiffs are informed and believe that they are entitled to an injunction restraining and enjoining the Defendants from allocating, disposing, encumbering, mortgaging, selling, hypothecating, wasting away, or otherwise disposing of the assets of the decedent's estate, some of which may be currently titled in Defendants' name. The Plaintiffs are informed and believe that said injunction is reasonably necessary to preserve assets so that the Defendants will have a means of reimbursing the Plaintiffs in the event the Plaintiffs are entitled to a recovery in the action herein. Plaintiffs are informed and believe that the injunction is necessary in order to protect the rights of the Plaintiffs.

22. Further, as explained more fully below, Plaintiffs are entitled to an award of actual, consequential, incidental, and punitive damages.

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty)

23. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

24. The Defendant, Christine Scheriff, by and through her fiduciary position as decedent's Attorney in Fact, had a fiduciary duty to decedent and to all those entitled to devise in accordance with the terms of decedent's Last Will and Testament and inter vivos trust. Specifically, said Defendant had a fiduciary duty to the decedent and the Plaintiffs. The Defendant, Christine Scheriff, was also in a fiduciary relationship with the decedent and the Plaintiffs because they reposed trust and confidence in her.

25. Said Defendant breached said fiduciary duty to Mother and the Plaintiffs by misappropriating Plaintiffs' property, thereby acting in bad faith.

26. As direct and proximate result of the breach of fiduciary duty, Plaintiffs have suffered great monetary loss.

27. Plaintiffs are informed and believe that they are entitled to an award of restitution and punitive damages and costs and fees from the Defendants.

AS A SECOND CAUSE OF ACTION
(Conversion)

28. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

29. Defendant Christine Scheriff while serving as Mother's fiduciary has wrongfully taken property from the Plaintiffs and converted it to her and her husband's own use, all to the damage of Plaintiffs. Plaintiffs pray that the trier of fact determine the amount converted under the circumstances, and award them a judgment for restitution and disgorgement in an appropriate amount, as well as punitive damages.

AS A THIRD CAUSE OF ACTION
(Setting Aside Deed)

30. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

31. Defendants misappropriated the proceeds from the sale of Mother's real property at 11 Governors Lane, Hilton Head South Carolina 29928 and improperly used said proceeds to purchase real estate titled in their own names at 2 Rosebud, Bluffton, South Carolina 29910.

32. Plaintiffs are informed and believed that they are entitled to an order of this Court setting aside said deed into Defendants' names and titling said real estate in the name of decedent's estate.

FOR A FOURTH CAUSE OF ACTION
(Equitable Lien)

33. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

34. Plaintiffs are informed and believe that they are entitled to an equitable lien imposed on the Defendants' property for all misappropriated property and any benefit therefrom.

FOR A FIFTH CAUSE OF ACTION
(Resulting Trust)

35. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

36. Plaintiffs are informed and believe that they are entitled to a resulting trust imposed on the Defendants for all misappropriated property and any benefit therefrom.

FOR A SIXTH CAUSE OF ACTION
(Constructive Trust)

37. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

38. Plaintiffs are informed and believe that they are entitled to a constructive trust imposed on the Defendants for all misappropriated property and any benefit therefrom.

FOR A SEVENTH CAUSE OF ACTION
(Fraud)

39. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

40. The Defendants knew that their scheme of misappropriating Mother's property was improper, unlawful and dishonest, yet they intentionally caused Kimberlee to receive their representations insuring the validity of this scheme.

41. Frank represented to Kimberlee that putting title to the Rosebud property in his

and Christine's name was easier and that was why the house should be titled in such a way.

Christine acquiesced in Frank's representation and such was received by Kimberlee to mean that the property would be divided once Mother passed and that she could rely on Frank's representation.

42. Frank and Christine knew that their representation was false and that they made it with intent to retain title to the property excluding both Kimberlee and Cathy from their rightful entitlement to said property.

43. Frank and Christine knew the representations were false at the time they were made to Kimberlee.

44. Defendants manifested their intent for Kimberlee to rely on the representations by making them and inducing Kimberlee to place Defendants in a position where they could withhold rightful title from Plaintiffs.

45. Kimberlee was ignorant of the falsity of the representations and was fraudulently induced to allow Defendants to title the Rosebud property in their name using the Governors Lane proceeds which were converted by Christine and Frank.

46. Kimberlee had a right to rely on the representations made by Frank and Christine as they were family and this family wouldn't steal from one another.

47. Because of the false representations made by Frank and Christine both Kimberlee and Cathy have suffered significant financial loss as a proximate result of the Defendants representations and actions.

48. Plaintiffs are informed and believe that they are entitled to an award of restitution, actual and punitive damages and costs and fees from the Defendants.

FOR AN EIGHTH CAUSE OF ACTION
(Constructive Fraud)

49. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

50. If the Defendants did not have a dishonest purpose or intent to deceive Kimberlee when making the aforesaid representations, Plaintiffs assert that the Defendants nevertheless made false, material statements as described above. The Defendants intended for Kimberlee to rely upon the representations. Kimberlee rightfully relied on the representations without knowledge of their falsity, which could not be uncovered by only further due diligence by her or her sister Cathy, who knew nothing of this activity.

51. Both Plaintiffs suffered significant financial loss as a proximate result of the Defendants representations and actions.

52. Plaintiffs are informed and believe that they are entitled to an award of restitution, actual and punitive damages and costs and fees from the Defendants.

FOR A NINTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress/Outrage)

53. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

54. Plaintiffs are informed and believe that Defendants have acted intentionally or at the minimum extremely reckless with their attempt to steal their rightful inheritance which was left to them by their Mother, who intended to leave her worldly assets equally to each of their three daughters as evidenced by Mother's Will.

55. Plaintiffs believe that the Defendants conduct was so extreme and outrageous that it exceeds all possible bounds of decency, and was so atrocious that their behavior cannot be tolerated in the civilized community.

56. As a direct and proximate result of Defendants' actions, both Kimberlee and

Cathy have undergone severe emotional distress.

57. Plaintiffs are informed and believe that they are entitled to an award of actual and punitive damages and costs and fees from the Defendants.

FOR A TENTH CAUSE OF ACTION
(Civil Conspiracy)

58. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

59. Plaintiffs are informed and believe that the Defendants, Frank Scheriff and Christine Scheriff, jointly initiated and continued their efforts to deprive Plaintiffs jointly and individually of their rightful inheritance, and did so in a concerted effort and by agreement between themselves.

60. Defendants took money and property from Mother which would have been available to them as a part of Mother's estate.

61. This joint effort was done for the purpose of converting for their own use the property which was rightfully Plaintiffs.

62. As a direct and proximate result of Defendants' combined efforts, the Plaintiffs suffered special damages, including the following:

- a. Attorney fees, expert expenses, appraisals as well as other litigation related expenses and costs.
- b. Interest and income lost by not having access to their inheritance.
- c. Rental owed to Plaintiffs by Defendants who have lived in the house, which a part of is rightfully Plaintiffs, without any costs or expenses.

63. Plaintiffs are informed and believe that they are entitled to an award of restitution, actual and punitive damages and costs and fees from the Defendants.

FOR A ELEVENTH CAUSE OF ACTION
(Intentional Interference with Inheritance)

64. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

65. Plaintiffs, along with Christine Scheriff, were Mother's surviving heirs. Mother's Will provided for them equally. Therefore, Plaintiffs had a reasonable expectation that each of them would receive one-third of Mother's estate.

66. Frank and Christine intentionally converted the proceeds from the sale of the Governors Lane home, Mother's primary asset, into their own. Frank and Christine titled the Rosebud house in their own names and used the proceeds from the sale of the Governors Lane home to purchase this home.

67. Plaintiffs had a reasonable certainty that they each would receive one-third of their Mother's estate, which would include the proceeds received from the sale of Governors Lane, and Defendants' actions interfered with their ability to inherit these assets because of Defendants improper actions.

68. As a direct and proximate result of Defendant's actions, Plaintiffs have been damaged.

69. Plaintiffs are informed and believe that they are entitled to an award of restitution, actual and punitive damages and costs and fees from the Defendants.

FOR A TWELFTH CAUSE OF ACTION
(Breach of Contract)

70. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

71. The parties, having been involved in this litigation regarding the sisters' Mother's estate, executed the written settlement agreement referenced above.

72. Defendants have breached their contract with Plaintiffs, as they entered into a binding contract, which was written up by the mediator, after a successful mediation which laid out the terms of their agreement and was signed by all the parties as well as their respective attorneys.

73. Plaintiffs provided consideration by agreeing to forgo this litigation and their efforts to recover their rights, interests, and equal division of their Mother's estate.

74. Defendants breached this contract, which has been filed with the Court and is made a part hereof, by unjustifiably failing to perform and by repudiating outright said contract without cause or reason.

75. Plaintiffs suffered actual and consequential damages as a direct and proximate result of the breach.

FOR A THIRTEENTH CAUSE OF ACTION
(Attorney fees and Costs)

76. Each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim

77. Because of the actions of the Defendants, Plaintiffs have been forced to obtain the services of an attorney and expert to defend themselves from the actions of the Defendants.

78. The Plaintiffs are informed and believe that they are entitled to an Order from this court commanding Defendants to pay for the costs, including those of their expert, and attorneys' fees they have incurred due to the actions of the defendants.

FOR A FOURTEENTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

79. The allegations contained in the preceding paragraphs that are consistent herewith are re-alleged as if repeated herein verbatim.

80. Plaintiffs are informed and believe that the Defendants have breached their

contract with Plaintiffs, as they entered into a binding contract after a successful mediation which laid out the terms of their agreement and was signed by all the parties as well as their respective attorneys.

81. Plaintiffs provided consideration by agreeing to forgo this litigation and their efforts to recover their rights, interests, and equal division of their Mother's estate.

82. Defendants breached this contract, which is attached here to and made a part hereof, by unjustifiably failing to perform and by repudiating outright said contract without cause or reason.

83. Plaintiffs suffered actual and consequential damages as a direct and proximate result of the breach.

84. Plaintiffs are informed and believe that the Defendants' breach was contemplated by Defendants at the inception of the contract and that because they have no mortgage and no cost to live in the Rosebud property, they intended in bad faith to breach their contract with Plaintiffs in order to cause delay and stay in the Rosebud home without any mortgage.

85. Plaintiffs are informed and believe that Defendants were dishonest when they entered into the contract, that their behavior and acts have been based on unfair dealing, and that they have taken Plaintiffs property by design.

86. Plaintiffs are informed and believe that they are entitled to actual damages for Defendants acts as well as punitive damages to punish Defendants for their intentional and deceitful acts plus costs and fees.

WHEREFORE, Kimberlee Tavino and Catherine Springfield pray for judgment against the Defendants for all actual, consequential, and incidental damages caused by the Defendants' acts and omissions; punitive damages; attorney fees; the costs of this action; all other relief specifically requested; and for such other and further relief as the Court deems just and proper.

MASELLA LAW FIRM, PA



Robert M. P. Masella, Esq.
Reynolds H. Blankenship, Jr.
917 Calhoun Street
Columbia, South Carolina 29201
(803) 748-9990
ATTORNEY FOR THE PLAINTIFFS

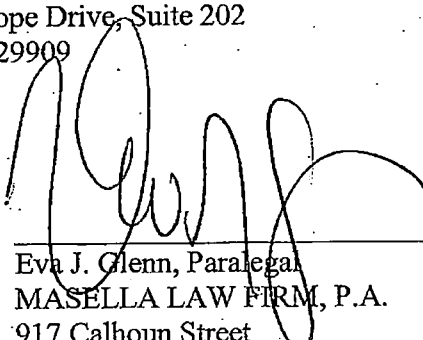
Columbia, South Carolina

Dated: January 20, 2012

CERTIFICATE OF SERVICE BY MAIL

I, Eva J. Glenn, Paralegal for Masella Law Firm, PA, do hereby certify that a copy of the Amended Summons and Amended Complaint were served upon the parties listed below by depositing said paper(s) in the United States Mail, Columbia, South Carolina on this 23rd day of January, 2012, with the first class postage duly affixed thereto and addressed as follows:

Antonia T. Lucia, Esq.
Vaux & Marscher, PA
16 William Pope Drive, Suite 202
Bluffton, SC 29909



Eva J. Glenn, Paralegal
MASELLA LAW FIRM, P.A.
917 Calhoun Street
Columbia, SC 29201

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2012-CP-07-01366

KIMBERLEE TAVINO, Individually)
and as Personal Representative of the)
Estate of Betty Jane Jackson, and)
CATHERINE SPRINGFIELD,)

Plaintiffs,

vs.

CHRISTINE SCHERIFF and FRANK)
SCHERIFF,)

Defendants.)

ORDER GRANTING DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND REMANDING TO
THE BEAUFORT COUNTY PROBATE
COURT

2014 OCT 24
AM 5:17
CLERK OF COURT
BEAUFORT COUNTY S.C.

THIS MATTER CAME BEFORE THE COURT for a hearing, following proper notice, on November 6, 2012, on Defendants' Motion for Partial Summary Judgment and for an Order remanding the above-captioned action to the Beaufort County Probate Court. Present at the hearing were Robert M.P. Masella, Esquire, attorney for Plaintiffs, and Roberts Vaux, Esquire, and Antonia T. Lucia, Esquire, attorneys for Defendants. John S. Nichols, Esquire, subsequently entered an appearance as co-counsel for the Plaintiffs.

After due consideration of the testimony and other admissible evidence presented at the hearing, the arguments and memoranda of counsel, the record, and the applicable law, the Court now grants Defendants' Motion for Partial Summary Judgment and the case is remanded to the Beaufort County Probate Court.

FACTUAL/PROCEDURAL BACKGROUND

The decedent, Betty Jane Jackson, died testate on May 4, 2008. Her Last Will and Testament, dated September 23, 1994, poured over her probate estate to the decedent's Revocable Living Trust Agreement which named her three surviving children, Kimberlee Tavino, Christine Scheriff, and Catherine Springfield, as beneficiaries.

QPM

In May of 2005, Betty Jane Jackson sold her home at 11 Governor's Lane, Hilton Head Island, South Carolina. The \$739,792.13 check for the proceeds of that sale was given to decedent's daughter, Christine Scheriff.

In June of 2005, Christine Scheriff and Frank Scheriff purchased a home at 2 Rosebud, Bluffton, South Carolina, for the amount of \$740,000.00, using the proceeds of the sale of the decedent's Governors Lane home. This property was titled in the name of Christine Scheriff and Frank Scheriff, as joint tenants with right of survivorship. This home was occupied by the decedent together with Christine Scheriff and Frank Scheriff until decedent's death in 2008.

In January of 2009, Kimberlee Tavino petitioned the Probate Court for the County of Beaufort to admit the Last Will and Testament of Betty Jane Jackson for probate and to appoint Kimberlee Tavino as Personal Representative of that estate.

In March of 2010, Kimberlee Tavino, individually and as the Personal Representative of the Estate of Betty Jane Jackson, together with Catherine Springfield, commenced an action against Christine Scheriff and Frank Scheriff. The complaint set forth a cause of action to set aside the deed for the property located at 2 Rosebud, Bluffton, South Carolina, as well as claims for breach of fiduciary duty, conversion, equitable lien, resulting trust, and constructive trust.

In December of 2010, the parties took part in mediation. In March of 2011, the Plaintiffs moved to compel an alleged settlement. By Order of the Beaufort County Probate Court dated September 8, 2011, and affirmed upon the Court's reconsideration by Order dated September 26, 2011, the Honorable Kenneth E. Fulp, Jr., denied the Plaintiffs' motion and refused to approve the alleged mediation agreement.

Subsequently, the Plaintiffs, with leave of Court, interposed an Amended Complaint which retained the original causes of action and added the following:

- Seventh cause of action for fraud
- Eighth cause of action for constructive fraud
- Ninth cause of action for intentional infliction of emotional distress/outrage
- Tenth cause of action for civil conspiracy

¹ The Amended Complaint also included a thirteenth cause of action which is merely a demand for attorney's fees and costs.

APM
2

- Eleventh cause of action for intentional interference with inheritance
- Twelfth cause of action for breach of contract
- Fourteenth cause of action for breach of contract accompanied by fraudulent act

Based on the Amended Complaint, Plaintiffs sought to remove this matter to Circuit Court, asserting that the breach of contract and intentional infliction of emotional distress causes of action entitled them to trial by jury and that the amount in controversy is at least \$5,000.00.

By Order of the Honorable Kenneth E. Fulp, Jr., entered on April 4, 2012, the Beaufort County Probate Court granted removal. On May 14, 2012, the Defendants moved for partial summary judgment, and for an Order remanding this case to Beaufort County Probate Court. Defendants' motion is now granted.

ANALYSIS/DISCUSSION

Seventh Cause of Action for Fraud and Eighth Cause of Action for Constructive Fraud:

In her deposition taken on January 13, 2010, Kimberlee Tavino answered, under oath, that there were no conversations with the Defendants regarding title to the property at issue. Despite this sworn testimony, in paragraph 8 of her subsequent Amended Complaint, Tavino alleges having a conversation with the Defendants in which she was told it was "just easier" to title the property in Defendants' names. Paragraph 8 of the Amended Complaint is the basis for the fraud and constructive fraud causes of action and further alleges that "Cathy [the third beneficiary] had no knowledge of this [titting of the property]."

The parties in this matter were provided multiple opportunities to supplement their submissions in this matter, and they did so. The Court received supplemental materials from the Plaintiffs on November 26, 2012, December 9, 2013, and April 14, 2014 (upon retaining additional counsel), and from Defendants on November 20, 2012, November 27, 2012, December 16, 2013, and May 8, 2014. Despite the diligent work of their attorneys, Plaintiffs have been unable make the necessary showing that a genuine issue of material fact exists for trial with respect to their fraud and constructive fraud

QPM
3

causes of action. See e.g., *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 308, 657 S.E.2d 67, 70 (Ct. App. 2008)(party opposing summary judgment must do more than rely on mere allegations); *Smith v. Hastie*, 367 S.C. 410, 416 n.5, 626 S.E.2d 13, 16 n.5 (Ct. App. 2005)(fraud claim requires proof by clear and convincing evidence).

Ninth Cause of Action for Intentional Infliction of Emotional Distress:

The same must be said for Plaintiffs' claim for Intentional Infliction of Emotional Distress, traditionally called "outrage." The Plaintiffs allege in Paragraph 54 of the Amended Complaint that:

"Plaintiffs are informed and believe that Defendants have acted intentionally or at the minimum extremely reckless [sic] with an attempt to steal their rightful inheritance which was left to them by their mother who intended to leave her worldly assets equally to each of her three daughters as evidenced by mother's will"

This is the same tortious conduct which forms the basis of the causes of action for breach of fiduciary duty, conversion, setting aside the deed, equitable lien, resulting trust, and constructive trust.

Again, despite multiple opportunities to do so, Plaintiffs have failed set forth any evidence suggesting that Defendants' conduct was "so extreme and outrageous as to exceed all bounds of decency." See *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010)(internal citations omitted). Nor have they presented evidence that they have suffered emotional distress as a result of Defendants' actions in handling the decedent's "worldly assets".

Tenth Cause of Action for Civil Conspiracy:

Judge Michael Duffy reiterated in *Harris v. Sand Canyon Corp.*, 274 F.R.D. 556 D.S.C. 2010) that:

XPML
4

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct.App.1989). The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. *Id.*; see also *Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.").

A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) *rev'd on other grounds*, 283 S.C. 155, 321 S.E.2d 602 (1984) *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

Harris at 563 -564.

Moreover, in order to properly plead a cause of action for civil conspiracy, the Plaintiffs must allege special damages, beyond those set forth in the other causes of action. See *LaMotte v. Punch Line of Columbia, Inc.* 296 S.C. 66, 370 S.E.2d 711 (1988) *Vaught, supra*.

In Paragraph 62 of the Amended Complaint, Plaintiffs allege that they have sustained attorney's fees and expenses of litigation, interest and income lost by not having access to their inheritance, and rental income owed to the Plaintiffs by the Defendants, who have lived in the Rosebud property. All of these damages are either actual or consequential damages which have been demanded in the breach of fiduciary duty and conversion causes of action (and the attorney fees sustained in prosecuting this matter would not be recoverable). The causes of action for setting aside the deed, resulting trust, and constructive trust also request not only a return of the misappropriated property but compensation for any benefit therefrom. Thus, for this reason, and because Plaintiffs have not made the necessary showing that a genuine issue of material fact exists with respect to their conspiracy claim, Defendants are entitled to summary judgment. See *Maples v. Myers*, 2004 WL6331521, 2004-UP-364 (S.C. Ct. App. June 10,

2/11/05

2004)(conspiracy claim must fail where summary judgment opposition is based on mere suggestion and speculation).

Eleventh Cause of Action for Intentional Interference with Inheritance:

South Carolina courts have not yet recognized intentional interference with inheritance rights as a valid cause of action. *See Meehan v. Meehan*, 2006 WL 7285712 at *3 n.3, 2006-UP-088 (S.C. Ct. App. Feb. 10, 2006). In *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 10 n.4, 542 S.E.2d 715, 717 n.4 (S.C. 2001), the South Carolina Supreme Court explained that:

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. *See, e.g., Nemeth v. Banhalmi*, 99 Ill.App.3d 493, 55 Ill.Dec. 14, 425 N.E.2d 1187 (1981); *Morrill v. Morrill*, 712 A.2d 1039 (Me.1998); *Doughty v. Morris*, 117 N.M. 284, 871 P.2d 380 (Ct.App.1994); *Firestone v. Galbreath*, 67 Ohio St.3d 87, 616 N.E.2d 202 (1993); *Wickert v. Burggraf*, 214 Wis.2d 426, 570 N.W.2d 889 (1997); *see also* Restatement (Second) of Torts § 774B (1979).

As set forth above, Plaintiffs have failed to set forth any evidence in support of their allegations that Defendants have intentionally and improperly interfered with their inheritance rights. Thus, even if South Carolina were to recognize this cause of action, Plaintiffs have failed to make the showing necessary to survive Defendants' properly supported motion for partial summary judgment.

Twelfth Cause of Action for Breach of Contract and Fourteenth Cause of Action for Breach of Contract Accompanied by Fraudulent Act:

In June of 2011, Plaintiffs moved for approval of the alleged mediation agreement which is the subject of the Twelfth and Fourteenth Causes of Action. The Plaintiffs' Notice of Motion stated: "This motion is pursuant to South Carolina sections 62-3-1101 and 1102, as well as Rule 6(a) of Supreme Court Administrative Order 2007-08-23-01 re: Probate Court Pilot Mediation Program."

SPM
6

South Carolina Probate Court Sections 62-3-1101 and 62-3-1102² provide (with emphasis) as follows:

62-3-1101. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

A compromise of a controversy as to admission to probate of an instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of a probated will, the rights or interests in the estate of the decedent, of a successor, or the administration of the estate, if approved by the court after hearing, is binding on all the parties including those unborn, unascertained, or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. A compromise approved pursuant to this section is not a settlement of a claim subject to the provisions of Section 62-5-433.

62-3-1102. Procedure for securing court approval of compromise.

The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parties acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identify cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) Upon application to the court and after notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that

² Any inconsistencies between the provisions of South Carolina Probate Code Sections 62-3-1101 and 1102 and SCRCP Rule 41.1 are resolved by SCRCP Rule 81 which provides:

These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable in magistrate's courts, probate courts, and family courts to the extent they are not inconsistent with the statutes and rules governing those courts. In any case where no provision is made by statute or these Rules, the procedure shall be according to the practice as it has heretofore existed in the courts of this State. (emphasis supplied.)

ARM
7

the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

The requirement of court approval is furthermore confirmed in Supreme Court Administrative Order 2007-08-23-01 re: Probate Court Pilot Mediation Program which provides that:

Rule 6(a). Agreement in Probate Court. Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. It is the obligation of the parties to seek approval of the agreement by the Probate Court.

The Plaintiffs' application for Probate Court approval of the mediation agreement was denied by Order of the Beaufort County Probate Court dated September 8, 2011, and on reconsideration by Order dated September 26, 2011. In reaching its decision, the Court was faced with evidentiary constraints since the alleged agreement was the result of mediation. The Court reasoned:

The exclusion of evidence of compromise negotiations is imperative and proper. Rule 408 compels it; moreover, the admission of such evidence would undesirably "chill" settlement negotiations, mediation, and other alternative dispute resolution.

Nevertheless, that exclusion, together with the other evidentiary constraints noted above, make it inappropriate for this Court to grant the relief requested by Plaintiffs in their Motion, either as a motion to compel the settlement or to approve it under § 62-3-1102. To do so would, in effect, amount to a judgment for money and enforcement of a contract – in final resolution of the underlying action and substitution for the relief requested in Plaintiffs' Complaint – without consideration of evidence that might be relevant and should be considered before awarding such relief.

In addition, it should be noted that approval of the subject agreement under §§ 62-3-1101 and 62-3-1102 appears inappropriate in this case, where one side of the purported compromise registered their "disagreement" by Motion filed a month before Plaintiffs' Motion to

APM
8

Compel (the Motion for Approval under §§ 62-3-1101 and 62-3-1102 being filed three months later). Sections 62-3-1101 and 62-3-1102 set forth a process for Court *approval* of a compromise to which all relevant parties have agreed, not a process to *compel* agreement – except to the extent that the Court may direct “all fiduciaries subject to its jurisdiction to execute the agreement.” S.C. Code § 62-3-1102(3).

The Probate Court declined to approve the mediation agreement so as to convert it to a binding contract, and no action for breach of contract or breach of contract accompanied by fraudulent act may be maintained in the absence of a contract, supported by the meeting of the minds.

Moreover, in order to recover for breach of contract accompanied by fraudulent act, the Plaintiffs must establish not only that the breach was accomplished with a fraudulent intention, but more importantly, that the breach was accompanied by a fraudulent act. *See Minter vs. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996). The Plaintiffs have not pled any fraudulent action on the part of the Defendants separate and apart from the alleged breach of contract. Accordingly, the Fourteenth Cause of Action cannot be sustained.

Remand to Probate Court:

Plaintiffs, in seeking removal, predicated their motion on the causes of action for breach of contract and intentional infliction of emotional distress. Plaintiffs argued that these causes of action entitled them to trial by jury and involved an amount in controversy of at least \$5000.00, thereby mandating removal pursuant to South Carolina Probate Code 62-1-302(d)(5).

Upon the granting of partial summary judgment, the original causes of action for breach of fiduciary duty, conversion, setting aside the deed, equitable lien, resulting trust, and constructive trust³ (as well as the thirteenth cause of action which is merely a demand for attorney’s fees and costs) now remain. As these causes of action sound in equity, the underlying basis for removing this matter to Circuit Court, §62-1-302(d)(5), is no longer applicable. Thus, this matter is properly remanded to the Beaufort County Probate Court, which retains continuing, exclusive jurisdiction pursuant to §62-1-302(e).

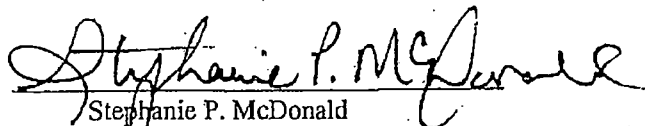
³ Judge Fulp, by Order dated June 8, 2010, denied a motion to remove to Circuit Court based on the original causes of action.

OPM
9

CONCLUSION

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment and Remand is granted. The Court grants summary judgment as to Plaintiffs' causes of action for fraud, constructive fraud, intentional infliction of emotional distress/outrage, civil conspiracy, intentional interference with inheritance, breach of contract, and breach of contract accompanied by fraudulent act and now remands this matter to the Beaufort County Probate Court to adjudicate the remaining causes of action.

AND IT IS SO ORDERED.


Stephanie P. McDonald
Presiding Circuit Court Judge

October 13, 2014

Charleston South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-07-01366

KIMBERLEE TAVINO, Individually and as
Personal Representative of the Estate of Betty Jane
Jackson, and CATHERINE SPRINGFIELD,
PLAINTIFF(S)

CHRISTINE SCHERIFF and FRANK
SCHERIFF,
DEFENDANT(S)

Submitted by: Antonia T. Lucia, Esquire
Vaux Marscher Berglind, P.A.
16 William Pope Drive, Suite 202, Bluffton, SC 29909

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : This action has been remanded to Probate Court

The motion to reconsider is denied.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Christine Scheriff and Frank Scheriff	Kimberlee Tavino, individually and as Personal Representative of the Estate of Betty Jane Jackson, and Catherine Springfield	\$ N/A
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2163
Judge Code

4/30/15
Date

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2012-CP-07-01366

KIMBERLEE TAVINO, Individually)
and as Personal Representative of the)
Estate of Betty Jane Jackson, and)
CATHERINE SPRINGFIELD,)

Plaintiffs,)

vs.)

CHRISTINE SCHERIFF and FRANK)
SCHERIFF,)

Defendants.)

ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION

THIS MATTER CAME BEFORE THE COURT on Plaintiffs' Motion, pursuant to S.C.R.C.P. Rules 52 and 59, requesting Reconsideration of the Court's Order entered on October 21, 2014. That Order granted Defendants' Motion for Partial Summary Judgment and remanded this action to the Beaufort County Probate Court. In opposition, Defendants' counsel submitted a Return dated December 18, 2014.

After due deliberation of the Motion, the opposition, the record, and the applicable law, the Court finds that the Plaintiffs have not set forth any issues or arguments warranting reconsideration. The Court therefore denies the Plaintiffs' Motion for Reconsideration and confirms its Order entered on October 21, 2014.

The Defendants' Motion for Partial Summary Judgment focused on seven causes of action, each of which was previously analyzed by the Court. That analysis is incorporated herein and reaffirmed as follows.

ANALYSIS/DISCUSSION

Seventh Cause of Action for Fraud and Eighth Cause of Action for Constructive Fraud:

The causes of action for fraud and constructive fraud are predicated on Paragraph "8" of the Amended Complaint which alleges:

After the closing of the sale of the Governors Lane home, Christine secretly converted the proceeds to her own use and placed these funds into her own escrow account. Those funds were used by Defendants to purchase a new home which Christine and Frank had titled in their names, telling Kimberlee it was easier to do it that way but not disclosing to her that they would later claim they owned the property. Cathy had no knowledge of this.

Contrary to this allegation, Kimberly Tavino, in her deposition testimony taken on January 13, 2010 stated, under oath, that there were no conversations with the Defendants regarding title to the property at issue.

Despite the Court's consideration of subsequent submissions by all parties, Plaintiffs have failed to offer any explanation for the inconsistencies or to demonstrate that there is even a scintilla of evidence to support these causes of action as mandated by *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 623 S.E.2d 801 (2009).

Ninth Cause of Action for Intentional Infliction of Emotional Distress:

In *Ford v. Hutson*, 276 S.C.157, 276 S.E.2d 776 (1981), the Supreme Court held that in order to recover for intentional infliction of emotional distress, a plaintiff must establish that the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency", and must be regarded as "atrocious, and utterly intolerable in a civilized community" such that "no reasonable man could be expected to endure it". *Id.* 276 S.C. at 162, 276 S.E.2d at 778.

Subsequent to this case, the Court of Appeals noted "the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct". *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct.App. 1984) *rev'd on other grounds*, 287 S.C.190, 336 S.E.2d 472 (1985).

The Plaintiffs in the case at bar did nothing more than assert the same tortious conduct which forms the basis for the causes of action for breach of fiduciary duty, conversion, setting aside deed, equitable lien, resulting trust and constructive trust. While Plaintiffs allege that they have undergone severe emotional distress and demand actual and punitive damages, there has been no evidence presented by the Plaintiffs which would support these allegations or shed light on the alleged damages.

DPM
2

Tenth Cause of Action for Civil Conspiracy:

Once again, the Plaintiffs have failed to prove the essential elements of this cause of action, i.e., additional acts in furtherance of the conspiracy other than those alleged in other causes of actions (*Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) *rev'd on other grounds*, 283 S.C. 155, 321 S.E.2d 602 (1984) *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985)) and special damages (*Pye v. Estate of Ford*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006)).

Plaintiffs' allegations are tantamount to nothing more than the same tortious acts which are alleged in other causes of action and the same damages which are demanded in and recoverable again through other causes of action.

Attorney's fees incident to proving the civil conspiracy are not in and of themselves special damages. If that were the case, the element of special damages would be rendered meaningless. More importantly, it is well established in South Carolina that attorney's fees are not recoverable unless authorized by contract or statute. *Dowaliby v. Chambless*, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001), citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993).

Eleventh Cause of Action for Intentional Interference with Inheritance:

Even assuming, as Plaintiffs argue, that the tort of intentional interference with inheritance has neither been adopted nor rejected in the State of South Carolina, the elements of such a cause of action include "an intentional interference with that expectancy through tortious conduct". In *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 10, n.4, 542 S.E.2d 715, 717 n.4 (2001). Again despite ample opportunity, the Plaintiffs have failed to proffer any evidence to support the alleged intentional and improper interference with their inheritance rights.

OPM
3

Twelfth Cause of Action for Breach of Contract and Fourteenth Cause of Action for Breach of Contract Accompanied by Fraudulent Act:

South Carolina Probate Code Sections 62-3-1101 and 62-3-1102 require court approval of any compromise as a sine qua non to the enforceability and binding effect of any such compromise. In June of 2011, the Plaintiffs made a motion for such approval and specifically cited these sections. Since the probate court denied this motion, the alleged mediation agreement was not converted into a binding contract. Absent a binding contract, there can be no cause of action for breach of contract.

While it is true that the probate court reached its decision based on the evidentiary constraints imposed by mediation, Plaintiffs have done nothing in the interim to obviate those evidentiary constraints. No admissible evidence has been proffered which would support a further motion to approve the alleged mediation agreement as fair and reasonable.

S.C.R.P.C. Rule 5(d)(5) further supports the Defendants' position that compromises in probate court are subject to court approval and specifically requires:

If a full or partial agreement is reached during the mediation conference, the agreement shall be reduced to writing signed by the parties. **Within thirty (30) days of the conclusion of the mediation conference, the parties shall pursue court approval of the terms of the settlement through either the submission of a consent order or motion filed with the court.** (emphasis supplied)

This rule highlights the inconsistencies between the probate code and S.C.R.C.P. Rule 43(k) which does not require court approval for a written and signed agreement to be binding. Faced with such an inconsistency, S.C.R.C.P. Rule 81 mandates that the probate court rule takes precedence.

Finally, "in order to recover for breach of contract accompanied by fraudulent act, the Plaintiffs must establish not only that the breach was accomplished with a fraudulent intention, but more importantly, that the breach was accompanied by a fraudulent act". Minter vs. GOCT, Inc, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996). The Plaintiffs have not pled any such fraudulent action on the part of the Defendants, separate and distinct from the alleged breach of contract.

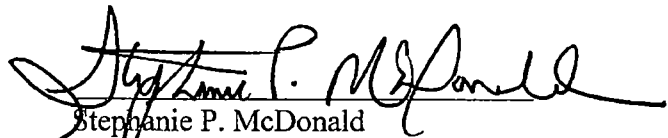
OPM
4

Remand to Probate Court:

The Court's decision to remand this matter to probate court is warranted for the reasons set forth in the Court's Order entered on October 21, 2014, and as further supported in this Order denying reconsideration.

ACCORDINGLY, the Plaintiffs' Motion for Reconsideration is hereby denied and the Order of this Court entered on October 21, 2014 is hereby confirmed.

AND IT IS SO ORDERED.


Stephanie P. McDonald
Presiding Circuit Court Judge

April 30, 2015
Charleston, South Carolina

RECEIVED
6/4/15

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2012-CP-07-01366

Kimberlee Tavino, individually
and as Personal Representative
of the Estate of Betty Jane Jackson,
and Catherine Springfield, Appellants,

v.

Christine Scheriff and Frank Scheriff, Respondents.

NOTICE OF APPEAL

Kimberlee Tavino, individually and as personal representative of the estate of Betty Jane Jackson, and Catherine Springfield appeal the judgment of the Honorable Stephanie P. McDonald, and also from the order denying their motion to alter, amend, or reconsider that judgment. The judgment is dated October 13, 2014, and was filed October 21st. Plaintiffs filed a motion for reconsideration which Judge McDonald denied in a written order dated April 30, 2015. Plaintiffs received written notice of the entry of this order on May 1, 2015.

/Signature page attached

June 1, 2015

Respectfully submitted,



John S. Nichols
SC Bar No. 4210
Bluestein, Nichols,
Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Robert M.P. Masella
SC Bar No. 8655
Masella Law Firm, P.A.
917 Calhoun St.
Columbia, SC 29201
(803) 748-9990

Attorneys for Appellants

Other Counsel of Record:

Antonia T. Lucia
Vaux & Marscher, PA
16 William Pope Dr., Ste 202
Bluffton, SC 29909

Attorney for Respondents

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE PROBATE COURT
CASE NO: 2008ES0700384

KIMBERLEE TAVINO, Individually)
and as Personal Representative of the)
Estate of Betty Jane Jackson, and)
CATHERINE SPRINGFIELD,)

Plaintiffs,)

v.)

CHRISTINE SCHERIFF and FRANK)
SCHERIFF,)

Defendants.)

ANSWER TO AMENDED
COMPLAINT

The Defendants, Christine Scheriff and Frank Scheriff, as and for their Answer to the Plaintiffs' Amended Complaint, respectfully show unto this Honorable Court as follows:

AS AND FOR AN ANSWER AND FIRST AFFIRMATIVE DEFENSE

1. The Defendants deny each and every allegation of the Amended Complaint unless hereinafter specifically admitted, qualified or explained and demands strict proof thereof.
2. The Defendants admit the allegations contained in Paragraphs marked 1, 2, 3, 4, 6, 13, 14, and 24 of the Amended Complaint.
3. Answering Paragraph marked 5 of the Amended Complaint, Defendants admit only that William L. Jackson died in October of 2004, not April of 2005, and Defendants deny each and other allegation contained therein and demand strict proof thereof.
4. Answering Paragraph marked 7 of the Amended Complaint, Defendants admit only that several months after the death of William L. Jackson, the Decedent moved in with the Defendants who agreed to provide a home for her and to care for her until her death. Defendants deny each and every other allegation contained in Paragraph marked 7 and demand strict proof thereof.

5. Answering Paragraph marked 8 of the Amended Complaint, Defendants admit only that the proceeds from the sale of the Governor Lane home were used to purchase a new home titled in the Defendants' name. Defendants deny each and every other allegation contained in Paragraph marked 8 and demand strict proof thereof.

6. Defendants deny each and every allegation contained in Paragraphs marked 9, 11, 18, 19, 20, 21, 22, 25, 26, 27, 29, 31, 32, 34, 36, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 54, 55, 56, 57, 59, 60, 61, 62, 63, 67, 68, 69, 72, 73, 74, 75, 77, 78, 80, 81, 82, 83, 84, 85, and 86 of the Amended Complaint.

7. Answering Paragraph marked 10 of the Amended Complaint, Defendants admit that the Decedent's trust provided for an equal division of her trust assets. Defendants deny each and every other allegation and demand strict proof thereof.

8. Answering Paragraph marked 12 of the Amended Complaint, Defendants admit the allegations contained therein, and further state that the South Carolina Probate Court requires filing of the Decedent's Will but no probate was necessary as the Decedent's estate contained no probate assets.

9. Answering Paragraph marked 15 of the Amended Complaint, Defendants admit only that the parties attended mediation. Defendants deny each and every other allegation contained in Paragraph marked 15 and demand strict proof there.

10. Answering Paragraph marked 16 of the Amended Complaint, Defendants admit only that all parties signed the document. Defendants specifically deny that this document was a binding contract and that it set forth the parties' obligations.

11. Answering Paragraph marked 17 of the Amended Complaint, Defendants deny each and every allegation contained therein since the referenced document was neither a binding contract nor did it comport with the covenant of good faith and fair dealing implied in every contract.

12. Paragraphs marked 23, 28, 30, 33, 35, 37, 39, 49, 53, 58, 64, 70, 76, and 79 are cumulative in effect and do not require a response.

13. Answering Paragraph marked 65 of the Amended Complaint, Defendants admit only that the Decedent's trust provided for the parties to share equally in the Decedent's estate. Defendants deny each and every other allegation contained in Paragraph marked 65 of the Amended Complaint and demand strict proof thereof.

14. Answering Paragraph marked 66 of the Amended Complaint, Defendants admit only that the Rosebud house was titled in the Defendants' names and was purchased with proceeds from the sale of the Governors Lane home. Defendants deny each and every other allegation contained in Paragraph marked 66 of the Amended Complaint and demand strict proof thereof.

15. Answering Paragraph marked 71 of the Amended Complaint, Defendants deny that the alleged agreement was the result of good faith and fair dealing.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

16. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

17. As to Christine Scheriff, there is a presumption of a gift in the property at issue.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

18. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

19. The Decedent agreed to provide the money to purchase the subject property and place that property in the name of Frank Scheriff, as a joint tenant. Frank Scheriff agreed to provide a home for the Decedent until her death and to care for her during that time period.

20. The contract between the parties was fully performed.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

21. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

22. The Plaintiffs are guilty of laches.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

23. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

24. The Plaintiffs have failed to state a cause of action upon which relief can be granted.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

25. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

26. The Plaintiffs were aware of the titling of the property at the time of its purchase and the Plaintiffs remained silent.

27. Upon information and belief, the Plaintiffs intended that the Defendants would rely upon the Plaintiffs' silence, and the Defendants did in fact rely upon this silence.

28. In reliance upon Plaintiffs' silence, the Defendants cared for and updated the property in order to maintain its value and to allow for the comfort of the Decedent, and therefore changed their position.

29. The Plaintiffs should be equitably estopped from maintaining this action.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

30. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

31. This action is barred by the applicable statute of limitations.

AS FOR AN EIGHTH AFFIRMATIVE DEFENSE

32. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

33. The Amended Complaint includes additional allegations (not contained in the original Complaint) which are frivolous and contrary to Plaintiffs' prior testimony.

AS FOR A NINTH AFFIRMATIVE DEFENSE

34. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

35. The Amended Complaint contains additional allegations (not contained in the original Complaint) which are new and inconsistent statements and therefore do not relate back to the conduct, transaction, or occurrence alleged in the original Complaint.

36. Any and all causes of action predicated on the additional allegations are barred by the applicable statute of limitation.

AS FOR A TENTH AFFIRMATIVE DEFENSE

37. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

38. The Plaintiff, Kimberlee Tavino, had actual knowledge and the Plaintiff, Catherine Springfield, had both constructive knowledge and constructive notice that title to the property at issue was taken in the names of Christine Scheriff and Frank Scheriff, thereby undermining the Plaintiffs' causes of action for fraud and constructive fraud.

AS FOR AN ELEVENTH AFFIRMATIVE DEFENSE

39. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

40. The Plaintiffs' causes of action for outrage and civil conspiracy must fail since the Plaintiffs have a remedy for the wrongs alleged by virtue of the causes of action previously plead in the original Complaint.

AS FOR A TWELFTH AFFIRMATIVE DEFENSE

41. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

42. The cause of action for intentional interference with inheritance rights is not recognized in the State of South Carolina.

AS FOR A THIRTEENTH AFFIRMATIVE DEFENSE

43. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

44. The causes of action for breach of contract and breach of contract accompanied by a fraudulent act are predicated upon the alleged mediation agreement which must be approved by the Probate Court pursuant to South Carolina Probate Court Sections 62-3-1101 and 62-3-1102.

45. Absent approval by the Probate Court, the alleged mediation agreement is not a binding contract.

AS FOR A FOURTEENTH AFFIRMATIVE DEFENSE

46. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

47. In the Court's Order dated September 8, 2011 denying the Plaintiffs' Motion to Compel and/or Approval Settlement, the Court stated:

"The exclusion of evidence of compromise negotiations is imperative and proper. Rule 408 compels it; moreover, the admission of

such evidence would undesirably “chill” settlement negotiations, mediation, and other alternative dispute resolutions.

Nevertheless, that exclusion, together with the other evidentiary constraints noted above, make it inappropriate for this Court to grant the relief requested by Plaintiffs in their Motion, either as a motion to compel the settlement or to approve it under §62-3-1102.”

48. Given these evidentiary constraints, the Plaintiffs cannot support an action to enforce the alleged mediation agreement, and the Defendants could not properly present their applicable defenses.

49. The causes of action for breach of contact and breach of contract accompanied by a fraudulent act cannot be maintained.

AS FOR A FIFTEENTH AFFIRMATIVE DEFENSE

50. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

51. The alleged mediation agreement was neither a binding contract nor did it comport with the covenant of good faith and fair dealing implied in every contract.

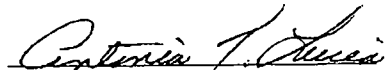
AS FOR A SIXTEENTH AFFIRMATIVE DEFENSE

52. Defendants repeat, reiterate, and reallege each and every allegation contained herein as if more fully set forth at length herein.

53. Defendants executed the mediation document at issue under duress.

WHEREFORE, having fully answered the Amended Complaint of the Plaintiffs herein, the Defendants would pray that the Court issue an Order dismissing the Amended Complaint in its entirety and granting such other and further relief as the Court deems just and proper.

VAUX & MARSCHER, P.A.



Antonia T. Lucia, Esquire
Attorney for Defendants
16 William Pope Drive, Suite 202
Bluffton, SC 29909
(843) 705-2888 (o)
(843) 705-2889 (f)

Bluffton, SC
February 6, 2012

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

RECEIVED

JUN 18 2015

SC Court of Appeals

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas**

Stephanie P. McDonald, Circuit Court Judge

Case No: 2015-001179

**Kimberlee Tavino, Individually
and as Personal Representative of
the Estate of Betty Jane Jackson,
and Catherine Springfield, Appellants,**

v.

Christine Scheriff and Frank Scheriff, Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 17, 2015, I mailed a true and accurate copy of the *Motion to Dismiss Plaintiffs' Appeal* and the *Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Appeal* with all attachments in the above-captioned matter to:

Robert M.P. Masella, Esquire
Masella Law Firm, P.A.
917 Calhoun Street
Columbia, SC 29201

John S. Nichols, Esquire
Bluestein, Nichols, Thompson & Delgado,
LLC
1614 Taylor Street
Columbia, SC 29902

SAID DOCUMENTS were mailed via federal express, with postage prepaid to
the above named parties.

VAUX MARSCHER BERGLIND, P.A.
16 William Pope Ave, Suite 202
Bluffton, SC 29909
(843) 705-2888

Debra A. Criddle
Debra A. Criddle
Legal Assistant to Antonia T. Lucia, Esquire
Attorney for the Respondents

SWORN TO BEFORE ME
this 17 day of June, 2015

Myra S. Daniell
Notary Public for South Carolina
My Commission Expires: 2/25/23

VAUX MARSCHER BERGLIND

A SOUTH CAROLINA PROFESSIONAL ASSOCIATION

ROBERTS VAUX
WILLIAM F. MARSCHER, III
MARK S. BERGLIND

ANTONIA LUCIA, SC & NY
ROBERTS "TABOR" VAUX, JR.

ATTORNEYS AND COUNSELORS AT LAW
16 WILLIAM POPE DRIVE, SUITE 202
BLUFFTON, SOUTH CAROLINA 29909
(843) 705-2888 (OFFICE)
(843) 705-2889 (FAX)

OF COUNSEL:
JAMES P. SCHEIDER, JR.
JUSTIN JOHN PRICE
MAC DUNAWAY, DC ONLY

antonia.lucia@vmblawfirm.com

June 17, 2015

Via Federal Express

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumpter Street
Columbia, SC 29201

RECEIVED
JUN 18 2015
SC Court of Appeals

Re: Kimberlee Tavino, Individually and as Personal Representative of the
Estate of Betty Jane Jackson, and Catherine Springfield v. Christine
Scherriff and Frank Scherriff
Case No: 2015-001179

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven copies of the following documents:

1. Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Appeal
2. Motion to Dismiss Plaintiffs' Appeal

Also enclosed is a Certificate of Service and a check for the filing fee in the amount of \$25.00

Kindly file the originals and six copies and return a clocked-in copy in the enclosed self-addressed, stamped envelope.

Please advise if anything additional is required.

Very truly yours,

VAUX MARSCHER BERGLIND, P.A.



Antonia T. Lucia

ATL:dac

OTHER OFFICE:
POST OFFICE BOX 769 (MAILING)
1251 MAY RIVER ROAD (PHYSICAL)
BLUFFTON, SOUTH CAROLINA 29910

The Honorable Jenny Kitchings

June 17, 2015

Page | 2

Enclosures

cc: Robert M.P. Masella, Esquire w/enclosure via Federal Express
John S. Nichols, Esquire w/enclosure via Federal Express

z:\team50\docsforfile\openfiles\Jackson, Betty Jane-Probate\Appeal\Ltr to COC w Dismiss Memo 6.17.15