

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

SEP 23 2016
SC Court of Appeals

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Consolidated Cases for Trial

Case No. 2010-CP-28-00322
Case No. 2010-CP-28-00323
Appellate Case No. 2016-000626

Jamie Curley,Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert PuchalskiDefendants,

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.

**REPLY BRIEF OF RESPONDENTS/APPELLANTS JAMIE CURLEY AND
DR. ORVILLE DYCE IN RESPONDENTS/APPELLANTS' CROSS APPEAL**

RECEIVED

SEP 23 2016

SC Court of Appeals

Morris A. Ellison (SC Bar No. 1881)
David M. Collins (SC Bar No. 6591)
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street (29401)
P. O. Box 999
Charleston, South Carolina 29402
mellison@wcsr.com
dcollins@wcsr.com
(843) 722-3400
(843) 723-7398 (facsimile)

And

William C. Cleveland, III (SC Bar No. 1284)
62 Lenwood Blvd.
Charleston, South Carolina 29401
wccleveland@gmail.com

ATTORNEYS FOR
RESPONDENTS/APPELLANTS JAMIE
CURLEY AND DR. ORVILLE DYCE

September 22, 2016
Charleston, South Carolina

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES..... | iv |
| STATEMENT OF FACTS..... | 1 |
| ARGUMENT | 2 |
| I. AS AUTHORIZED BY SCENT’S ARTICLES OF INCORPORATION AND TWO SOUTH CAROLINA STATUTES, THE CIRCUIT COURT ERRED BY FAILING TO AWARD DR. DYCE ATTORNEYS’ FEES AGAINST SCENT AND DR. PUCHALSKI, JOINTLY AND SEVERALLY..... | 2 |
| II. THE CIRCUIT COURT ERRED BY NOT AWARDING DR. DYCE DAMAGES AGAINST AMY PUCHALSKI AS RECIPIENT OF THE FUNDS ON DR. DYCE’S CONVERSION AND CONSTRUCTIVE TRUST CLAIMS | 7 |
| CONCLUSION | 14 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----------|
| <u>Bank of Williston v. Alderman</u> , 106 S.C. 386, 391, 91 S.E. 296, 297-298 (1917).... | 8, 9, 10 |
| <u>Blumberg v. Nealco</u> , 310 S.C. 492, 493-494, 427 S.E.2d 659, 660-661 (1993)..... | 3 |
| <u>Donohue v. Ward</u> , 298 S.C. 75, 84, 378 S.E.2d 261, 266 (Ct.App. 1989) | 3 |
| <u>Gitlitz v. Comm’r</u> , 531 U.S. 206, 214 n. 6, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001) | 5 |
| <u>Gordon v. Busbee</u> , 397 S.C. 119, 141-142, 2012 S.C. App. LEXIS 163, *28-29 (Ct.App. 2012) | 8 |
| <u>Green v. Waidner</u> , 284 S.C. 35, 38, 324 S.E.2d 331, 333 (Ct. App. 1984) | 11 |
| <u>In re Cain</u> , 2015 Bankr. LEXIS 1501, *5-8 (Bankr. D.S.C. Apr. 30, 2015)..... | 9 |
| <u>In re Wicker</u> , 2014 Bankr. LEXIS 5382, *12-13 (Bankr. D.S.C. Apr. 4, 2014) | 9 |
| <u>Kuznik v. Bees Ferry Assocs.</u> , 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct.App.2000) | 1 |
| <u>Maloo v. C.I.R.</u> , 456 F.3d 645, 647 (6th Cir. 2006) .. | 5 |
| <u>McNair v. Rainsford</u> , 330 S.C. 332, 357, 499 S.E.2d 488, 500-01 (Ct.App. 1998)... | 7, 8, 9 |
| <u>Moseley v. Oswald</u> , 376 S.C. 251, 656 S.E.2d 380 (2008) | 11, 12 |
| <u>Mullis v. Trident Emergency Physicians</u> , 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct.App. 2002) | 13 |
| <u>Powell v. Green</u> , 281 S.C. 358, 361, 315 S.E.2d 183, 185 (Ct.App. 1984) | 4 |
| <u>SSI Medical Services, Inc. v. Cox</u> , 301 S.C. 493, 392 S.E.2d 789 (1990) | 12 |
| <u>Straight v. Goss</u> , 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct.App. 2009) | 8 |
| <u>Sunrise Sav. & Loan Ass'n v. Mariner's Cay Dev. Corp.</u> , 295 S.C. 208, 367 S.E.2d 696 (1988) | 3 |
| <u>Vieira v. AGM II, LLC (In re Worldwide Wholesale Lumber, Inc.)</u> , 372 B.R. 796, 813-814, 2007 Bankr. LEXIS 1882, *42-43 (Bankr. D.S.C. 2007) | 8 |

Statutes

| | |
|--|---|
| S.C. Code Ann. 33-18-210 (2006) | 6 |
| S.C. Code Ann. 33-18-410(c)(3) (2006 & Supp. 2015) | 7 |
| S.C. Code Ann. 33-8-520 (2006 & Supp. 2015) | 6 |
| 26 U.S.C. § 1361(b)(1)(D) (2011 & Supp. 2014) | 5 |
| 26 U.S.C. § 1366(a)(1) (2011 & Supp. 2014) | 5 |

Rules of Civil Procedure

| | |
|-------------------------|---|
| Rule 59(e), SCRPC | 3 |
|-------------------------|---|

Other Authorities

| | |
|--|----|
| RESTATEMENT (SECOND) OF TORTS § 224 (1965) comm. c | 13 |
|--|----|

STATEMENT OF FACTS

Instead of referencing specific portions of the voluminous record relevant to the matters raised in this cross appeal, Appellants/Respondents SCENT Land Holdings, LLC, Amy Puchalski, Robert Puchalski and South Carolina ENT, Allergy & Sleep Medicine, P.A. (“**Defendants below**”) simply repeat verbatim the lengthy Statement of Facts from their Initial Brief in the main appeal.¹ Not surprisingly, this eight-page, “word for word” recitation has little or nothing to do with the narrow issues framed by Respondents/Appellants Dr. Dyce (“**Dr. Dyce**”) and Jamie Curley (“**Curley**”) and with Dr. Dyce collectively, (“**Plaintiffs below**”) in their cross-appeal. Thus, while the Statement of Facts of Defendants below is wholly inconsistent with the findings of fact made by the trial court, in the words of Defendants below, “[a]fter many witnesses and voluminous exhibits were admitted,”² Plaintiffs below will concentrate on those facts material to this cross-appeal: namely their demand for attorneys’ fees and the liability of Amy Puchalski.³

¹ Compare Initial Brief of Appellants/Respondents (“**Defendants’ Initial Brief- Appeal**”) at p. 5-13 with the Initial Brief of Appellants/Respondents (“**Defendants’ Reply Brief – Cross Appeal**”) at p. 5-13. All defined terms used in this Brief shall have the meanings ascribed to them in the Brief of Plaintiffs below filed on September 14, 2016 (“**Plaintiffs’ Reply Brief- Appeal**”).

² See Defendants’ Brief – Cross Appeal at p. 3. This concession by the Defendants below is also significant given their further admission that “Dr. Dyce’s alleged claims sound in contract.” See id. at p. 23. Since an “action seeking damages for breach of contract is...an action at law..., the trial judge’s findings of fact will be upheld unless without support.” Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct.App. 2000).

³ As discussed in detail in Plaintiffs’ Reply Brief - Appeal, Plaintiffs below maintain that the factual findings of the trial court regarding the alleged conspiracy with Dr. Gunnlauggson, the enforceability (and claimed breach) of the Covenant not to Compete, the financing of Lugoff facility, etc., are well supported by the evidence and should be affirmed. Since these issues are not germane to this cross appeal, the Plaintiffs below will rely on their discussion of these matters in their other submissions.

ARGUMENT

I. AS AUTHORIZED BY SCENT'S ARTICLES OF INCORPORATION AND TWO SOUTH CAROLINA STATUTES, THE CIRCUIT COURT ERRED BY FAILING TO AWARD DR. DYCE ATTORNEYS' FEES AGAINST SCENT AND DR. PUCHALSKI, JOINTLY AND SEVERALLY.

A. The Plaintiffs below properly preserved the issue of Attorneys' Fee.

The Defendants below ignore the record below and baldly assert that Dr. Dyce “never requested for attorneys’ fees to be awarded.”⁴ They make this assertion despite citing to places in the record where Dr. Dyce made this claim.⁵ Contrary to this assertion, each of the Complaints filed in the SCENT case contained numerous demands for an award of these damages.⁶ Furthermore, both Dr. Dyce and his expert witness, Professor McWilliams, offered testimony on this issue.

Specifically, Professor McWilliams was asked whether Dr. Dyce could recover attorneys’ fees if he prevailed in the action. Defense counsel’s objection was overruled and the witness testified as to the contractual and statutory bases for such a recovery. Professor McWilliams’ testimony was entirely consistent with the arguments raised by the Plaintiffs below in the trial court and in this appeal.⁷ As conceded by the Defendants below, Dr. Dyce testified that he had incurred substantial legal fees in effort to enforce his rights.⁸ In addition, when asked directly what relief he was requesting from the Court, Dyce included his legal fees in enforcing his agreements with SCENT and Dr. Puchalski.⁹ Significantly, on direct examination by his attorney, Dr. Puchalski offered

⁴ See Defendants’ Reply Brief – Cross Appeal at p. 14.

⁵ See Defendants’ Reply Brief – Cross Appeal at pp. 15 and 17 (citations omitted).

⁶ See 3/12/10 Complaint-SCENT Case at para. 37 and para. D of the prayer; 10/21/11 Amended Complaint-SCENT Case at paras. 35, 43, 49, 53, 67 and paras. B-G of the prayer; 3/10/12 First Amended Complaint-SCENT Case at paras. 42, 50, 56, 60, 74 and B-G of the prayer.

⁷ See November 19-12, 2013 Tr. 136: 22 – 138:12.

⁸ See November 19-12, 2013 Tr. 323: 20 – 22.

⁹ See November 19-12, 2013 Tr. 323: 23 – 324: 11.

very similar “summary testimony” as to his demand for legal fees associated with the litigation.¹⁰ Thus, it is abundantly clear that each party “requested” an award of attorneys’ fees if they prevailed and were simply waiting for a ruling before providing documentary support for the quantum thereof.¹¹

It must also be noted that the Plaintiffs below followed the proper procedure to preserve this issue when the trial court failed to address it in its December 8, 2015 Order. To wit, they filed a timely Motion to Alter or Amend the Judgment pursuant to SCRCF Rule 59(e). See Donohue v. Ward, 298 S.C. 75, 84, 378 S.E.2d 261, 266 (Ct. App. 1989) (Since “nowhere in the record does it appear the appellants made a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to amend the judgment to address the issue[, t]hey cannot now complain of the trial judge's failure to address the issue.”) This motion noted that the Court had failed to rule on the claim of Plaintiffs below for attorneys’ fees and detailed the grounds for their request.¹² The arguments made in this motion mirror those raised at trial and in this appeal.

B. As the Prevailing Party, Dr. Dyce is Entitled to an Award of Attorneys’ Fees.

Contrary to the claim of the Defendants below, the trial court did not “deny” an

¹⁰ See November 25-26, 2014 Tr. 244 ln 21 – p. 245 ln 3. The fact that neither party raised the failure to submit a fee affidavit during their directed verdict motions confirms the understanding that the amount of any attorneys’ fees would be addressed after the trial. See id. at 261: 17 - 284: 14.

¹¹ If the trial court had awarded a specific quantum of fees without addressing the requisite factors of reasonableness, this award would have been subject to reversal and remand. See Blumberg v. Nealco, 310 S.C. 492, 493-494, 427 S.E.2d 659, 660-661 (1993); Sunrise Sav. & Loan Ass’n v. Mariner’s Cay Dev. Corp., 295 S.C. 208, 367 S.E.2d 696 (1988). In the instant case, however, the trial court did not reach the threshold issue of entitlement to fees. In addition, the final total of recoverable fees could not be ascertained until the consideration of post-trial motions. Similarly, the December 8, 2015 Order of the trial court contemplated that additional status conferences and other fee generating actions would be necessary due to the winding up of SCENT Land’s affairs. See December 8, 2015 Order at p. 45. Consequently, the submission of a fee affidavit at the conclusion of trial would have been premature.

¹² See December 11, 2015 Motion to Alter or Amend Judgment at p. 1-2.

award of fees.¹³ Rather, Judge Goodstein failed to rule on his request either one way or the other in her December 8, 2015 Order. “A judgment should not be rendered without disposing of matters raised by [a party’s] pleadings.” Powell v. Green, 281 S.C. 358, 361, 315 S.E.2d 183, 185 (Ct.App. 1984). Since the Plaintiff’s March 15, 2010 Complaint – SCENT Case and each amendment thereof included a demand for attorneys’ fees, the trial court’s failure to address this matter is error.

In this regard, it is intriguing that the Statement of the Case of the Defendants below continues to omit all reference to Dr. Dyce’s original March 15, 2010 Complaint – SCENT Case. This original complaint was prompted by Dr. Puchalski’s refusal to provide his co-owner with access to SCENT’s corporate information and Dr. Dyce’s concerns that Puchalski was mismanaging the affairs of the corporation.¹⁴ Among other things, the March 15, 2010 Complaint – SCENT Case sought an accounting regarding all distributions made to SCNET’s shareholders.¹⁵

Importantly, the relief requested in this Complaint was necessary to preserve SCENT’s Subchapter “S” status. As found by the trial court, Dr. Puchalski was taking unequal distributions from SCENT (and making them payable to his wife Amy Puchalski) which effectively created two classes of stock and violated the rules applicable to Subchapter S corporations and expressly prohibited by SCENT’s Articles of Incorporation. Accordingly, if Dr. Dyce had not sought to remedy the wrong committed by SCENT and Dr. Puchalski, namely, failing to make equal distributions to Drs. Dyce and Puchalski, SCENT could lose its Subchapter “S” status.

The significance of such a loss of status cannot be overstated. It was Dr.

¹³ See Defendants’ Reply Brief – Cross Appeal at p. 14.

¹⁴ See March 15, 2010 Complaint - SCENT Case.

¹⁵ See id. at para. 34.

Puchalski himself who chose for SCENT to be a Subchapter S corporation from its very formation in order to avail himself of the significant tax advantages of this structure.¹⁶ Consequently, SCENT's initial articles of incorporation dated October 28, 2004 prohibited the issuance of more than a single class of shares as required by law.¹⁷ SCENT's amended articles of incorporation filed June 12, 2008 include a similar provision and expressly state that "[a]ny such...authorization of a different class of stock...shall be void ab initio...."¹⁸ These restrictions are repeated in Section 5.2 of the July 16, 2008 Shareholders' Agreement which sets forth significant consequences for "the commission or omission of [any act] which would cause the termination of the Subchapter S election of the Corporation."¹⁹ Thus, compliance with the restrictions on S corporations, including limiting K-1 distributions to shareholders, was an essential part of SCENT's corporate governance.²⁰ If not, there would have been no need to for Drs. Puchalski and Dyce to "undo" the 2007 Shareholders' Agreement by their subsequent oral agreement.²¹

Thus, Dr. Dyce was involved in litigation from the outset "by reason of the fact that...the shareholders...are or were managing the business and affairs of the corporation

¹⁶ The "S" election status presents many critical advantages to shareholders for various reasons, particularly avoiding "double" taxation on income at both the entity and individual levels. "[U]nlike a traditional C corporation, S corporations themselves generally do not pay taxes." *Maloof v. C.I.R.*, 456 F.3d 645, 647 (6th Cir. 2006) (quoting *Gitlitz v. Comm'r*, 531 U.S. 206, 214 n. 6, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001) ("The very purpose of Subchapter S is to tax at the shareholder level, not the corporate level. Income is determined at the S corporation level ... not in order to tax the corporation ... but solely to pass through to the S corporation's shareholders the corporation's income.")). "Each shareholder of an S corporation thus pays taxes at individual rates on the pro rata share of the corporation's income (if there is any) and receives the pro rata tax benefits (e.g., losses, deductions and credits) of the corporation." *Id.* (citing 26 U.S.C. § 1366(a)(1)). In other words, the S election allows for only one level of taxation, at the shareholder level, rather than two levels of taxation, at both the corporate and shareholder levels.

¹⁷ See 26 U.S.C. § 1361(b)(1)(D) (2011 & Supp. 2014).

¹⁸ Plaintiffs' Ex. 0108.002 at para. 10(a).

¹⁹ Plaintiff's Ex. 0007.019.

²⁰ See November 19 – November 22, 2013 Tr. 74:14 – 76:3.

²¹ See March 31 – April 2, 2014 Tr. 417: 1-16; see also December 8, 2015 Order at p. 4.

in place of a board of directors.”²² In such circumstances, Paragraph 10(f) of the SCENT Articles of Incorporation mandates that he be indemnified “against all expenses (including attorneys’ fees), liabilities, losses, judgments, fines, amounts paid in settlement or other similar costs actually and reasonably incurred in connection with such action, suit or proceeding.”²³

In addition, South Carolina Business Corporations Act, S.C. Code Ann. 33-8-520 (2006 & Supp. 2015), entitled Mandatory Indemnification, provides as follows:

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.²⁴

In this action, Dr. Puchalski and SCENT counterclaimed against Dr. Dyce on several counts predicated on his status as a shareholder of SCENT.²⁵ Since Dr. Dyce was “wholly successful” in the defense of the actions against him as the shareholder equivalent of a director of this statutory close corporation, he should be awarded his attorneys’ fees in connection with these proceedings.

Lastly and alternatively, South Carolina’s Statutory Close Corporation Supplement provides additional legal support for the grant of attorneys’ fees to Dr. Dyce. That statute provides that “[i]f a court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their

²² Plaintiffs’ Ex. 108.003.

²³ *Id.*

²⁴ As a statutory close corporation, SCENT chose to eliminate any need for a board of directors in its Articles of Incorporation, as amended. Dr. Dyce, as one of SCENT’s equal shareholders, was equally responsible for the management of SCENT’s affairs and assumed the responsibility that would have been imposed on a board of directors. S.C. Code Ann. 33-18-210 (2006), Cmts (“The shareholders of a statutory close corporation operating without a board of directors have the legal liability imposed by law on directors for managing the business and affairs of the corporation.”).

²⁵ See November 8, 2011 Answer to Amended Complaint and Counterclaims at paras. 22, 23, 27 and 30; June 4, 2012 Answer to First Amended Complaint and Counterclaims at paras. 24, 25, 29 and 32.

reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding.” S.C. Code Ann. 33-18-410 (2006 & Supp. 2015). The Findings of Fact as set forth in the trial Court’s December 8, 2015 Order and underlying record provide ample evidence that Dr. Puchalski did not act in good faith which further entitles Dr. Dyce to an award of attorneys’ fees and costs.

Significantly, Defendants’ Reply Brief – Cross Appeal makes **no** effort whatsoever to challenge the Plaintiffs’ entitlement to fees on the merits.

In summary, the circuit court erred by failing to award Dr. Dyce attorneys’ fees. Dr. Dyce should recover such fees under SCENT’s own corporate documents and under South Carolina statutory law. Therefore, this Court should remand the case to the circuit court to determine the amount of attorneys’ fees to which Dr. Dyce is entitled.

II. THE CIRCUIT COURT ERRED BY NOT AWARDING DR. DYCE DAMAGES AGAINST AMY PUCHALSKI AS RECIPIENT OF THE FUNDS ON DR. DYCE’S CONVERSION AND CONSTRUCTIVE TRUST CLAIMS.

A. The Funds Wrongfully Distributed in 2008 and 2009 to Amy Puchalski were impressed with a Constructive Trust and Must Be Disgorged by Her to Dr. Dyce.

Defendants below lead their objection to the constructive trust imposed on Amy Puchalski with a citation to McNair v. Rainsford, 330 S.C. 332, 357, 499 S.E.2d 488, 500-01 (Ct.App. 1998), for the proposition that “[f]raud is an essential element, although it need not be actual fraud.”²⁶ The actual quote from McNair, states that:

Generally, fraud is an essential element giving rise to a constructive trust, although it need not be actual fraud.

Id. (emphasis added).²⁷

²⁶ See Defendants’ Reply Brief – Cross- Appeal at p. 20.

²⁷ In fact, this part of the McNair decision is dictum. That court also held, with the concurrence of Judge Howard, that “[b]ecause Ann Rainsford received no benefit, there can be no constructive trust.” McNair v.

The omission by Defendants below is glaring. A review of the case law demonstrates that the omission of the qualifying phrase “generally” is telling.

Specifically, it has been repeatedly held subsequent to McNair that:

In general, a constructive trust may be imposed when a party obtains a benefit which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it **as where money has been paid by accident, mistake of fact**, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.

Gordon v. Busbee, 397 S.C. 119, 141-142, 2012 S.C. App. LEXIS 163, *28-29 (Ct.App. 2012) (emphasis added); Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct.App. 2009) (same); Vieira v. AGM II, LLC (In re Worldwide Wholesale Lumber, Inc.), 372 B.R. 796, 813-814, 2007 Bankr. LEXIS 1882, *42-43 (Bankr. D.S.C. 2007) (“South Carolina courts generally hold that fraud or the breach of a fiduciary duty are elements of a constructive trust; however, these elements are not always necessary to the imposition of a constructive trust. A constructive trust can arise by mistake of fact, abuse of confidence, or accident.”).

These principles were more fully explained in a recent bankruptcy decision:

[A constructive trust] is a “flexible equitable remedy whose enforcement is subject to the equitable discretion of the trial court.” Hale v. Finn, 388 S.C. 79, 694 S.E. 2d 51, 57 (S.C. Ct. App. 2010). While a constructive trust is often considered in instances of fraud, bad faith, and violation of fiduciary duty, actual fraud is not necessary to establish a constructive trust. City of Charleston, S.C. v. Hotels.com, 520 F.Supp.2d 757 (D.S.C. 2007). A mistake of fact has been held to be sufficient grounds for imposing a constructive trust. See Bank of Williston v. Alderman, 106 S.C. 386, 91 S.E. 296 (S.C. 1917) (“By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money, which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another, who is beneficially entitled to it; as for example, when money has been paid by accident, mistake of fact, or fraud...”) (emphasis added); Gordon v. Busbee, 723 S.E.2d 822 (S.C. Ct. App. 2012) (stating that a constructive trust may be imposed in circumstances where money has been paid by mistake of fact); In re Thames, 21 B.R. 704, 707 (Bankr. D.S.C. 1981) (concluding the scope of a constructive trust under South Carolina law was broad enough to give a wife equitable ownership of property mistakenly titled in her husband's name only, where joint funds were used to purchase the property and

Rainsford, 330 S.C. 332, 357, 499 S.E.2d 488, 501 (Ct.App. 1998). Judge Howard also authored a stinging dissent which observed, inter alia, that “[n]one of the constructive trust rules seem to prevent the use of the constructive trust remedy where the defendant obtained property through another's fraud but did not himself commit the fraud.” Id. at 360.

make mortgage payments). “The forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice.” In re Thames, 21 B.R. 704, 707 (Bankr. D.S.C. 1981) (Davis, J.) (quoting Dominick v. Rhodes, 202 S.C. 139, 24 S.E.2d 168, 172-73 (S.C. 1943)). A constructive trust may even be imposed against an innocent party in order to protect the equitable rights of those who have suffered the wrong. McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488, 502 (S.C. App. 1998) (noting that “the sweep of unjust enrichment is broad enough so that a constructive trust may also be imposed against an innocent party, provided that the innocent party would be unjustly enriched vis-à-vis the plaintiff.”).

In re Wicker, 2014 Bankr. LEXIS 5382, *12-13 (Bankr. D.S.C. Apr. 4, 2014); see also In re Cain, 2015 Bankr. LEXIS 1501, *5-8 (Bankr. D.S.C. Apr. 30, 2015).

As noted by the Wicker Court, this “flexible” approach to constructive trusts was first adopted in South Carolina almost a century ago in Bank of Williston v. Alderman, 106 S.C. 386, 91 S.E. 296 (1917). In that case, a bank mistook the certificate number of a draft for the amount and overpaid defendant. In ruling that the Defendant could not retain these funds, our Supreme Court held that:

“By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money, which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another, who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him, by a legal action upon an implied assumpsit, but in many instances a resort to the equitable jurisdiction is proper and even necessary.” 3 Pom. Eq. Jur. § 1047. “It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner. Whenever one person had wrongfully taken the property of another, and converted it into a new form, or transferred it, **the trust arises and follows the property or its proceeds.**” Id., § 1051.

Bank of Williston v. Alderman, 106 S.C. 386, 391, 91 S.E. 296, 297-298 (1917) (emphasis added).

In fact, Defendants below make the very point that monies received by Amy Puchalski were the very monies owed to Dr. Dyce when they note:

Austin Sheheen 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 of those earnings.²⁸

Thus, whether the distributions belonging to Dr. Dyce were paid to Amy Puchalski by mistake or due to bad faith on the part of Dr. Puchalski, she received the benefit of these funds which were impressed with a constructive trust and they must be returned by her to their beneficial owner, Dr. Dyce.²⁹

B. Amy Puchalski's Conversion of the Distributions Owing to Dr. Dyce Should Result in Personal Liability for these Funds.

Personal liability on the part of Amy Puchalski is also necessary due to her conversion of the distributions belonging to Dr. Dyce. In this regard, the Bank of Williston decision discussed above also held that:

it was unquestionably the duty of Alderman to give notice of the mistake as soon as he discovered it, and his failure to give notice of the mistake was a moral wrong. But, in any event, the refusal to return the money, after the demand was made, was a conversion thereof, to his own use, and a fraud upon the rights of the plaintiff, if he knew that it was paid to him by mistake, and that he had absolutely no right, title, or interest in it whatever.

Bank of Williston v. Alderman, 106 S.C. 386, 390, 91 S.E. 296, 297 (1917).

In the case at bar, the trial court found that "between February 1, 2008 and December 31, 2008 SCENT distributed \$872,992.16 more to Drs. Robert and Amy Puchalski than it distributed to Dr. Dyce."³⁰ It is undisputed that during this time period, Amy Puchalski, who was never a SCENT employee or shareholder, received checks from SCENT totaling \$2,308,128.95.³¹ It was also found that the Puchalskis received an

28 Defendants' Reply Brief – Cross Appeal at p. 19 (internal citations omitted).

²⁹ During this period, Amy Puchalski was issued checks by SCENT totaling \$2,308,128.95. See Plaintiff's Ex. 0296.0010.

³⁰ December 8, 2015 Order at p. 6.

³¹ See Plaintiff's Ex. 0296.0010.

additional \$48,542.06 in excess distributions in 2009.³² Amy Puchalski's refusal to return these monies constitutes conversion even if her receipt thereof was "by mistake or under a bona fide belief or right". Green v. Waidner, 284 S.C. 35, 38, 324 S.E.2d 331, 333 (Ct.App. 1984).

The Defendants below make much of the fact that "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."³³ This distinction was apparently accepted by Judge Goodstein as she ruled that Amy Puchalski was "only jointly and severally liable for \$25,596.87 of the \$436,496.08...."³⁴ The fact remains, however, that Amy Puchalski exercised dominion over these funds, including monies owed to Dr. Dyce, whether or not they were charged to her husband's distribution account.

Similar niceties regarding ownership were deemed irrelevant in Moseley v. Oswald, 376 S.C. 251, 656 S.E.2d 380 (2008). In that case:

Oswald Wholesale Lumber, Inc. ("Oswald Lumber"), of which Respondent is the president, purchased a large tract of land from Petitioner's son. In October 1998, Petitioner filed a conversion action against Respondent alleging that Respondent refused to allow her to take possession of seven automobiles and various pieces of furniture stored on the property. Respondent filed a motion for summary judgment, arguing that Oswald Lumber, and not Respondent individually, owned the property. The trial court held that because Petitioner could not show that Respondent owned the property, there was no evidence that Respondent converted Petitioner's personal property, and Respondent was therefore entitled to summary judgment. The court of appeals affirmed, holding that there was no evidence to support Petitioner's allegation that Respondent owned the property and that Petitioner presented no admissible evidence that Respondent exercised control over her personal property.

Id. at 253, 381.

On appeal, the South Carolina Supreme Court held that:

³² See id. at 7.

³³ See Defendants' Reply Brief – Cross Appeal at p. 23.

³⁴ December 8, 2015 Order at p. 36.

the courts below erred in hinging their decisions on the fact that Oswald Lumber, and not Respondent individually, owns the property on which Petitioner's chattels are stored. While ownership of the real property may be relevant, a conversion action does not depend on who owns the real property on which the automobiles and other items are stored. Rather, the issue in a conversion action is whether Respondent exercised unauthorized control over Petitioner's personal property.

Id. at 254, 382.

Amy Puchalski, as the husband of Dr. Puchalski, stands in analogous position to Oswald as the president of Oswald Lumber. Thus, the critical inquiry is whether she exercised unauthorized control over the distributions belonging to Dr. Dyce not the accounting treatment of these funds by SCENT. There is no question that she did.

Defendants below further argue that the conversion claim must fail because there was no showing of “unauthorized detention after demand.”³⁵ The Supreme Court rejected a similar contention in SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990), where:

By Cox's own admissions, no one at SSI knew that he was depositing and keeping proceeds in his own account from the sale of the vehicles and not passing them along to SSI. Cox stated that he never told anyone that he was doing this and was unaware of anyone at SSI having knowledge of such. SSI could not acquiesce in Cox's scheme because SSI was unaware that Cox was acting in a manner inconsistent with its rights in relation to its property. Consequently, the trial judge did not err in granting summary judgment to SSI on the issue of liability as to its conversion claim against Cox.

Id. at 499-500, 793.

In the instant case, prior to filing the March 15-2010 Complaint – SCENT Case and engaging in discovery, Dr. Dyce did not know that the Puchalskis were receiving excess distributions which rightfully belonged to him. Indeed, it was Dr. Dyce's lack of access to the information which could have disclosed this conversion that led him to

³⁵ See Defendants' Reply Brief – Cross Appeal at p. 22.

commence this lawsuit. Accordingly, he cannot be faulted for failing to demand these monies at the time they were delivered to Amy Puchalski.

As discovery into these matters progressed, Dr. Dyce amended his complaint to add Amy Puchalski as a Defendant and to assert a claim for conversion against her.³⁶ The factual allegations in the First Amended Complaint expressly assert that Amy Puchalski wrongfully received distributions belonging to the shareholders of SCENT.³⁷ The cause of action for conversion in this pleading also alleges that Dr. Dyce had a right and interest in these distributions; that they were converted to the use of the Puchalskis without his permission; and that they continued to possess these funds.³⁸ Over four years after demanding relief for these actions, Amy Puchalski is still detaining the distributions due to Dr. Dyce without his authorization.

The excess distributions improperly paid to Amy Puchalski constitute a “determinate sum”, i.e. \$436,496.08, and, therefore, are a proper subject for a claim for conversion. See Mullis v. Trident Emergency Physicians, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct.App. 2002). Furthermore, there was nothing unintentional about her cashing these checks³⁹ and depositing these monies into her account. See RESTATEMENT (SECOND) OF TORTS § 224 (1965) comm. c (“The intention required is an intention merely to exercise dominion or control over the chattel which in fact seriously interferes with the right of another to control it. It is not an intention to interfere with the rights of the other; and the defendant may be liable for conversion where he has in fact exercised dominion or control, although he might be quite unaware of the existence of the rights

³⁶ See May 10, 2012 First Amended Complaint SCENT Case.

³⁷ See id. at paras. 30 – 33.

³⁸ See id. at paras. 76 - 80.

³⁹ During this period, Amy Puchalski was issued checks by SCENT totaling \$2,308,128.95. See Plaintiff’s Ex. 0296.0010.

with which he interferes.”). Therefore, the unauthorized exercise of control over the funds belonging to Dr. Dyce by Amy Puchalski mandates her personal liability for the total amount of the excess distributions paid to her.

CONCLUSION

The circuit court erred in (i) not addressing Dr. Dyce’s claim for attorneys’ fees despite its finding in his favor regarding Dr. Puchalski’s mismanagement of the corporation thereby jeopardizing SCENT’s Subchapter S status and dismissal of all the counterclaims made against Dr. Dyce; and (ii) having awarded Dr. Dyce judgment against SCENT and Dr. Puchalski on his conversion and constructive trust causes of action for monies withheld in 2008 and 2009, by failing to award Dr. Dyce damages against Amy Puchalski, the recipient of those wrongfully withheld funds based on the undisputed facts.

Accordingly, Respondents/Appellants Jamie Curley and Dr. Orville Dyce respectfully request that the Court reverse the circuit court’s decision on these two issues.

Respectfully submitted,



Morris A. Ellison (SC Bar No. 1881)
David M. Collins (SC Bar No. 6591)
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street (29401)
P. O. Box 999
Charleston, South Carolina 29402
mellison@wcsr.com
dcollins@wcsr.com
(843) 722-3400
(843) 723-7398 (facsimile)

And

William C. Cleveland, III (SC Bar No. 1284)
62 Lenwood Blvd.
Charleston, South Carolina 29401
wccleveland@gmail.com

September 22, 2016
Charleston, South Carolina

ATTORNEYS FOR RESPONDENTS/APPELLANTS
JAMIE CURLEY AND DR. ORVILLE DYCE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Consolidated Cases for Trial

Case No. 2010-CP-28-00322

Case No. 2010-CP-28-00323

APPELLATE CASE NO. 2016-000626

RECEIVED

SEP 23 2016

SC Court of Appeals

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.

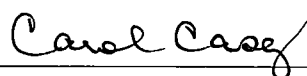
PROOF OF SERVICE


I do hereby certify that on the 22nd day of September 2016, I served a copy of the within **REPLY BRIEF OF RESPONDENTS/APPELLANTS JAMIE CURLEY AND DR. ORVILLE DYCE IN RESPONDENTS/APPELLANTS' CROSS APPEAL** and **SUPPLEMENTAL DESIGNATION OF MATTER OF RESPONDENTS/APPELLANTS JAMIE CURLEY AND DR. ORVILLE DYCE IN RESPONDENTS/APPELLANTS' CROSS APPEAL** in the within entitled matter by sending a copy of the same via Federal Express, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Vincent A. Sheheen
(SC Bar No. 115552)
Savage, Royall & Sheheen, LLP
1111 Church Street
Camden, SC 29020
Attorney for Appellants/ Respondents

Michael D. Wright
(SC Bar No. 78401)
Savage, Royall & Sheheen, LLP
1111 Church Street
Camden, SC 29020
Attorney for Appellants/Respondents

WOMBLE CARLYLE SANDRIDGE & RICE,
LLP




WOMBLE
CARLYLE
SANDRIDGE
& RICE
A LIMITED LIABILITY
PARTNERSHIP

5 Exchange Street
Charleston, SC 29401

Mailing Address:
Post Office Box 999
Charleston, SC 29402
Telephone: (843) 722-3400
Fax: (843) 723-7398
www.wcsr.com

MORRIS A. ELLISON
ATTORNEY AT LAW
E-Mail: mellison@wcsr.com
DIRECT DIAL: 843-720-4614
FAX: 843-723-7398

September 22, 2016

Via Federal Express

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
John C. Calhoun Building
P.O. Box 11629
Columbia, South Carolina 29201

RECEIVED

SEP 23 2016

SC Court of Appeals

RE: Jamie Curley, Plaintiff, v. SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants, and Dr. Orville Dyce, Plaintiff,
v.
South Carolina ENT, Allergy and 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.

Appellate Case No. 2016-00626
WCSR File No. 85182.0000.0

Dear Ms. Kitchings:

Please find enclosed for filing, an original and two (2) copies of each of the following:

- (1) Reply Brief of Respondents'/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal;
- (2) Supplemental Designation of Matter of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal;
- (3) Certificate of Compliance of Supplemental Designation of Matter of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal; and

South Carolina Court of Appeals
September 22, 2016

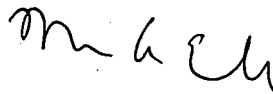
- (4) Certificate of Service of Reply Brief of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal and Supplemental Designation of Matter of Respondents/Appellants Jamie Curley and Dr. Orville Dyce to be included in the Record on Appeal.

Please file the originals and return the filed-stamped copies to me in the self-addressed, stamped envelope enclosed herewith. The enclosed are being served on counsel of record by copy of this letter.

Please do not hesitate to contact me at the above direct dial telephone number or email address.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



Morris A. Ellison

MAE/cbc

cc w/encl: Vincent A. Sheheen, Esq. (via FedEx)
Michael D. Wright, Esq. (via FedEx)
William C. Cleveland, III, Esq. (via email)
Orville Dyce (via US Mail)

ORIGIN ID:CHSA (843) 722-3400
CAROL CASEY
WOMBLE CARLYLE LLP
5 EXCHANGE STREET

CHARLESTON, SC 29401
UNITED STATES US

SHIP DATE: 22SEP16
ACTWGT: 0.50 LB
CAD: 103494906AWSX12500

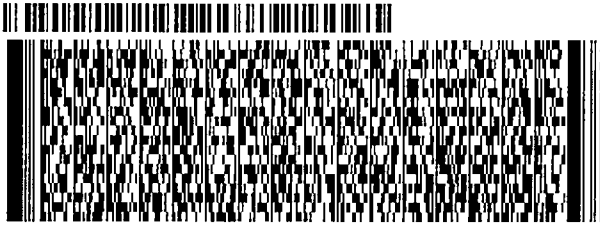
BILL SENDER

TO HON. JENNY ABBOTT KITCHINGS
SOUTH CAROLINA COURT OF APPEALS
1015 SUMTER ST

COLUMBIA SC 29201

(843) 722-3400 REF: 85182-0000.0/2911
INV. PO: DEPT

544-U/A05314EB



FRI - 23 SEP 10:30A

PRIORITY OVERNIGHT

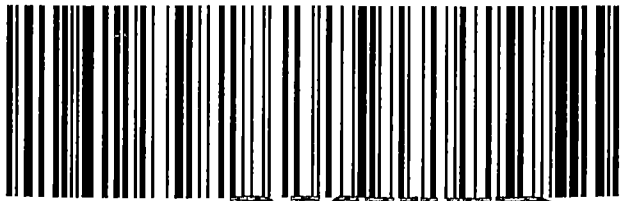
TRK# 7841 5771 0736
0201

ASR

29201

SC-US CAE

28 USCA



RECEIVED

SEP 23 2016

SC Court of Appeals

FOLD on this line and place in shipping pouch with bar code and delivery address visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.