

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

SC Court of Appeals

DeAndrea G. Benjamin, Circuit Court Judge
Diane S. Goodstein, Circuit Court Judge

Consolidated Cases For Trial

Case No.: 2010-CP-28-322

Case No. 2010-CP-28-323

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants
and Dr. Orville Dyce, Plaintiff,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski, and Robert
Puchalski, Defendants

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South Carolina
ENT, Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

**RESPONDENTS' INITIAL BRIEF
OF APPELLANTS/RESPONDENTS**

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court's refusal to award attorney's fees should be affirmed when the record is void of any evidence on the issue of attorneys' fees and there was no abuse of discretion by the lower court?
- II. Whether the Circuit Court Properly Refused to Award Damages Against Amy Puchalski for Claims of Constructive Trust and Conversion?

STATEMENT OF THE CASE

In accordance with Rule 208(b)(6), Appellants/Respondents hereby adopt by reference and incorporate verbatim herein the "Statement of the Case" and "Statement of the Facts" included in its lead brief filed on July 14, 2016.¹

On October 17, 2011, Plaintiff Orville Dyce ("Dyce") filed an amended summons and complaint in the Court of Common Pleas for Kershaw County against South Carolina ENT Allergy and Sleep Medicine, PA ("SCENT") and Robert Puchalski, MD alleging various causes of action including breach of contract, accounting, and conversion. ("The Dyce case"). Defendants denied the allegations and filed counterclaims for among other things, breach of contract and violation of a covenant not to compete. On May 12, 2012, Plaintiff filed another Amended Complaint, this time asserting claims against an additional Defendant, Amy Puchalski. On June 4, 2012 Defendants filed an Answer and asserted counterclaims, including claims for breach of contract, breach of a covenant not to compete, shareholder oppression, and other causes of action.

In 2012, Dyce filed for Summary Judgment on Defendant's counterclaims including SCENT's claim for breach of covenant not to compete. The Honorable

¹ Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all or any part of the brief of another." Rule 208(b)(6), SCACR.

DeAndrea G. Benjamin, Circuit Judge, entered a Form-4 Order on July 31, 2012 denying Plaintiff's motion, rejecting his arguments that the covenant not to compete was overbroad.²

On October 17, 2011, Plaintiff Jamie Curley ("Curley") filed an amended summons and complaint in the Court of Common Pleas for Kershaw County against SCENT Land Holdings, LLC ("SCENT Land" or "Company"), Amy Puchalski ("Puchalski"), and Robert Puchalski, M.D. ("Dr. Puchalski") (collectively, "Defendants") seeking a judicial dissolution of SCENT Land and judicial supervision of the winding up of SCENT Land. Am. Sum. & Comp. P. 3, 4. ("The Curley case"). On November 8, 2011, Defendants timely filed an answer to the amended summons and complaint and asserted several counterclaims alleging breach of fiduciary duty, conspiracy, interference with a contractual relationship, and violation of the South Carolina Unfair Trade Practices Act.

Curley filed a motion for summary judgment on her cause of action seeking judicial dissolution of SCENT Land and a motion for summary judgment as to the counterclaims asserted by the Defendants on February 23, 2012. (Pl. Motions for S.J.) On April 11, 2012, Defendants filed a combined memorandum opposing Plaintiff's motions. (Memorandum in Opposition). Following oral argument by counsel on April

² Along with the Dyce and Curley cases, another physician from SCENT, Dr. Gunnlauggson filed litigation against SCENT. The Dyce and Gunnlauggson cases involved many of the same allegations, claims, witnesses, counterclaims, and defenses. Hearings on the cases were sometimes held at the same time. Although Judge Benjamin issued a Form 4 order in the Dyce case, she issued a more lengthy opinion in the companion Gunnlauggson case finding as a matter of law that the identical covenant not to compete was legally valid and enforceable. (Order of Judge Benjamin dated 9/28/2012). The hearing in these two cases was held on April 16, 2012. This identical Covenant was later found legally valid and enforceable by Judge Cooper. (P's Ex. 141).

16, 2012 on the motions for summary judgment, the Honorable DeAndrea G. Benjamin, Circuit Judge, entered a Form-4 Order on July 31, 2012 granting "Plaintiff's Motion for Summary Judgment against SCENT Land seeking dissolution of the company . . . solely on the grounds that the company failed to deliver her the purchase agreement as required by S.C. Code Ann. § 33-44-702c." (Order, P. 1.) Defendants timely filed a Rule 59(e), SCRCP, Motion to Alter or Amend the circuit court's judgment on August 13, 2012. The circuit court issued a Form-4 Order on January 28, 2013 denying Defendant's motion for reconsideration. Defendants timely served and filed a Notice of Appeal on February 21, 2013.

After filing the appeal, the parties agreed that the matters in the Curley case were interlocutory and that the issues would be preserved for appeal after the proceedings in the trial court were completed. (See Agreement to Dismiss Without Prejudice dated 7/23/13.) On August 21, 2013, the Honorable John Cannon Few entered an Order dismissing the appeal without prejudice and finding the Curley matters were interlocutory and would be reviewable after a final judgment was entered in the case. (See Order of the Honorable John Cannon Few).

After numerous motions, hearings, and orders before various judges regarding discovery and pretrial matters, the two cases finally came to trial before the Honorable Dianne Goodstein on Nov. 10 -Nov. 26, 2013; March 31-April 2, 2014; and Nov. 24-Nov. 25, 2014. The two cases were consolidated for trial. After many witnesses and voluminous exhibits were admitted, the trial court took the matter under advisement. On November 25, 2015, the trial court issued its order. The trial court ruled against the Defendants on all of their counterclaims. The trial court found in favor of the Plaintiff

Dyce on his claims for breach of contract, accounting, constructive trust, and conversion in the amount of \$436,496.08 allegedly to have occurred in 2008, jointly and severally against SCENT and Dr. Puchalski. The trial court found in favor of Plaintiff Dyce on his claims against Amy Puchalski for constructive trust and conversion in the amount of \$25,596.87 stemming from these 2008 claims. The court further found for Dr. Dyce in the amount of \$24,271.03 against Dr. Puchalski and SCENT on his allegations for breach of contract, accounting, constructive trust, and conversion in 2009.

Judge Goodstein further found for Dr. Dyce against SCENT and Dr. Puchalski jointly and severally in the amount of \$1,809,472 for his alleged entitlement to redemption of his shares from SCENT. Judge Goodstein awarded pre-judgment interest on all these awards.

The trial court further awarded judicial winding up of SCENT Land Holdings and appointed a receiver to oversee the winding up. The trial court stated that Jaime Curley was entitled to an equal share of distributions even though she had not been a member since 2010. Defendants filed a motion to reconsider on December 17, 2015 setting forth numerous grounds for which the trial court had erred. (Motion to Reconsider). Also on December 17, 2015, Defendants filed a motion objecting to an appointment of receiver and winding down of SCENT Land. (Motion Objecting). Plaintiff Dyce also filed a motion to reconsider on December 10, 2015. The trial court denied both motions in an order dated February 24, 2016.

Appellants filed a notice of appeal March 24, 2016, and Respondents filed a notice of cross appeal dated March 29, 2016.

STATEMENT OF THE FACTS

South Carolina Ear, Nose, Throat, Allergy, & Sleep Medicine, P.A. (hereinafter, "SCENT") is a medical practice, founded by Dr. Robert Puchalski, that provides a broad spectrum of medical services, including ear, nose, and throat care as well as surgeries, sleep medicine, allergy, cosmetic medicine, and other related services. With the financial help of his parents, Dr. Puchalski opened the practice in 2002. (V. II p. 6-7). Dr. Puchalski hired Dr. Dyce as a physician employee in 2005. Dr. Dyce became a Shareholder on July 16, 2008 when he signed his Shareholder Agreement and was issued 50,000 shares. (Tr. V. II, p. 37; P's Ex. 7; D's Ex. 13). Current shareholders of the practice are Dr. Macy Vidrine and Dr. Robert Puchalski.

In late 2009 and into 2010, Dr. Dyce became disgruntled as the parties negotiated new shareholder contracts and began to build a new office building in Lugoff, South Carolina. (Vol II, p. 141-143; D's ex. 24, 29, 34, 39, 51, 56, 88). To gain leverage in the negotiations, Dr. Dyce and his wife Jamie Curley began to stymie the practice by refusing to execute vendor contracts, close loans, and follow policies necessary to conduct business. (V. II, p. 148-149, 167, 187; D's Ex 42, 57, 58, 60, 115). Dr. Dyce conspired with another physician employee, Dr. Chad Gunnlaugsson ("Gunnlaugsson") to disrupt the practice and alleged that Dr. Gunnlaugsson had become a shareholder.³ (Vol. I p. 29; D's Ex. 71). Dr. Dyce began to secretly tape record meetings and phone calls with his fellow shareholder, SCENT employees, corporate counsel, and the corporate accountant. (V. I p. 330; D ex. 207). Dr. Dyce even snuck confidential and proprietary insurance

³ Litigation with Gunnlaugsson subsequently ensued and was settled, which resulted in Gunnlaugsson paying money to SCENT, along with an apology and a recognition of his theft of confidential information, violation of his Covenant, and admission that he had never been a shareholder of the practice. (D's Ex. 141, 190, 232,).

agreements out of the practice “on the down low” for his own use and not for the benefit of SCENT. (V. III p 242-43; V. II p 61-62). Dr. Dyce continually excused his sabotage by stating he wanted information from the practice. However, in one of his secretly recorded conversations⁴, Dyce admitted that SCENT had sent his attorney "probably even more than he'd asked for." (V I p. 422; Def. Ex. 207) Dr. Dyce’s many actions to harm the practice violated his Shareholder and Employment Agreements. (See P's Ex. 7, 10). Therefore, Dr. Dyce was ultimately expelled from the practice on May 8, 2010 to save it from imploding when bills could not be paid and construction on the new building had ground to a halt. (V. II p. 154, 169- 170; P. Ex. 20; D’s Ex. 49, 60, 68, 127, 163.) Shortly after leaving his employment, Dr. Dyce blatantly violated his Covenant Not to Compete by repudiating it, taking steps to open a new practice, and opening a practice in Hartsville and Cheraw, effectively destroying SCENT’s practice in these already established markets. (Ex. 12, 129, 231, 233).

Background

Dr. Puchalski opened SCENT and saw his first patient in August of 2002. He gradually expanded, opening locations in, Hartsville, Columbia, and Cheraw, South Carolina. The Plaintiff, Dr. Orville Dyce (hereinafter, “Dyce”) was one of Dr. Puchalski’s best friends from residency and SCENT hired him as an employee beginning in February 2005 before he eventually became a fifty-percent (50%) shareholder on July 16, 2008. From 2005 until July of 2008, the parties discussed various approaches to making Dr. Dyce a Shareholder and created and signed numerous and various documents

⁴ The trial Court ignored the secretly tape-recorded conversations by Dr. Dyce. Additionally, the trial court did not address the fact that Dr. Dyce failed to turn over or disclose the existence of the secretly tape recorded conversations until a year and a half after discovery requests covering them were originally sent by attorneys for SCENT.

in those attempts and negotiations. These previous discussions and agreements were never implemented because Dr. Dyce did not want to pay a lump sum to become a shareholder, but instead wanted to find a way to become a shareholder over time by deferring income toward Dr. Puchalski. Although the parties had been negotiating Dyce's shareholder status for many years, it was not until July 16 of 2008 that they issued him shares to become a shareholder. Furthermore, they signed a Shareholders' Agreement, which explicitly stated that Dr. Dyce became a Shareholder on July 16, 2008 and "contains the entire agreement of the parties with respect to the matter" and that "all other agreements dated prior to the date of this Agreement are hereby superseded in their entirety." (P's ex. 7 Sections 8.8 & 8.1). Furthermore, it was not until July of 2008 that Dr. Dyce signed onto the debt of SCENT Land with First Palmetto, was listed as an owner of workers compensation policy and was announced as an owner to the practice. (V. II p. 203; D's Ex. 126).

At all times, Dr. Puchalski was tasked with managing the business operations of SCENT as well as managing its employees. Dr. Dyce never asked to assist in managing the business nor was he inclined to do so because he just wanted to be a doctor. (V. I p. 368). Dr. Dyce went from making \$150,000 a year at his previous practice in Virginia to more than \$1,000,000 at SCENT after Dr. Puchalski brought him in. (Def. Ex. 108; V. I p. 367, 437).

During 2008 and 2009, Dr. Puchalski and Dr. Dyce engaged in discussions relating to the construction of a new building for SCENT's Camden/Lugoff practice. SCENT and SCENT Landholdings, LLC (hereinafter "SCENT Land") approved construction of the new building. (V. II p148-59, 167; Aff. Dr. Puchalski, P. 2). A new

building had previously been built in Hartsville where Dr. Dyce had primary responsibility. (V. II p. 138-39).

SCENT Land, a limited liability company organized under the Limited Liability Company Act pursuant to section 33-44-101, *et. seq.* of the South Carolina Code, is a sister company of SCENT, owning and leasing the physical premises that SCENT uses for the medical practice. The company was created by Amy Puchalski contributing \$110,000 in land. (D. Ex 115). Dr. Puchalski and Dr. Dyce were named as managers. (P's ex. 17; SCENT Land Oper. Agreement, P. 39). On September 30, 2009, Dr. Dyce's wife, Jamie Curley (hereinafter, "Curley"), became a member of SCENT Land without being required to contribute any capital to the company. (D. Ex. 115). During this time, Dr. Dyce and Dr. Puchalski continued in negotiations about a new shareholder agreement. Negotiations stalled, and, as previously mentioned, Dr. Dyce began to stymie normal business operations, ultimately causing the breakup of the shareholders and the demise of the practice.

Ultimately, Dr. Dyce, along with his wife, Curley, and SCENT employee physician Dr. Gunnlaugsson brought the business's normal operations to a halt in an attempt to gain leverage over the negotiations of the new Shareholders' Agreement. Specifically, Dr. Dyce refused to allow SCENT to change its malpractice carrier to a lower cost provider, failed to approve new capital expenditures for the company, refused to attend five (5) separate closings for the new office building as a manager of SCENT Land, and ultimately refused to regularly return phone calls, electronic mail, or other communications despite the fact that he was a shareholder of SCENT and, consequently,

owed a fiduciary duty to ensure he took actions in the best interests of the company and his fellow shareholder. (V. II. p. 148-49, 154, 169-70; D. ex. 49, 60, 127).

In March of 2010, SCENT and SCENT Land had reached a crisis point. Construction of the new facility had ground to a halt because Dr. Dyce and Curley refused to sign the necessary loans documents as required by the bank. (Vol. II p 104, 110, 210, 217, 220-221, 265). Curley refused to provide funds to cover the shortfall in SCENT Land, although a vote of the members had called for capital to be invested in the company as allowed under the Operating Agreement. (P ex. 16 section 6.9; P Ex. 154, 155, 156, 157; Aff. Dr. Puchalski, P. 2). During the course of this crisis, Dr. Dyce requested numerous and ever changing data and financial information from SCENT. On numerous occasions, Dr. Puchalski and the employees of SCENT made the requested documentation available to Dr. Dyce at the practice site. (V. III p 313-315). SCENT even offered to allow an audit of the records, and offered to allow Dyce's attorney and accountant to come on the premises to review any and all records. (V. II p. 157).

Because of the actions of Dr. Dyce and Curley, the general contractor and sub-contractors went unpaid and the building went unfinished. (V. II p. 170; D. ex. 49, 60, 127). Due to Curley's refusal to finance the building and Dr. Dyce's refusal to execute the required paperwork to close on the building, the general contractor threatened a mechanics lien and the subcontractors went unpaid. (Aff. Dr. Puchalski, P. 2). The partially constructed building was vandalized and SCENT began having to loan money to SCENT Land to meet obligations. (Aff. Dr. Puchalski, P. 2). Moreover, SCENT's current site lease was running out. (V II p 154). Dr. Puchalski, as managing shareholder, sent an email to Dr. Dyce on March 1, 2010 literally begging Dr. Dyce to put aside whatever

differences he had with Dr. Puchalski and approve the closing so SCENT's loan could be paid back and the contractors could be paid. (D. ex. 43, 44). Dr. Dyce and Curley refused to allow the loan to close. Additionally, SCENT Land validly issued a two-stage capital call pursuant to section 6.9c of its Operating Agreement to raise the necessary funds to complete the new building. Although Amy Puchalski contributed \$170,000 to cover costs needed for the new medical building, Jamie Curley failed to do so. (Aff. Dr. Puchalski, P. 3, Oper. Agree., P. 16; V. II p. 184; D. Ex. 158). To stop the destruction of SCENT and SCENT Land, Dr. Puchalski, founding shareholder of SCENT, reluctantly exercised Section 3.3.2(iv) of the Shareholders' Agreement and Section 2.3(a) of Dr. Dyce's Employment Agreement to terminate Dr. Dyce's employment and shareholder status with SCENT on March 10, 2010. (P ex. 19, 289, D. ex. 50). Dr. Dyce continued to work for sixty (60) days, and the parties attempted to work through the issues so as to keep the practice together. Dr. Puchalski continued to offer Dr. Dyce employment at approximately One Million Dollars a year as they worked out their differences if he would cooperate in the operations of SCENT, but Dr. Dyce refused. (V. II p. 89-90; D. Ex 73). On April 19, 2010, SCENT Land expelled Curley for her failure to meet the mandatory capital call under the Operating Agreement. (D ex. 157).

Prior to departing the practice, Dr. Dyce continued to breach both his Shareholders' Agreement and Employment Agreement with SCENT and further breached them upon departure. Dr. Dyce's termination was changed to a "for cause" basis on May 8, 2010 pursuant to Section 2.3(a) of his Employment Agreement based upon these actions and his failure to comply with the Management Directives issued

pursuant to section 2.2c of Dr. Dyce's Employment Agreement and transition time line set out by SCENT. (Def. Ex. 68, 8, 163).

Shortly after leaving the practice, Dr. Dyce began violating the non-compete provision of his Employment Agreement. First, his attorney sent a letter to SCENT stating that Dyce was going to treat patients in Hartsville and explicitly stating that Dr. Dyce would not acknowledge the validity of the Covenant. (Def. Ex. 129). As Dr. Puchalski testified, the letter from Dr. Dyce's legal counsel told SCENT "that Dr. Dyce and his attorneys had- were repudiating the covenant and were breaching their contract." (Vol. II, P. 65). Dr. Dyce further breached the Covenant by working with Carolina Pines to purchase equipment for an ENT office⁵, by approaching Carolina Pines for employment, by sharing SCENT's confidential information, and by opening two offices only yards away from existing SCENT practice sites. (Def. Ex. 231, Vol. I, P. 564-565, Vol. I, P. 578, Vol. II, P. 132; Vol. IV, P. 77-78).

On June 6, 2010, Dr. Dyce negotiated a call coverage contract with Carolina Pines Regional Medical Center and began contacting vendors. Moreover, Dr. Dyce created Dyce Medical Enterprises, LLC, which was incorporated in August 2010. (D ex. 231, Vol II p 72-75, V. IV p 85). Dr. Dyce's employer began taking steps to set up his practice. (Vol. II p 67-71). The pro forma established with Carolina Pines specifically

⁵ Even a cursory review of Defendants' Exhibit 231 shows that Dr. Dyce was involved in requesting this quote as the quote was sent to his attention at Carolina Pines where he competed against the practice in violation of the Covenant. Moreover, it is apparent that the equipment is not for an operating room as Dr. Dyce suggested in his testimony, but is indeed for an ear, nose, and throat office. The quote contains waiting room chairs, decorations, pictures, and end tables, as well as equipment that would be used in an ENT office and not in an operating room. (Def. Ex. 231). Dr. Dyce's testimony that he was unaware of this quote and that this equipment was used for an operating room is not credible. (Vol. I, P. 327-329).

referenced confidential "payor mix" information of SCENT. (D. ex. 99, V. II p 13, V. IV p 75-76). These actions were a direct violation of both the Shareholders' and Employment Agreements and entitle SCENT to the liquidated damages provision outlined in Section 3.11 of Dr. Dyce's Employment Agreement. (P. ex. 8). On September 15, 2010, Dr. Dyce signed his employment agreement with Carolina Pines Regional Medical Center and began practicing on October 25, 2010. (D's Ex. 109).

Dr. Dyce advertised in Cheraw, Hartsville, and Camden—all existing markets for SCENT—and generated immediate revenue at SCENT's expense. (V. IV p 82, Def. Ex. 123, 124, 130). He began seeing existing patients of SCENT whom he had previously treated as a SCENT employee. (D. ex. 117, 211, 212, 213, 220). The result was catastrophic and SCENT has lost at least Four Hundred Eighty-Six (486) patients that it is aware of based upon patient transfer requests SCENT received. (V. II p.11-116, 236, V. IV p.80; D. ex. 117, 144). Dr. Dyce's violation of his agreements, his breach of his fiduciary duty, and his conspiracy to ground the practice to a halt resulted in the shuttering of the Hartsville and Cheraw offices, and the loss of a conservative estimate of One Million Four Hundred Thousand Dollars (\$1,400,000) based solely upon those patient transfers. (V. II p236, D. ex. 218).

As a result of Dr. Dyce's actions, SCENT has been left with a huge debt load, lost its entire Cheraw and Hartsville Practice—the entire eastern half of SCENT's practice, and saw significantly diminished earnings. On the other hand, Dr. Dyce has little debt associated with his medical practice, is making more than a million dollars a year,⁶ and

⁶ Within a short time of taking SCENT's Hartsville patients, Dr. Dyce was earning in excess of one million dollars, money which would have been earned by SCENT but for his breaching of the Covenant not to Compete. (D.'s ex. 217).

has completely taken SCENT's medical practice in Hartsville. Yet Dr. Dyce has asked for more from his litigation.

STANDARD OF REVIEW

“Attorneys’ fees are not recoverable unless authorized by contract or statute.” *See Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997). A claim for statutory attorneys’ fees is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion. *Patel v. Patel*, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004).

The burden for establishing a constructive trust is high, and the plaintiff must prove it by evidence that is “clear, definite, and unequivocal.” *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561-62 (1987). An action to declare a constructive trust is in equity and the appellate court should find facts in accordance with its own view of the evidence. *Id.*

A claim for conversion is an intentional tort, and the court reviews it for legal error. Accordingly, the standard of review includes correcting errors of law and determining whether the trial court's findings are supported by competent evidence. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 28, 738 S.E.2d 480, 495 (Ct. App. 2013). When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal.” *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006). “The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review.” *Id.* at 17–18, 640 S.E.2d at 495.

ARGUMENT

I. The Circuit Court Properly Refused an Award of Attorneys' Fees

Dr. Dyce contends the circuit court erred in refusing to award him attorneys' fees against SCENT and Dr. Puchalski. The lower court properly denied an award of attorneys' fees.

a. Dr. Dyce Failed to Preserve the issue of Attorneys' Fees for the Record

As a threshold matter, this argument is not preserved for review by this Honorable Court. Dr. Dyce's contention that he is entitled to the recovery of attorneys' fees is waived as no evidence was established at trial that he was to be awarded fees. Moreover, there was no testimony that Dr. Dyce was seeking attorneys' fees or the amount of those fees. *See Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983) ("The petitioner [seeking attorney's fees] also has a burden to show a request for attorney's fees."); *Abbott v. Gore*, 304 S.C. 116, 119, 403 S.E.2d 154, 157 (Ct. App. 1991) ("A party who seeks attorney's fees has the burden to show that request is well-founded and failure to offer any evidence on the issue of attorney's fees precludes an award.")

In *Gainey*, the lower court awarded attorneys' fees to the respondent in the underlying action despite her failure to present any evidence on the question at trial. *Id.* at 70, 301 S.E.2d at 764. Our supreme court held "because [the] respondent failed to offer any evidence on the issue of attorney's fees ... she has not met her burden" and the award of attorneys' fees was vacated. *Id.* In short, the respondent in *Gainey* never requested for attorneys' fees to be awarded.

In this instant matter, Dr. Dyce, like the respondent in *Gainey*, never requested for attorneys' fees to be awarded. Dr. Dyce, nor his three counsel appearing at trial,

specifically requested for attorneys' fees to be awarded at trial. Dr. Dyce presented no evidence on the question of attorneys' fees at trial and there is no evidence of the amount of fees incurred by Dr. Dyce. In fact, the only reference to attorneys' fees presented at trial was a summary answer that Dr. Dyce had incurred legal fees. (Vol. I, P. 323).⁷ A party who seeks attorneys' fees has the burden to show that the request is well-founded and a failure to offer any evidence on the issue of attorneys' fees precludes award. *See Gainey*, 279 S.C. at 70, 301 S.E.2d at 764; *Abbott*, 304 S.C. at 119, 403 S.E.2d at 157. *But cf. Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)(remanding the case for a determination on the issue of attorneys' fees when petitioners *specifically testified* they were seeking reasonable fees) (emphasis supplied). The facts of the underlying matter are analogous to those of *Gainey* as Dr. Dyce never requested an award of attorney's fees.

Counsel for Dr. Dyce did not put forth any evidence as to the fees that were incurred during the preparation of and for the trial of the underlying case. There was no submission of a fee affidavit providing an itemization of the time and expenses paid by Dr. Dyce. Dr. Dyce's counsel also failed to present a resume of their qualifications and never requested a hearing from the trial judge to rule on the matter. The circuit court never evaluated the six factors outlined by our supreme court in *Glasscock v. Glasscock*⁸

⁷ "Q And have you incurred substantial legal fees in an effort to enforce those rights under the governing documents?"

"A. I have." (Vol. I, P. 323, L. 20-22).

⁸ The six factors cited by the *Glasscock* court in determining a reasonable attorneys' fee: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) beneficial

because the award of attorneys' fees was never specifically requested. This issue—a specific request for attorneys' fees—was not properly raised to the court at trial or during the motion for reconsideration. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raise to and ruled upon by the trial judge to be preserved for appellate review.”). This issue has not been properly preserved for appeal and should not be considered.

b. The Circuit Court Did Not Abuse its Discretion in Refusing to Award Dr. Dyce Attorneys' Fees

Even assuming *arguendo* the issue of attorneys' fees is preserved for this court to review, the circuit court properly refused to award Dr. Dyce any fees from the trial of this case. Moreover, the circuit court's ruling certainly does not amount to an abuse of discretion.

Attorneys' fees are not recoverable unless authorized by contract or statute. *See Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997). In the underlying action, after a review of the evidence and a judgment in which both parties prevailed on certain causes of action, the circuit court chose not to award attorneys' fees to Dr. Dyce. A claim for attorneys' fees is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion. *Patel*, 359 S.C. at 533, 599 S.E.2d at 123. Dr. Dyce has shown no abuse of discretion.

Dr. Dyce does not present any specific argument as to how or why Judge Goodstein abused her discretion in not awarding attorneys' fees. Instead, Dr. Dyce

results obtained; and 6) customary legal fees for similar services. *Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

argued that attorneys' fees may be allowed contractually or statutorily and because Dr. Dyce prevailed on some of his causes of action, he should be entitled to attorneys' fees. This is not the standard when determining whether the circuit court abused its discretion. *See Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (“An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.”).

Over Dr. Puchalski's counsel's objection, the circuit court heard testimony from Dr. Dyce's expert witness, Professor Marty McWilliams, on the ability of Dr. Dyce to recover attorneys' fees. (Vol. I, P. 136-138). Although there was no request for attorneys' fees, Professor McWilliams detailed reasons and avenues for which he contended Dr. Dyce may recover attorneys' fees. (Vol. I, P. 136-138). The circuit court considered these arguments—over counsel's objection—for the recovery of attorneys' fees and properly rejected them in its order. The circuit court will not be reversed for failing to make specific findings of fact on the record for each factor if there is evidentiary support in the court's ruling. *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995); *cf. Blumberg*, 310 S.C. 492, 427 S.E.2d 659 (1993) (when an award of attorney's fees is requested and authorized by statute, the court should make specific findings of fact on the record for each factor; however, the court will not be reversed for failing to do so if there is sufficient evidentiary support on the record for each factor); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) (requirement that trial court without a jury find the facts specially and state separately its conclusions of law under Rule 52(a), SCRCP, is directory; noncompliance alone does not invalidate the judgment

as long as the trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches).

In the instant matter, Dr. Dyce did not prevail on all of issues he pled. Dr. Dyce withdrew both his causes of action for unpaid wages and on his contention that he became a shareholder in SCENT in 2007. Moreover, the circuit court ruled against Dr. Dyce on whether he was a member of and entitled to disbursements from Somnus and he abandoned this issue on appeal. The circuit court also ruled against Dr. Dyce on his request for post-termination profits generated from SCENT and on the joint and several liability of Amy Puchalski. The decision whether to award statutory attorneys' fees does not fall within a court's equitable jurisdiction. *See Harvey v. S.C. Dep't of Corrections*, 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct. App. 2000). Regardless, if the decision to award attorneys' fees sounded in equity, the equities fall in favor of each side bearing responsibility for their own attorneys' fees because both parties won on some matters and lost on others, neither entered the instant litigation with clean hands, and each makes over one million dollars a year.

Ultimately, a review of the record indicates that Dr. Dyce failed to establish that the circuit court abused its discretion in not awarding attorneys' fees and the circuit court's order should be affirmed.

II. The Circuit Court Properly Refused to Award Damages Against Amy Puchalski for Claims of Constructive Trust and Conversion.

The circuit court correctly rejected claims against Amy Puchalski for constructive trust and conversion relating to alleged unpaid shareholder proceeds in the amount of

\$460,767.11.⁹ The circuit court recognized important distinctions between Dr. Robert Puchalski who was a shareholder and officer of SCENT and his wife Amy Puchalski who played no role in SCENT.¹⁰ As a spouse, Amy Puchalski received portions of her husband's income. It is not unusual for a spouse to give a portion of his or her earnings to the other spouse. The corporate accountant, Austin Sheheen, testified that all money received by Amy Puchalski was owed to Dr. Puchalski for his employment and ownership of SCENT. (V. III, P. 355-360). Dr. Puchalski testified that his wife received money directly, instead of him signing checks over to her, as a convenience because she handled all household financial affairs. (Vol. II, P. 231) Austin Sheheen further testified that any money received by Amy Puchalski was for Dr. Puchalski and "were part of his wages, part of his distributions, and that Dr. Puchalski paid taxes on all those earnings." (Def. Ex 250; Def. Ex 251; Vol III, P. 359). The only evidence introduced at trial demonstrated that checks made payable to Amy Puchalski were charged to Dr. Puchalski's distribution and capital accounts. (Def. Ex. 94; Def. Ex 251).

⁹ Please see Appellants' Initial Brief contesting the trial court's findings of conversion and constructive trust against Dr. Robert Puchalski relating to \$460,767.11 in shareholder earnings, which were disbursed to Dr. Robert Puchalski prior to Dr. Dyce signing the July 2008 Shareholder Agreement. For the reasons stated therein, Dr. Dyce was never owed the \$460,767.11, and therefore any claims against Amy Puchalski must also fail. *See* Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all or any part of the brief of another." Rule 208(b)(6), SCACR.

¹⁰ The trial court did find Amy Puchalski liable for \$25,596.87 in separate reimbursements to Amy Puchalski, finding that she directly benefitted from those disbursements unlike the shareholder earnings at issue in this brief. For the reasons stated in Appellants' Initial Brief on page 51 and also herein, Amy Puchalski should not be liable for the \$25,596.87 because those were also treated as disbursements to Dr. Puchalski and credited toward his capital account. *See* Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all or any part of the brief of another." Rule 208(b)(6), SCACR.

a. Constructive Trust

“A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.” *Lollis*, 291 S.C. at 530, 354 S.E.2d at 561-62. The burden for establishing a constructive trust is high, and the plaintiff must prove it by evidence that is “clear, definite, and unequivocal.” *Id.* An action to declare a constructive trust is in equity and the appellate court should find facts in accordance with its own view of the evidence. *Id.*

Importantly, “[f]raud is an essential element, although it need not be actual fraud.” *Id.*; *McNair v. Rainsford*, 330 S.C. 332, 357, 499 S.E.2d 488, 500-01 (Ct. App. 1988)(refusing to impose constructive trust because there was no existence of fraud); *Baptist Foundation v. Baptist College*, 282 S.C. 53, 59-60, 317 S.E.2d 453, 458 (Ct App. 1984)(refusing to impose constructive trust because there was no evidence of fraud); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995)(requiring fraud as an essential element for a constructive trust).

The *McNair* case involved claims against a husband who allegedly committed wrongdoing and the Plaintiff attempted to impose a constructive trust against the wife who received benefits. Just as in *McNair*, the Plaintiff here failed to allege and the circuit court did not make any findings against Amy Puchalski for “fraud or fraudulent acts.” *McNair*, 330 S.C. at 357, 499 S.E.2d at 500-01. Therefore, “[the Plaintiff has] failed to present any evidence of the circumstances necessary to establish a constructive trust.” *Id.*

Furthermore, a constructive trust may only be imposed against a defendant when the defendant owes a duty to the plaintiff either arising because of fraud or because of a fiduciary relationship of trust. *See, e.g. Lollis; McNair.* Intrinsic to a claim for

constructive trust is some breach of a relationship that imposes a duty such as a fiduciary relationship or relationship of trust. *Id.* The circuit court properly refused to impose a constructive trust against Amy Puchalski because the Plaintiff made no allegations or presented proof of fraud by Amy Puchalski or the existence of a fiduciary relationship that she owed to Dr. Dyce. Because the evidence was insufficient to support the imposition of a constructive trust, this portion of the circuit court's order should be affirmed.

b. Conversion

The circuit court properly refused to find against Amy Puchalski under a cause of action for conversion. "There can be no conversion of money *unless there is an obligation* on the defendant to deliver a specific, identifiable fund to the plaintiff." *Richardson v. NBSC*, 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991)(emphasis supplied); *Mullis v. Trident*, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct. App 2003); *Dawkins v. Nat. Liberty Life*, 263 F.Supp. 119 (D.S.C. 1967). The tort of conversion supposes that the plaintiff had possession or ownership of something, which was then taken by the defendant. *See Castell v. Stephenson Finance Co.*, 244 S.C. 45, 51, 136 S.E.2d 311, 313 (1964). Conversion is to be contrasted with breach of contract, wherein a plaintiff claims he was owed or entitled to something he did not receive. *Owens v. Andrews Bank & Trust*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1975)(holding there is no conversion where there is a mere obligation to pay a debt.)"

Furthermore, conversion is an intentional tort. *See The South Carolina Law of Torts*, 4th Ed. pp. 437, 485 (2011). As such, the Plaintiff must prove some intentional wrongdoing. *Id.* at 438. Finally, "money may be the subject of conversion if it can be

identified but not if the money is not held as a separate item and is commingled with other sums.” *Id.* at 487.

At its core Dr. Dyce’s claims are against SCENT, not Amy Puchalski. The Plaintiff alleges that he was not paid what he was owed prior to signing a Shareholders’ Agreement on July 16, 2008.¹¹ Dr. Dyce never once possessed the money he now claims he was entitled to. Furthermore, even in his initial complaint, Dr. Dyce did not allege that he became a shareholder prior to July 16, 2008 when he signed his Shareholders’ Agreement. At best, Dr. Dyce’s claims are based on a disputed contractual obligation by SCENT to pay money to him prior to him signing the July 16, 2008 Shareholders’ Agreement, not for conversion.

A claim to an *entitlement* of money because of an agreement is not a claim for conversion; it is a claim for a breach of contract. *Id.* at 485. Furthermore, “there can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff,” which is not present here. *Richardson*, 304 S.C. at 294, 403 S.E.2d at 672. Finally, a claim for conversion must include a showing of “unauthorized detention after demand.” *Moore v. Weinberg*, 373 S.C. 209, 227, 644 S.E.2d 740, 749 (Ct. App 2007); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (“A plaintiff claiming conversion may prevail based upon a showing of unauthorized detention of property, after demand.”).

In this matter, there was no evidence presented, and the trial court did not find, that Amy Puchalski owed an obligation to deliver a specific, identifiable fund to Dr.

¹¹ SCENT contests the court’s finding Dr. Dyce became a shareholder prior to signing the Shareholders’ Agreement on July 16, 2008. *See* Rule 208(b)(6), SCACR, provides: “In cases involving more than one appellant or respondent ... any party may adopt by reference all or any part of the brief of another.” Rule 208(b)(6), SCACR.

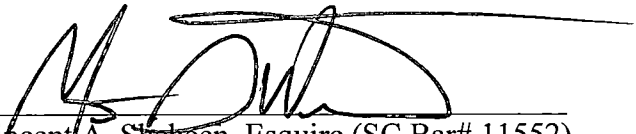
Dyce. Importantly, Amy Puchalski owed no obligation to Dr. Dyce. Instead, his claims and the evidence presented demonstrate that the only relationship was between Dr. Dyce and SCENT. Furthermore, Dr. Dyce never made a demand for these funds and did not even claim an entitlement to them in his initial complaint. Money is only subject to a claim for conversion if it is held in discrete and separate fund upon which demand is made. *See Moore, supra*. As referenced herein, Amy Puchalski obtained funds on her husband's behalf regularly as part of the family financial arrangement and deposited them all in the household account. Amy Puchalski never acted with any intent to convert funds and never committed the intentional tort of conversion. Finally, Dr. Dyce never took ownership or possession of the funds he now claims, and therefore they could not have been "converted" by anyone. Dyce's strained attempts to reach a spouse of a member of a corporation must fail. It is evident, as the circuit court found, that Dr. Dyce's alleged claims sound in contract against SCENT; not in conversion against Amy Puchalski.

The trial court properly refused to find Amy Puchalski converted funds because 1) there was never an obligation by Amy Puchalski to deliver a specific sum of identifiable money to Dr. Dyce; 2) Amy Puchalski had no intent to convert funds; 3) Dr. Dyce never took possession of the alleged funds; 4) the alleged funds are not separate items; 4) Dr. Dyce made no demand for a specific account; and 5) because Dr. Dyce's alleged claims sound in contract against SCENT. Accordingly, Judge Goodstein's order denying Dr. Dyce full relief on his conversion cause of action against Amy Puchalski should be affirmed.

CONCLUSION

Based on the arguments stated more fully herein, the circuit court's ruling on the attorneys' fee, constructive trust, and conversion issues should be affirmed. The appeal, with respect to the attorneys' fee, was not properly preserved for appeal. Even if the attorneys' fee issue was properly preserved, the circuit court did not abuse its discretion in not awarding fees to Dr. Dyce. Additionally, Dr. Dyce did not meet his burden for establishing a constructive trust or conversion with respect to Amy Puchalski and therefore the circuit court's ruling should be affirmed.

Respectfully submitted,



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September 13, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge
Diane S. Goodstein, Circuit Court Judge

Consolidated Cases For Trial

Case No.: 2010-CP-28-322

Case No. 2010-CP-28-323

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants
and Dr. Orville Dyce, Plaintiff,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski, and Robert
Puchalski, Defendants

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South Carolina ENT,
Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel
with a copy of the Respondent's Initial Brief of Appellants/Respondents and Designation

of Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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Charleston SC 29402
Respectfully submitted,

A handwritten signature in black ink, appearing to read "V. A. Sheheen", written over a horizontal line.

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September 13, 2016

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SC Court of Appeals

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Jamie Curley vs. SCENT Allergy & Sleep Medicine, P.A.
Appellate Case No. 2016-0626

Dear Mrs. Kitchings:

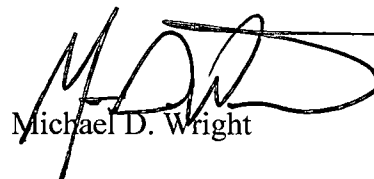
I hope this correspondence finds you doing well.

Please find enclosed the original and one (1) copy of the Respondents/Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. I have also enclosed a proof of service of this upon opposing counsel.

I ask that you have someone from your office file the original and return a filed copy in the pre-stamped envelope provided

If you have any questions, please do not hesitate to contact me.

Very truly,


Michael D. Wright

Enclosures as Stated

cc: Morris Ellison, Esquire (Via U.S. Mail)
Jana B. Baker, Esquire (Via U.S. Mail)
Robert Puchalski, M.D. (Via Hand-Delivery)

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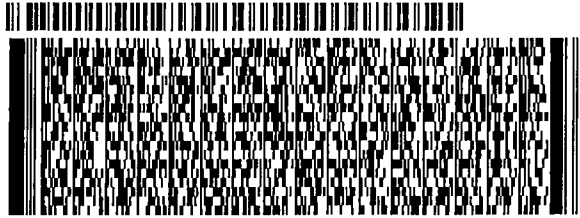
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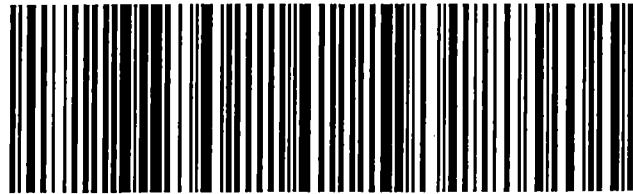
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