

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

S.C. Supreme Court

R. Lawton McIntosh, Circuit Court Judge

Case No: 2010-CP-40-0044

Case No.: 2010-CP-40-2812

Howard Alston Duncan, Jr. and Thomas Duncan, ...Appellants,

v.

Rose Ann Voyles and Mary Liverman, ...Respondents.

RECORD ON APPEAL

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ATTORNEYS FOR APPELLANTS

ATTORNEYS FOR RESPONDENT

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IN THE COURT OF COMMON PLEAS

Howard Alston Duncan, Jr. and Thomas Duncan v. Rose Ann Voyles and Marry Liverman

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.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

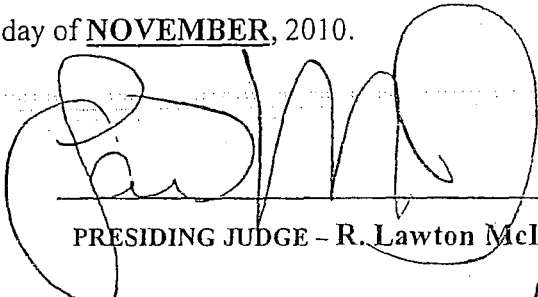
☐ See attached order;

☒ Statement of Judgment by the Court;

Plaintiffs Alston Duncan and Thomas Duncan's Motion to Reconsider is DENIED.

Dated at ANDERSON, South Carolina, this 10th day of NOVEMBER, 2010.

Court Reporter: _____


PRESIDING JUDGE - R. Lawton McIntosh

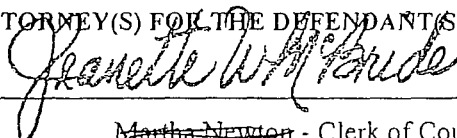
is judgment was entered on the Nov day of NOVEMBER, 2010, and a copy mailed first class this 19 day of NOVEMBER, 2010 to attorneys of record or to parties (when appearing pro se) as follows:

THOMAS M. KENNADAY

ATTORNEY(S) FOR THE PLAINTIFF(S)

BRIAN DUMAS

ATTORNEY(S) FOR THE DEFENDANT(S)


Jeanette W. McRae

Martha Newton - Clerk of Court

CRCP APP-24/FORM 4 (Rev. 6/02)

SCANNED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No.: 2010 CP 40-00044
Howard Alston Duncan, Jr., and	)	
Thomas Duncan,	)	
	)	
Plaintiffs,	)	ORDER
	)	
v.	)	
	)	
Rose Ann Voyles and	)	
Mary Liverman,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
 FILED
 2010 SEP 14 AM 11:36
 JEANETTE W. McBRIDE
 C.C.P. & C.S.

On June 29, 2010, counsel for the parties came before the Court on Defendants' Motion to Dismiss or Change Venue Pursuant to SCRCP 12. Also before the Court was Plaintiffs' motion to consolidate the above captioned action with civil action 2010 CP 40-02812. The motion to consolidate was filed less than 10 days before the hearing and was not scheduled to be heard on June 29, 2010, but counsel for Defendants consented to the Court hearing the motion and consented to consolidation if there was anything left to consolidate.

Defendants' Motion to Dismiss was made pursuant to Rule 12(b)(6). Accordingly, the Court considered the arguments of the parties and the Complaint. The Court accepted the allegations in the Complaint as true for purposes of the motion, and did not consider any facts from outside the Complaint.

The Complaint alleges Civil Conspiracy and Tortious Interference with an Inheritance. Both causes of actions allege interference with inheritance rights, and as such, the Complaint is fatally defective and fails to state a claim for which relief can be granted. See *Douglass ex rel. Louthian v. Boyce*, 519 S.E. 2d 802 (Ct. App. 1999).

SCANNED

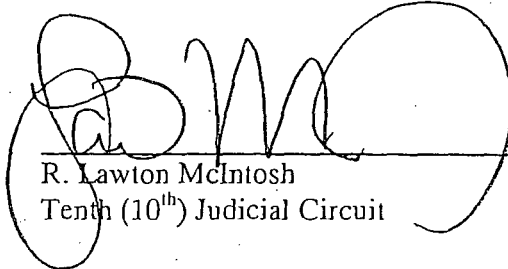
The motion to change venue is denied. The most substantial part of the alleged acts on which the claims are based are alleged to have taken place in Richland County and, therefore, venue is proper in Richland County. See S.C. Code Ann. §15-7-30(C)(2).

The Motion to Consolidate was consented to. Accordingly, to the extent applicable, the actions are consolidated under CA No. 2010-CP-40-0044.

Claims under CA No. 2010-CP-40-2812 for (1) Civil Conspiracy and (2) Tortious Interference with inheritance rights are also fatally defective and therefore dismissed pursuant to Rule 12(b)(6), SCRCP, inasmuch as both causes of action alleged interference with inheritance rights. This ruling is further based upon judicial economy and upon Plaintiff's consent to the Motion to Consolidate.

AND IT IS SO ORDERED.

Anderson, South Carolina
September 10, 2010



R. Lawton McIntosh
Tenth (10th) Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE PROBATE COURT
CASE NO.: 2007-ES-40-686

IN THE MATTER OF)
THE ESTATE OF:)
MARY ROSE DUNCAN,)

HOWARD ALSTON DUNCAN and)
WILLIAM THOMAS DUNCAN,)
PETITIONERS,)

v.)

ROSE ANN VOYLES, Individually and)
as Personal Representative, and)
MARY LIVERMAN,)
RESPONDENTS.)

ORDER GRANTING MOTION FOR
REMOVAL TO CIRCUIT COURT
AND
DENYING MOTION TO DISMISS
AND/OR TRANSFER VENUE

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CLERK OF COURT
SOUTH CAROLINA

FILED

THIS MATTER IS BEFORE THE COURT upon the filing of a Summons and Petition for Declaratory Judgment and Motion for Removal of that Petition to Circuit Court, by Howard Alston Duncan and William Thomas Duncan. In their Petition, Howard Alston Duncan and William Thomas Duncan (hereinafter "Petitioners") allege purported causes of action for undue influence, intentional interference with inheritance, and civil conspiracy against Rose Ann Voyles and Mary Liverman (hereinafter "Respondents"), pertaining to the titling, or re-titling, of certain financial accounts held in the name of the decedent. Along with their Petition, the Petitioners simultaneously filed a Motion to remove the action to Circuit Court, pursuant to S.C. Code Ann. § 62-1-302, 1976, as amended. Proof of service of this Petition on Respondent Mary Liverman was filed with the Court on February 10, 2010, and proof of service on Respondent Rose Ann Voyles was filed with the Court on March 15, 2010.

Subsequent to the filing of the above Petition and Motion, a Motion to Dismiss And/Or Transfer Venue was filed by Respondents. In their Motion, Respondents seek to dismiss the

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jdb

above action on several grounds, including lack of jurisdiction, res judicata, collateral estoppel, waiver, laches, and failure to state allege facts sufficient to support a cause of action. Respondents also seek to transfer venue of this action to Kershaw County, should it be removed, because Respondent Rose Ann Voyles is a resident of Kershaw County.

S.C. Code Ann. § 62-1-302(d) provides, in pertinent part:

Notwithstanding the exclusive jurisdiction of the probate court over the forgoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, *must* be removed to the circuit court . . .

(3) actions to try title

(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value

S.C. Code Ann. § 62-1-302(d)(3), (5) (2009) (emphasis added).

After an examination of the contents of the Petition and a consideration of the literal interpretation of the above statute, the Court concludes that it is appropriate to remove this action to the Circuit Court. Here, Petitioners have commenced an action, for the first time in the Probate Court, related to the titling of bank accounts which could entitle Petitioners to a jury trial and which involves an amount in controversy over five thousand dollars. Although Respondents may have legal justifications for dismissal of this action and/or transfer of venue, those will have to be considered by the Circuit Court because removal of this matter at this stage in the litigation is required by statute.

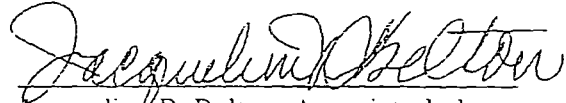
THEREFORE, IT IS HEREBY ORDERED:

A. That the Motion for Removal of the Summons and Petition for Declaratory Judgment filed January 5, 2010, by Howard Alston Duncan and William Thomas Duncan, shall be granted.

2 of 3
JTB

B. That the Motion to Dismiss And/Or Transfer Venue, filed February 16, 2010, by
Rose Ann Voyles and Mary Liverman, shall be denied.

IT IS SO ORDERED.


Jacqueline B. Belton, Associate Judge
Richland County Probate Court

April 15, 2010
Columbia, South Carolina

3 of 3
jlb

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No.: 2010 CP 40-0044
	)	
Howard Alston Duncan, Jr., and	)	
Thomas Duncan,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' MOTION FOR
	)	RECONSIDERATION
v.	)	
	)	
Rose Ann Voyles and	)	
Mary Liverman,	)	
	)	
Defendants.	)	

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 CLERK OF COURT

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiffs Howard Alston Duncan, Jr. and Thomas Duncan hereby move the Court to reconsider its Order dated September 10, 2010 (Exhibit A). The Order was filed by the clerk of court on September 14 and Plaintiffs' counsel received the order on September 16, 2010.

BACKGROUND

Plaintiffs filed two actions against the defendants by the filing and service of a Complaint in Court of Common Pleas (Exhibit B) and a Petition for Declaratory Judgment in the Probate Court (Exhibit C). The actions arose out of the defendants being added as joint account holders with rights of survivorship to checking and savings accounts and certificates of deposit of the parties' mother. Prior to the addition of the defendants to these accounts, the parties' mother was the sole account holder on all accounts. At the time the defendants were made account holders, the last will and testament of the parties' mother left her estate to each of the parties of this lawsuit in equal shares, and defendant Voyles was the attorney-in-fact for the parties' mother. These facts were alleged in the initial pleading for each action.

The action originally filed in the Court of Common Pleas was given C/A No. 2010-CP 40-0044. The Complaint seeks actual and punitive damages for the civil conspiracy and tortious interference with an inheritance. The action originally filed in the Probate Court seeks a declaratory judgment to re-title the bank accounts as sole accounts of the parties' mother on the grounds that the additions of the defendants to the accounts was invalid because they resulted from the undue influence, intentional interference with an inheritance, and/or civil conspiracy of the defendants.

Plaintiffs moved for removal of the action originally filed in the Probate Court to the Circuit Court. Defendants opposed the removal and moved in the Probate Court to dismiss the Petition for Declaratory Judgment or change venue. Defendants also moved in the action originally filed in the Circuit Court to dismiss or change venue.

The Probate Court granted the motion to remove and denied the motion to dismiss or change venue by order dated April 15, 2010 (Exhibit D). The removed action was given the civil action number 2010-CP-40-2812 in the Circuit Court.

The defendants' motion to dismiss or change venue in C/A No. 2010-CP 40-0044, the action originally filed in the Circuit Court, was set for a hearing on June 29, 2010. *See* Motions Roster (Exhibit E). On June 23, 2010, less than 10 days before the hearing on the defendants' motion to dismiss or change venue filed in the Circuit Court action, Plaintiffs moved to consolidate the two actions. On June 29, 2010, Judge McIntosh heard the motion to dismiss or change venue in C/A No. 2010-CP 40-0044 and, by consent of the Defendants, heard the motion to consolidate.

On September 10, 2010, Judge McIntosh signed the Order that is the subject of this motion. The Order granted the motion to dismiss the tort claims for Civil Conspiracy and

Tortious Interference with an Inheritance in C/A No. 2010-CP 40-0044 on the grounds that the "causes of action allege interference with inheritance rights," citing *Douglass ex rel. Louthian v. Boyce*, 519 S.E.2d 802 (S.C. Ct. App. 1999). In the same order, Judge McIntosh denied the motion to change venue and granted the motion to consolidate. Furthermore, Judge McIntosh ordered, "Claims under C/A No. 2010-CP-40-2812 for (1) Civil Conspiracy and (2) Tortious Interference with inheritance rights are also fatally defective and therefore dismissed pursuant to Rule 12(b)(6), SCRCF, inasmuch as both causes of action alleged interference with inheritance rights."

Plaintiffs' counsel received the Order that is the subject of this motion on September 16, 2010.

ISSUES FOR RECONSIDERATION

Plaintiffs request reconsideration of the dismissal of the tort claims for Civil Conspiracy and Tortious Interference with an Inheritance originally filed in the circuit court under C/A No. 2010-CP 40-0044 on the grounds that:

1. As a novel theory, the claim for Tortious Interference with an Inheritance should be allowed to proceed in order to provide a complete record for the appellate court;
2. South Carolina should recognize Tortious Interference with an Inheritance, also known as Intentional Interference with an Inheritance;
3. The claim for Civil Conspiracy to deprive a devisee of an expected inheritance is a valid claim because South Carolina recognizes expectancies as recoverable damages; and
4. The claim for Civil Conspiracy to deprive a devisee of an expected inheritance should be allowed for the same reasons Intentional Interference with an Inheritance should be recognized, and such policy considerations are even stronger when a conspiracy is involved.

Plaintiffs request reconsideration of the dismissal of the "Claims under C/A No. 2010-CP-40-2812 for (1) Civil Conspiracy and (2) Tortious Interference with inheritance rights" on the grounds that:

1. The motion to dismiss the claims in C/A No. 2010-CP-40-2812 had already been denied by the Probate Court and therefore there was no motion to dismiss claims in C/A No. 2010-CP-40-2812 pending, and the order of Judge McIntosh's order improperly overrules an order of another judge;
2. The motion to dismiss claims under C/A No. 2010-CP-40-2812 was not scheduled to be heard and was not heard by consent;
3. There were no tort claims for (1) Civil Conspiracy and (2) Tortious Interference with inheritance rights made in C/A No. 2010-CP-40-2812. Civil Conspiracy and Tortious Interference were asserted as grounds for a Declaratory Judgment claim to re-title bank accounts along with the ground of undue influence; and
4. South Carolina should recognize Tortious Interference with an Inheritance, also known as Intentional Interference with an Inheritance, and Civil Conspiracy to deprive a devisee of an expected inheritance as grounds to re-title assets even if South Carolina does not recognize them as tort claims for monetary damages.

ARGUMENT

- I. The Motion To Dismiss The Claim For Declaratory Judgment Action Should Be Ignored, Or Alternatively Denied, Or Alternatively The Court's Ruling Should Be Clarified.

The Defendants' Motion to Dismiss or Change Venue filed in the original circuit court action, C/A No. 2010-CP 40-0044, was the only motion set for hearing on June 29, 2010. (See

exhibit __, Motion's Roster.) The only other motion filed in C/A No. 2010-CP 40-0044 at the time of the June 29 hearing was Plaintiffs' motion to consolidate. Defendants consented to hearing the motion to consolidate. Plaintiffs' did not consent to hearing the motion to dismiss or change venue in C/A No. 2010-CP-40-2812. Because there was no notice that the motion in C/A No. 2010-CP-40-2812 would be heard on June 29, 2010, and there was no consent to its being heard, that motion should not have been ruled on. Moreover, that motion was not heard or argued. The undersigned counsel for Plaintiffs did not argue the motion in C/A No. 2010-CP-40-2812 or the viability of civil conspiracy and intentional interference with an inheritance in the context of a declaratory judgment action to re-title assets. For all the foregoing reasons, the Court should reconsider its ruling on the motion to dismiss claims brought in C/A No. 2010-CP-40-2812.

On top of the foregoing is the fact that the Probate Court already ruled on the motion to dismiss the claims in C/A No. 2010-CP-40-2812 and denied them. Exhibit D (Order Granting Motion for Removal to Circuit Court and Denying Motion to Dismiss and/or Change Venue). Therefore, not only was there no motion set for hearing on June 29, 2010 in C/A No. 2010-CP-40-2812, there was no motion to dismiss the claims in C/A No. 2010-CP-40-2812 pending on June 29, 2010. Furthermore, by dismissing claims asserted in C/A No. 2010-CP-40-2812 the Court improperly overruled the ruling of another judge of an equivalent court, the Probate Court. See *Charleston County DSS v. Father*, 317 S.C. 283, 454 S.E.2d 307 (S.C. 1995) ("There is a long-standing rule in this State that one judge of the same court cannot overrule another.").

Instead of dismissing claims made in C/A No. 2010-CP-40-2812, the Court should ignore the claims made in C/A No. 2010-CP-40-2812 and rule only on the motion to dismiss or change

venue filed in C/A No. 2010-CP 40-0044, because that motion and the motion to consolidate were the only motions before the Court on June 29, 2010.

If the Court determines that it can rule on the motion to dismiss that the Probate Court denied, the Court should still deny the motion, even if the Court confirms its order dismissing the Civil Conspiracy and Intentional Interference with an Inheritance tort actions from C/A No. 2010-CP 40-0044. Plaintiffs do not assert tort claims for civil conspiracy and intentional interference with inheritance rights in C/A No. 2010-CP-40-2812. That action seeks a declaratory judgment to invalidate the conversion of the accounts in question from sole accounts to joint accounts with rights of survivorship. Asset transfers can be set aside for "undue influence, incapacity or other basis of invalidation." *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (S.C. 1983); *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (Ct. App. 2005). In addition to undue influence, the Probate Code recognizes fraud and duress as grounds to contest a will. S.C. Code Ann. § 62-3-405. Plaintiffs contend that civil conspiracy and tortious interference are other kinds of misconduct that are valid bases for invalidating transfers. As with undue influence, fraud or duress, Plaintiffs will have to show that the civil conspiracy or tortious interference resulted in the parties' mother making a transfer she would not have made but for the misconduct. However, if misconduct that satisfies the elements of Civil Conspiracy or Intentional Interference with an Inheritance caused the transfer, South Carolina should at least recognize the remedy for that misconduct of setting aside the transfer. Otherwise, South Carolina law would encourage such misconduct. Therefore, if the Court determines it can rule on the motion, Plaintiffs request the Court amend its order to deny the motion.

Alternatively, if the Court confirms its order, Plaintiffs request the Court clarify what is left of the declaratory judgment action. Plaintiffs understand the order to dismiss civil

conspiracy and intentional interference with an inheritance as independent grounds for setting aside an asset transfer, but to allow the undue influence claim to proceed and to allow Plaintiffs to argue the underlying conduct as a method or form of undue influence.

II. The Motion To Dismiss The Tort Claims For Tortious Interference With An Inheritance And Civil Conspiracy Should Be Denied Instead Of Granted.

Plaintiffs also request that the Court reconsider the decision to dismiss the tort claims brought in the circuit court under C/A No. 2010-CP 40-0044. Although South Carolina has not yet recognized Tortious Interference with an Inheritance, neither has South Carolina rejected the cause of action. In *Douglass ex rel. Louthian v. Boyce*, 542 S.E.2d 715 (S.C. 2001) (affirming the Court of Appeals order cited in the Court's order that is the subject of this motion), the Supreme Court stated that South Carolina has not adopted intentional interference with an inheritance, and that it did not have to decide whether to recognize the cause of action because alternative grounds precluded such a claim under the facts of the case. *Id.* at 717.¹ South Carolina should recognize this cause of action. Without it, there will be no discouragement to attempting tortious conduct intended to interfere with an inheritance. While recognizing a right to set aside a transfer for such misconduct would at least not encourage the misconduct, more is needed. Without a recognized intentional tort and the corresponding possibility of punitive damages, the only penalty for succeeding at the misconduct would be the loss of effort expended because the worst case scenario for the malefactor would be a return to the position he or she held before undertaking the tortious conduct.

¹ In a footnote, the Supreme Court set forth the elements of the tort and cited other jurisdictions and the Restatement (Second) of Torts for recognizing the cause of action. *Id.* at 717 n.4. The elements are: "(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." *Id.*

The inchoate nature of the damages at the time of the misconduct is no reason not to recognize the tort cause of action. South Carolina has “adopted the closely analogous tort of intentional interference with prospective contractual relations.” *Boyce*, 542 S.E.2d at 717 (citing *Crandall Corp. v. Navistar Int’l Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 179 (1990)). As stated by one of the states recognizing intentional interference with an inheritance, “there is no essential reason for refusing to accord to noncommercial expectancies, such as an expected gift or legacy under a will, the protection courts have generally accorded commercial expectancies.” *Nemeth v. Banhalmi*, 425 N.E.2d 1187, 1190 (Ill. App. 2001) (cited by *Boyce*, 542 S.E.2d at 717 n.4). The “reasonable certainty that the expectancy would have been realized but for the interference” requirement in the elements of intentional interference with an inheritance is merely an application of the normal standard of proof for future damages. *See e.g. Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 451-452 (S.C. 2008) (“the law does not require absolute certainty of lost profits but only reasonable certainty that the damages are not purely speculative and there exists a fairly accurate method to estimate the lost profits.”).

The lack of recognition of intentional interference with an inheritance at the appellate level does not require dismissal by the trial court. To the contrary, the trial court can, and should, recognize the cause of action. “As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCp, motion to dismiss.” *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547, 551 (S.C. 2001).

Civil conspiracy is already a recognized tort in South Carolina. That the damages in this case are an expectancy does not preclude the claim. As previously discussed, South Carolina routinely allows recovery for prospective damages when it allows recovery for lost profits. The reasonable certainty requirement can be applied to an expectancy, as implicitly recognized by the

Supreme Court when it recognized the closely analogous tort of intentional interference with prospective contractual relations in *Crandall Corp. v. Navistar Int'l Transp. Corp.*, *supra*. The same articulation of that requirement in the elements of intentional interference with an inheritance can be applied to the civil conspiracy claim for deprivation of the expected inheritance.

If the Court determines that civil conspiracy is a novel theory when the damages are an expectancy, the Court should nevertheless recognize the claim at the 12(b) stage and allow the development of a full record before the validity of the cause of action is determined.

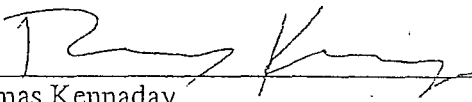
For the foregoing reasons, as to the tort claims brought originally in the Circuit Court under C/A No. 2010-CP 40-0044, Plaintiffs request that the court deny rather than grant the motion to dismiss.

Respectfully submitted.

TURNER, PADGET, GRAHAM & LANEY, P.A.

September 24, 2010

By:



Thomas Kennaday
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR PLAINTIFFS HOWARD
ALSTON DUNCAN, JR. AND THOMAS
DUNCAN

CERTIFICATE OF SERVICE

I hereby certify that this 24th day of September 2010 a copy of the foregoing Plaintiff's
Motion for Reconsideration has been served as follows:

VIA HAND DELIVERY

Brian Dumas, Esquire
Peake Fowler & Associates, PA
9357 Two Notch Road, Ste. 103
Columbia, SC 29223

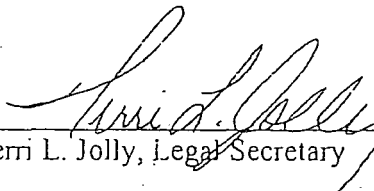
ATTORNEYS FOR
DEFENDANTS/RESPONDENTS

VIA REGULAR U.S. MAIL

The Honorable R. Lawton McInosh
Circuit Court Judge
P. O. Box 8002
Anderson, SC 29622

JEANETTE M. MCENRIDE
Clerk of Court
C.S. & G.S.

2010 SEP 24 PM 2:46



Terri L. Jolly, Legal Secretary

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP4000044

Edward Alston Duncan Jr

vs.

Rose Ann Voyles

Plaintiff

Defendant

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.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC;
 SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC;
☐ 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.

ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2010.

PRESIDING JUDGE

Judgment was entered on the _____ day of _____, 2010, and a copy mailed first class this 14th
 of September, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Thomas M Kennaday

Brian Dumas

 COUNSEL FOR THE PLAINTIFF(S)_____
 ATTORNEY(S) FOR THE DEFENDANT(S)*Jeannette W. McRid*

Clerk of Court

APP-24/FORM 4



SCANNED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No.: 2010 CP 40-00044
	)	
Howard Alston Duncan, Jr., and	)	
Thomas Duncan,	)	
	)	
Plaintiffs,	)	ORDER
	)	
v.	)	
	)	
Rose Ann Voyles and	)	
Mary Liverman,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
FILED
2010 SEP 14 AM 11:36
JEANETTE W. McBRIDE
C.C.P. & G.S.

On June 29, 2010, counsel for the parties came before the Court on Defendants' Motion to Dismiss or Change Venue Pursuant to SCRCP 12. Also before the Court was Plaintiffs' motion to consolidate the above captioned action with civil action 2010 CP 40-02812. The motion to consolidate was filed less than 10 days before the hearing and was not scheduled to be heard on June 29, 2010, but counsel for Defendants consented to the Court hearing the motion and consented to consolidation if there was anything left to consolidate.

Defendants' Motion to Dismiss was made pursuant to Rule 12(b)(6). Accordingly, the Court considered the arguments of the parties and the Complaint. The Court accepted the allegations in the Complaint as true for purposes of the motion, and did not consider any facts from outside the Complaint.

The Complaint alleges Civil Conspiracy and Tortious Interference with an Inheritance. Both causes of actions allege interference with inheritance rights, and as such, the Complaint is fatally defective and fails to state a claim for which relief can be granted. See *Douglass ex rel. Louthian v. Boyce*, 519 S.E. 2d 802 (Cl. App. 1999).

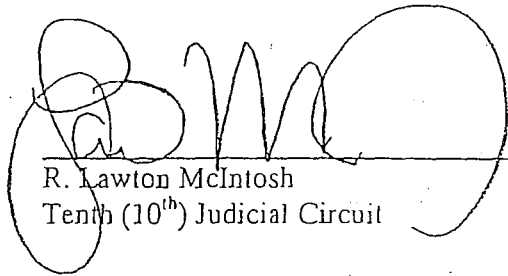
SCANNED

The motion to change venue is denied. The most substantial part of the alleged acts on which the claims are based are alleged to have taken place in Richland County and, therefore, venue is proper in Richland County. See S.C. Code Ann. §15-7-30(C)(2).

The Motion to Consolidate was consented to. Accordingly, to the extent applicable, the actions are consolidated under CA No. 2010-CP-40-0044.

Claims under CA No. 2010-CP-40-2812 for (1) Civil Conspiracy and (2) Tortious Interference with inheritance rights are also fatally defective and therefore dismissed pursuant to Rule 12(b)(6), SCRCF, inasmuch as both causes of action alleged interference with inheritance rights. This ruling is further based upon judicial economy and upon Plaintiff's consent to the Motion to Consolidate.

AND IT IS SO ORDERED.



R. Lawton McIntosh
Tenth (10th) Judicial Circuit

Anderson, South Carolina
September 10, 2010

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Howard Alston Duncan, Jr., and
Thomas Duncan.

Plaintiff(s)

vs.

Rose Ann Voyles and
Mary Liverman

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010CP4000044
- CP - 40 -

(Please Print)

Submitted By: Thomas M. Kennaday, Esquire
Address: Turner Padgett Graham & Laney, P.A.
1901 Main Street, 17th Floor
Post Office Box 1473
Columbia, SC 29202

SC Bar #:

Telephone #: 803-254-2200

Fax #: 803-799-3957

Other:

E-mail: TKennaday@TurnerPadgett.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers, as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

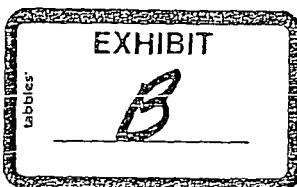
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Construction (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Other (299) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Other (399) | ☐ Building Code Violation (460) |
| | | | ☐ Other (499) |
-
- | | | | |
|--|--|---|--|
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Sexual Predator (510) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Mandamus (520) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Habeas Corpus (530) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| ☐ Other (599) | ☐ Transcript Judgment (740) | ☐ Forfeiture (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Other (899) | ☐ SCDOT (950) |
| | ☐ Other (799) | | ☐ Worker's Comp (960) |
| | | | ☐ Zoning Board (970) |
| | | | ☐ Administrative Law Judge (980) |
| | | | ☐ Public Service Commission (990) |
| | | | ☐ Employment Security Comm (991) |
| | | | ☐ Other (999) |
-
- | | |
|--|---|
| Special/Complex /Other | |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) |
| ☐ Medical (620) | ☒ Other (699) |



Submitting Party Signature:

Date: January 2010

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

Civil Action No.:

Howard Alston Duncan, Jr., and
Thomas Duncan,

Plaintiffs,

v.

Rose Ann Voyles and
Mary Livenman,

Defendants.

SUMMONS
(Jury Action Demanded)

JEANETTE W. McBRIDE
C.C.P. & G.S.

2010 JAN -5 PM 3:04

RICHLAND COUNTY
FILED

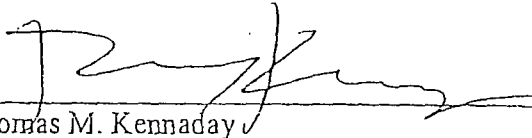
TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscribers at their office, 1901 Main Street, Bank of America Plaza, P.O. Box 1473, Columbia, South Carolina, 29202, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiffs in this action will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 5, 2010

By:


Thomas M. Kennaday
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957
tkennaday@turnerpadget.com

ATTORNEYS FOR PLAINTIFFS HOWARD
A. DUNCAN, JR., AND WILLIAM T.
DUNCAN

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No.:
	)	
Howard Alston Duncan, Jr., and	)	
Thomas Duncan,	)	
	)	
Plaintiffs,	)	COMPLAINT
	)	(Jury Trial Demanded)
v.	)	
	)	
Rose Ann Voyles and	)	
Mary Liverman,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
FILED
2010 JAN -5 PM 3:04
JEANETTE W. McBRIDE
C.C.P. & G.S.

Plaintiffs Howard Alston Duncan, Jr. and William Thomas Duncan bring this action for actual and punitive damages against Defendants Rose Ann Voyles and Mary Liverman and allege as follows:

PARTIES AND JURISDICTION

- Howard Alston Duncan, Jr. ("Alston") is a citizen and resident of the State of Louisiana and is a son of Mary Rose Duncan.
- William Thomas Duncan ("Tom") is a citizen and resident of the State of Georgia and is a son of Mary Rose Duncan.
- Rose Ann Voyles ("Voyles") is a resident of Kershaw County, South Carolina, and is a daughter of Mary Rose Duncan.
- Mary Liverman ("Liverman") is a resident of North Carolina, and is a daughter of Mary Rose Duncan.
- The Circuit Court has personal jurisdiction over Voyles as a citizen and resident of South Carolina.

6. The Circuit Court has personal jurisdiction over Liverman because this action relates to business Liverman transacted in South Carolina, contracts Liverman entered into in South Carolina, and tortious conduct Liverman committed in South Carolina.

FACTS

7. In 1997, Mary Rose Duncan, a domiciliary of Richland County, South Carolina, executed a Will that devised her assets to her four children equally.

8. At the same time she executed the Will, Mary Rose Duncan executed a Power of Attorney that named Voyles as her attorney-in-fact.

9. Voyles remained the attorney-in-fact for Mary Rose Duncan until Mary Rose Duncan's death on May 2, 2007.

10. At the time Mary Rose Duncan executed the Will and until April 2004, Mary Rose Duncan was the sole owner of funds held in a checking account, a savings account, and several certificates of deposit. These accounts were all titled solely in the name of Mary Rose Duncan and were all established at First Citizens Bank of South Carolina.

11. The 1997 Will of Mary Rose Duncan gave the Plaintiffs and Defendants each one-fourth of the assets of Mary Rose Duncan.

12. In 2004, Voyles and Liverman became joint account holders with Mary Rose Duncan on the checking account, savings account, and certificates of deposit (collectively, the "Accounts"). Voyles and Liverman were both added to the checking and savings accounts. As to the certificates of deposit, Voyles was added to some of the certificates, while Liverman was added to the other certificates of deposit.

13. The addition of Voyles and Liverman to the Accounts took place in Richland County, South Carolina.

14. Mary Rose Duncan did not drive and was dependant upon others for her transportation.

15. Mary Rose Duncan placed her trust and confidence in Voyles and Liverman and was dominated by and dependant upon Voyles and Liverman.

16. Voyles and Liverman knew that the addition of their names to the Accounts would result their receiving the funds in the Accounts on Mary Rose Duncan's death and that the funds would not pass under Mary Rose Duncan's Will.

17. Upon the death of Mary Rose Duncan, Voyles and Liverman received the funds in the Accounts as the joint account holders.

18. Within days of the death of Decedent, Voyles and Liverman closed the majority of the Accounts and re-distributed these funds between themselves.

19. Voyles and Liverman combined their efforts to intentionally manipulate, encourage, and/or deceive Decedent into adding their names to the Accounts thus converting the Accounts into joint accounts with rights of survivorship in Voyles and Liverman.

20. Voyles and Liverman intentionally and maliciously acted to deprive Plaintiffs of their share of the funds in the Accounts which Plaintiffs would have received under the Will of Mary Rose Duncan.

21. It was Mary Rose Duncan's desire that the funds in the Accounts be divided equally between her four children upon her death.

FOR A FIRST CAUSE OF ACTION
(Civil Conspiracy)

22. Defendants combined with the intent and purpose to injure Plaintiffs by depriving them of their inheritance in the assets of their mother, Mary Rose Duncan, held in First Citizens Bank.

23. Defendants acted in concert to deprive Plaintiffs of their inheritance in the financial assets of Decedent by manipulating, encouraging, and/or deceiving Decedent to add Defendants as joint account holders with rights of survivorship to the Accounts of Decedent.

24. The concerted actions of Defendants have damaged Plaintiffs by depriving them of their one-quarter share each of over \$200,000 of Mary Rose Duncan's assets.

25. Tom and Alston Duncan are entitled to actual and punitive damages from Defendants.

FOR A SECOND CAUSE OF ACTION
(Tortious Interference with an Inheritance)

26. Plaintiffs each had an expectancy in the funds held in the Accounts.

27. Defendants intentionally interfered with the expectancy of Plaintiffs through tortious conduct of civil conspiracy, the exercise of undue influence, and the breach of fiduciary duties owed to Decedent.

28. But for the tortious conduct of Defendants, Plaintiffs would have realized their inheritance in the funds held in the Accounts.

29. The tortious conduct of Defendants has damaged Plaintiffs by depriving them of their one-quarter share each in over \$200,000.

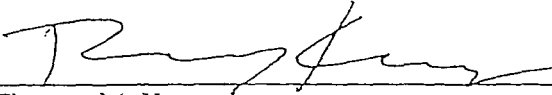
30. Plaintiffs are entitled to actual and punitive damages from Defendants.

WHEREFORE Plaintiffs request a jury trial and pray for an award of actual and punitive damages from Defendants Mary Liverman and Rose Voyles and such other relief as justice requires.

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 5, 2010

By:



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Post Office Box 1473
Columbia, SC 29202
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Fax: (803) 799-3957
tkennaday@turnerpadget.com

ATTORNEYS FOR PLAINTIFFS HOWARD
A. DUNCAN, JR., AND WILLIAM T.
DUNCAN

FILED

10 JAN -5 PM 3:08

AMY W. MCCULLOCH
CLERK OF PROBATE COURT
RICHLAND COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE PROBATE COURT
Estate No. 2007-ES-40-00686

IN THE MATTER OF :)
MARY ROSE DUNCAN)

SUMMONS

Howard Alston Duncan, William)
Thomas Duncan,)
Petitioners,)

v.)

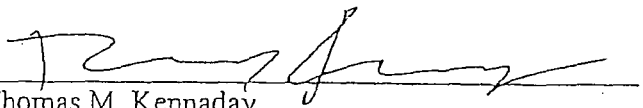
ROSE ANN VOYLES, Individually and)
as PERSONAL REPRESENTATIVE,)
and Mary Liverman,)
Defendants.)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Petition upon the subscribers at their office, 1901 Main Street, Bank of America Plaza, P.O. Box 1473, Columbia, South Carolina, 29202, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition within the time aforesaid, or otherwise appear and defend, the Petitioners in this action will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Petition.

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 5, 2010

By: 
Thomas M. Kennaday
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Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957
tkennaday@turnerpadget.com

ATTORNEYS FOR PETITIONERS
HOWARD A. DUNCAN, JR., AND WILLIAM
T. DUNCAN



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE PROBATE COURT
Estate No. 2007-ES-40-00686

IN THE MATTER OF :)
THE DECEDENT, Mary Rose Duncan)
)
Howard Alston Duncan, William)
Thomas Duncan,)
)
Petitioners,)

PETITION FOR DECLARATORY
JUDGMENT

v.)
)
ROSE ANN VOYLES, Individually and)
as PERSONAL REPRESENTATIVE,)
and Mary Liverman,)
)
Respondents.)

Howard Alston Duncan, Jr. ("Alston") and William Thomas Duncan ("Tom"), through their attorneys; hereby petition the Probate Court for a Declaratory Judgment and such further necessary and proper relief and in support thereof allege as follows:

1. Rose Voyles is the Personal Representative of the Estate of The Decedent, Estate No. 2007-ES-40-00686, having been appointed by an Order of the Richland County Probate Court dated May 29, 2007.

2. Alston, Tom, Rose Ann Voyles, ("Voyles") and Mary Liverman ("Liverman") are the children of Mary Rose Duncan (the "Decedent") and are the sole beneficiaries under the Decedent's Will.

3. The Probate Court has jurisdiction over the subject matter of this action pursuant to S.C. Code Ann. § 62-1-302(a)(1) (2009), which gives the Probate Court exclusive original jurisdiction over all subject matter related to estates of decedents.

4. In 1997, the Decedent executed a Will that devised her assets to her four children equally.

5. At the same time she executed the Will, the Decedent executed a Power of Attorney that named Voyles as her attorney-in-fact. Voyles remained the attorney-in-fact for the Decedent until the Decedent's death on May 2, 2007.

6. At the time the Decedent executed the Will and until April 2004, the Decedent was the sole owner of funds held in a checking account, a savings account, and several certificates of deposit. These accounts were all titled solely in the name of the Decedent and all held by First Citizens Bank of South Carolina.

7. In 2004, Voyles and Liverman became joint account holders with Mary Rose Duncan on the checking account, savings account, and certificates of deposit (collectively, the "Accounts"). Voyles and Liverman were both added to the checking and savings accounts. As to the certificates of deposit, Voyles was added to some of the certificates, while Liverman was added to the other certificates of deposit.

8. The Decedent placed her trust and confidence in Voyles and Liverman and was dominated by and dependant upon Voyles and Liverman.

9. Voyles and Liverman knew that the addition of their names to the Accounts would result their receiving the funds in the Accounts on the Decedent's death and that the funds would not pass under the Decedent's Will.

10. It was the Decedent's desire that the funds in the Accounts would be divided equally between her four children upon her death.

11. The addition of Voyles and Liverman to the Decedent's Accounts was the result of the intentional and concerted efforts of Voyles and Liverman to manipulate, encourage, and/or

deceive the Decedent, and to deprive Tom and Alston of their rightful shares of the Decedent's assets to the benefit of Voyles and Liverman.

12. The additions of Voyles and Liverman to the Accounts was invalid because they resulted from the undue influence, intentional interference with an inheritance, and/or civil conspiracy of Voyles and Liverman, and but for such conduct, the Accounts would have been solely owned by the Decedent and would have passed pursuant to the Decedent's Will.

13. Within days of the death of the Decedent and *before the opening of the Estate of Mary Rose Duncan*, Voyles and Liverman closed the majority of the Accounts and distributed the monies from a majority of the Accounts amongst themselves.

14. The funds in the Accounts should rightfully be assets of the Estate to be administered and distributed according to the Will of the Decedent.

WHEREFORE, the Petitioners Tom Duncan and Alston Duncan pray for an order declaring the following:

- A. That the re-titling of the Accounts in joint names with Voyles and Liverman was invalid;
- B. That the monies contained in Accounts on the date of death of Mary Rose Duncan were the sole assets of the Mary Rose Duncan;
- C. That the monies contained in the Accounts and the successor accounts at the time of the death of Mary Rose Duncan, plus interest *at the judgment rate*, are assets of the Estate;
- D. That Rose Voyles and Mary Liverman are to return the monies in the Accounts and successor accounts at the time of the Decedent's death, or an equivalent sum, plus interest to be part of the Estate of Mary Rose Duncan; and

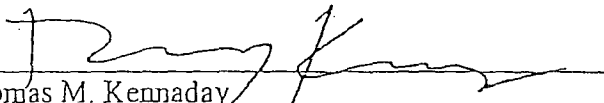
E. That the monies returned are to be administered and distributed pursuant to the terms of the Last Will and Testament of Mary Rose Duncan.

The Petitioners pray for such further relief as may be necessary and proper under the circumstances.

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 5, 2010

By:


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tkennaday@turnerpadget.com

ATTORNEYS FOR HOWARD A. DUNCAN,
JR., AND WILLIAM T. DUNCAN

STATE OF SOUTH CAROLINA

) IN THE PROBATE COURT

) CASE NO.: 2007-ES-40-686

COUNTY OF RICHLAND

) IN THE MATTER OF

) THE ESTATE OF:

) MARY ROSE DUNCAN,

) HOWARD ALSTON DUNCAN and

) WILLIAM THOMAS DUNCAN,

) PETITIONERS,

) v.

) ROSE ANN VOYLES, Individually and
) as Personal Representative, and

) MARY LIVERMAN,

) RESPONDENTS.

ORDER GRANTING MOTION FOR
REMOVAL TO CIRCUIT COURT
AND

DENYING MOTION TO DISMISS
AND/OR TRANSFER VENUE

2010 APR 15 PM 5:08

FILED

THIS MATTER IS BEFORE THE COURT upon the filing of a Summons and Petition for Declaratory Judgment and Motion for Removal of that Petition to Circuit Court, by Howard Alston Duncan and William Thomas Duncan. In their Petition, Howard Alston Duncan and William Thomas Duncan (hereinafter "Petitioners") allege purported causes of action for undue influence, intentional interference with inheritance, and civil conspiracy against Rose Ann Voyles and Mary Liverman (hereinafter "Respondents"), pertaining to the titling, or re-titling, of certain financial accounts held in the name of the decedent. Along with their Petition, the Petitioners simultaneously filed a Motion to remove the action to Circuit Court, pursuant to S.C. Code Ann. § 62-1-302, 1976, as amended. Proof of service of this Petition on Respondent Mary Liverman was filed with the Court on February 10, 2010, and proof of service on Respondent Rose Ann Voyles was filed with the Court on March 15, 2010.

Subsequent to the filing of the above Petition and Motion, a Motion to Dismiss And/Or Transfer Venue was filed by Respondents. In their Motion, Respondents seek to dismiss the



1 of 3
JLB

above action on several grounds, including lack of jurisdiction, res judicata, collateral estoppel, waiver, laches, and failure to state allege facts sufficient to support a cause of action. Respondents also seek to transfer venue of this action to Kershaw County, should it be removed, because Respondent Rose Ann Voyles is a resident of Kershaw County.

S.C. Code Ann. § 62-1-302(d) provides, in pertinent part:

Notwithstanding the exclusive jurisdiction of the probate court over the forgoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, *must* be removed to the circuit court . . .

(3) actions to try title

(5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value

S.C. Code Ann. § 62-1-302(d)(3), (5) (2009) (emphasis added).

After an examination of the contents of the Petition and a consideration of the literal interpretation of the above statute, the Court concludes that it is appropriate to remove this action to the Circuit Court. Here, Petitioners have commenced an action, for the first time in the Probate Court, related to the titling of bank accounts which could entitle Petitioners to a jury trial and which involves an amount in controversy over five thousand dollars. Although Respondents may have legal justifications for dismissal of this action and/or transfer of venue, those will have to be considered by the Circuit Court because removal of this matter at this stage in the litigation is required by statute.

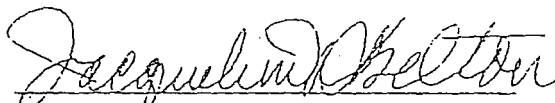
THEREFORE, IT IS HEREBY ORDERED:

A. That the Motion for Removal of the Summons and Petition for Declaratory Judgment filed January 5, 2010, by Howard Alston Duncan and William Thomas Duncan, shall be granted.

2 of 3
JLB

B. That the Motion to Dismiss And/Or Transfer Venue, filed February 16, 2010, by
Rose Ann Voyles and Mary Liverman, shall be denied.

IT IS SO ORDERED.


Jacqueline B. Belton, Associate Judge
Richland County Probate Court

April 15, 2010
Columbia, South Carolina

3 of 3
jlb

Tmk R 035

Richland County Fifth Judicial Circuit - Roster Details
MOTION ROSTER JUNE 29, 2010 COURTROOM 2-E

Court/Agency	Richland County Common Pleas	Judge	McIntoch	RosterID	94
Roster type	Motions Non Jury Roster	RosterBeginDate	06/29/2010	RosterEndDate	06/29/2010

Number of motions = 10

Scheduled	#	Time	hr:mn	Description	Filing Party	Filed Date	Case	Case Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
06/29/2010	1	9:30 AM	0:30	Plaintiff's Motion to Sever Third Party Claims, to strike fr	Branch Banking And Trust Co-PLT	03/31/2010	2009CP4007366 Branch Banking And Trust Co vs Lee Jacobs Dailey	Foreclosure 420	John Judson Hearn (803) 771-7900	Tucker S Player (803) 772-8008	
06/29/2010	2	9:30 AM	0:15	Defendant Edens & Avant, Inc's Motion for Summary Judgment	Edens & Avant, Inc-DEF	03/17/2010	2009CP4009093 Victoria Logan vs Edens & Avant, Inc defendant et al	Premises Liab 930	Shane Morris Burroughs (803) 268-9800 Harper W. Louthian Jr (803) 256-4274	Wesley D. Fewell (803) 254-4190 John D. Hudson Jr (803) 254-4190 Douglas Edward Leadbetter (803) 212-1010	
06/29/2010	3	9:30 AM	0:15	Motion to Compel Discovery	Mike Jones Cars Of Columbia LLC-DEF	02/10/2010	2009CP4006731 Tiffany Vann vs Mike Jones Cars Of Columbia LLC, defendant, et al	Unfair Trade Pra 640	Byron Elvester Gipson (803) 536-9610	Neil S Haldrup (843) 329-9500	
06/29/2010	4	9:30 AM	0:15	Motion for Default Judgment	State of South Carolina-PLT	02/11/2010	2009CP4000187 State of South Carolina vs Kebion S. Williams	Special Comp/Oth 699	David A. Spencer (803) 734-8970		
06/29/2010	5	9:30 AM	0:15	Motion for Judgment on the Pleadings	American Express Centurion Bank-PLT	02/12/2010	2009CP4006954 American Express Centurion Bank vs Ben Pendergrass	Debt Collections 110	Jerry T Myers (919) 250-2133	Ben Pendergrass	
06/29/2010	6	1:00 AM	0:15	Motion for Extension of Time to File Expert Affidavit	Bobby Fox Jr-PLT	02/12/2010	2009CP4009123 Bobby Fox Jr, plaintiff et al vs Palmento Realty Alliance, defendant et al	Notice/Med Mal/230	Lara Pettiss Harrell (864) 582-5472		
06/29/2010	7	11:00 AM	0:30	Motion to Dismiss on behalf of Defendants Richland County Sh	Richland County Sheriffs Department -DEF	02/12/2010	2009CP4005132 Evalena Catoe, plaintiff, et al vs Columbia Police Department, defendant, et al	Wrongful Death 360	Mitchell A. Norrell (803) 289-1800	Robert G. Cooper (803) 737-4242 William H Davidson II (803) 806-8222 Robert David Garfield (803) 806-8222	
06/29/2010	8	11:00 AM	0:15	Motion/Damages	Tionoco LLC-PLT	02/22/2010	2009CP4008962 Tionoco LLC vs Kenneth C Alexander, defendant et al	Breach of Cont 140	Gerald D Jowers (803) 765-9620		
06/29/2010	9	11:00 AM	0:15	Motion/Damages	Comfort Group LLC-PLT	02/22/2010	2009CP4008941 Comfort Group LLC vs Kenneth C Alexander, defendant, et al	Breach of Cont 140	Gerald D Jowers (803) 765-9620		
06/29/2010	10	11:00 AM	0:15	Motion to Dismiss and/or Change Venue Pursuant to SCRCP 12	Rose Ann Voyles-DEF	02/16/2010	2010CP4000044 Howard Alison Duncan Jr, plaintiff et al vs Rose Ann Voyles, defendant et al	Special Comp/Oth 699	Thomas M Kennaday (803) 227-4290	Brian Dumas (803) 788-4370	



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Howard Alston Duncan, Jr. and Thomas
Duncan,
☒ Plaintiffs

v.

Rose Ann Voyles and Mary Liverman,
☐ Defendants

CASE NO.: 2010-CP-40-00044

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiffs' Attorney:

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Post Office Box 1473
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Phone: (803) 254-2200 Fax: (803) 799-3957
E-mail: TKennaday@TurnerPadgett.com

Defendants' Attorney:

Brian Dumas (S.C. Bar No. 001786)
Peake Fowler & Associates, PA
9357 Two Notch Road, Ste. 103
Columbia, SC 29223
Phone: (803) 788-4370 Fax: (803) 788-3290
Email: bdumas@peakefowler.com

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration

Estimated Time Needed: 15 min.

Court Reporter Needed: YES ☒ / NO ☐

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed: _____

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Howard Alston Duncan, Jr., and)
Thomas Duncan,)

Civil Action No.: 2010-CP-40-00044
and

Plaintiffs,)

Civil Action No.: 2010-CP-40-02812

v.)

Rose Ann Voyles and Mary Liverman,)

Defendants.)

JEANETTE W. McBRIDE
C.C.P. & G.S.

2010 JUN 23 PM 1:52

FILED

IN THE MATTER OF :)
THE DECEDENT, Mary Rose Duncan)

MOTION TO CONSOLIDATE

Howard Alston Duncan, William)
Thomas Duncan,)

Petitioners,)

v.)

Rose Ann Voyles, Individually and as)
Personal Representative, and Mary)
Liverman,)

Respondents.)

Plaintiffs/ Petitioners Howard Alston Duncan, Jr. and William Thomas Duncan move to consolidate the above captioned actions pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure. Rule 42(a) permits the consolidation of actions that involve "common questions of law or fact." There is no question the above captioned actions involve common questions of law and fact. Civil Action No. 2010-CP-40-00044 was initially filed in Circuit Court. It seeks damages based on an alleged civil conspiracy and tortious interference with an inheritance. Civil Action No. 2010-CP-40-02812 was initially filed in the Probate Court and

removed to the Circuit Court. It seeks a declaratory judgment to retitle bank accounts based on the same alleged misconduct by the Defendants/Respondents that was alleged in Civil Action No. 2010-CP-40-00044. Consolidation of these may tend to avoid unnecessary costs or delays as discovery, motions practice and questions for trial are likely to be similar or identical in the two actions. Plaintiffs/Petitioners would have brought the declaratory judgment action and the claims for damages in the same civil action initially but for the Probate Court having exclusive original jurisdiction over the declaratory judgment action.

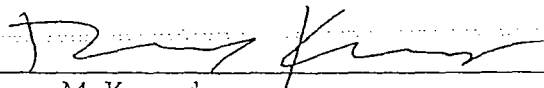
Plaintiffs/Petitioners' counsel has consulted with Defendants/Respondents' counsel in an effort to reach an agreement on this motion but was unable to reach an agreement.

Based on the foregoing and the Complaint and Petition filed in the above captioned actions, Plaintiffs/Petitioners respectfully request that the Court consolidate the above captioned actions.

TURNER, PADGET, GRAHAM & LANEY, P.A.

June 23, 2010

By:



Thomas M. Kennaday
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957
tkennaday@turnerpadget.com

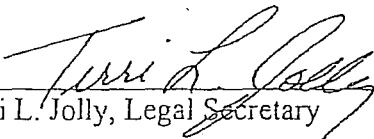
ATTORNEYS FOR PLAINTIFFS HOWARD
A. DUNCAN, JR., AND WILLIAM T.
DUNCAN

CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of June 2010 a copy of the foregoing **Motion to Consolidate** has been served upon other counsel of record, by hand delivery, to the following:

Brian Dumas, Esquire
Peake Fowler & Associates, PA
9357 Two Notch Road, Ste. 103
Columbia, SC 29223

**ATTORNEYS FOR
DEFENDANTS/RESPONDENTS**



Terri L. Jolly, Legal Secretary

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT

COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

IN THE MATTER OF THE DECEDENT) Civil Action No. 2007-ES-40-00686

Mary Rose Duncan)

Howard Alston Duncan Jr., and Thomas
Duncan,

Petitioners/Plaintiffs,

vs.

Rose Ann Voyles, individually and as
Personal Representative, and Mary
Liverman,

Respondents/Defendants.

RETURN TO MOTION FOR
REMOVAL AND NOTICE OF AND
MOTION TO DISMISS AND/OR
VENUE CHANGE PURSUANT TO
SCRCP 12

TO: THOMAS M. KENNADAY, ESQUIRE, ATTORNEY FOR
PETITIONERS/PLAINTIFFS:

Reserving all rights to subsequently move, answer, plead, or otherwise respond and in response to the Motion for Removal as filed by Plaintiffs, and in response to the allegations of the Petition concerned therein, Defendants would oppose the same and respond thereto on the following grounds:

.1. That the issues as raised by the Declaratory Judgment action filed by the Plaintiffs have been in this Court the initial filing of the Inventory in this case, and have been the subject this Court's consideration and rulings. Plaintiffs allege removal as a matter of right pursuant to SC Code Ann. §62-1-302(d), however, that statute requires that the matter being removed be a matter to which the party is entitled to a jury trial pursuant to the Uniform Declaratory Judgments Act, SC Code Ann § 15-53-90. However, that Act provides that any Court of record

may hear the Petition for Declaratory Judgment, and defendant maintain that this is the proper court for the same since all of the Plaintiff's claims revolve around testamentary intent.

2. Defendants would further allege that more than ten (10) days have elapsed since all responsive pleadings were required by virtue of the repeated litigation of this issue in this Court by Plaintiffs, thereby mandating a denial of the Motion for Removal.

In the alternative, and in further response to the allegations of the Petition for Declaratory Judgment in this Court, the Defendants would submit that they are entitled to relief as follows below.

1. For dismissal of the Motion for Removal pursuant to SCRCP 12(b)(1) due to lack of jurisdiction due to Plaintiffs' repeated choice of forum of the Probate Court for Richland County for the litigation of these same issues in excess of the statutory deadline. Therefore the only jurisdiction the Circuit Court may have would be appellate upon the issuance of a Final Order of the Probate Court of Richland County.

2. For dismissal of the Motion for Removal pursuant to SCRCP 12(b)(8) as the issues as raised by the Plaintiffs in this new action in this Court and in the Circuit Court have been repeatedly raised and litigated in the Probate Court for Richland County in Case number 2007-ES-40-00686.

3. For dismissal of the Complaint for Declaratory Judgment in its entirety against all Defendants based upon the rules of prior adjudication in that the issue(s) raised herein are the same issues as raised in this Court on prior occasions. Defendants would allege that, based upon the principles of *res judicata* and/or collateral estoppel, the instant action should be dismissed in whole or in part as to Defendants pursuant to SCRCP 12(b)(1), (6), and/or (8).

4. For dismissal of the Complaint in its entirety against the Defendants on the grounds of waiver, in that the Plaintiffs have already repeatedly submitted these identical issues to this Court, therefore waiving any right they may have had to have this/these issue/issues determined again by this Court.

5. For dismissal of the Complaint in its entirety against the Defendants on the grounds of laches in that the Plaintiffs, knowing their rights to potentially bring this action seasonably in or to this Court, and unreasonably delayed doing so, thereby causing the Defendants to incur expenses and/or enter into obligations, and/or otherwise detrimentally change their positions in the handling of and litigation in the Probate Court for Richland County. Therefore any and all claims under this new action against the Defendants should be dismissed pursuant to SCRCPP 12(b)(1), (6), and/or (8).

6. For dismissal of the Causes of Action for failure to allege sufficient facts as opposed to the statement of conclusory allegations in the following manner:

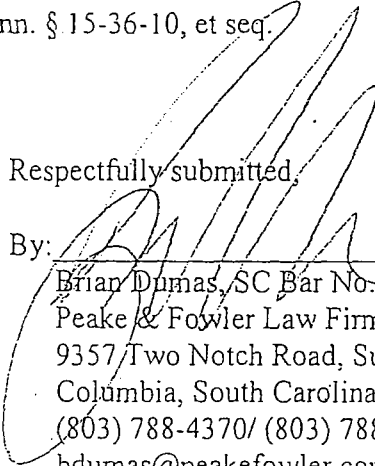
A. As to the alleged cause of action for Civil Conspiracy, the pleading does not state sufficient facts to meet the requirement that there must be allegations of fact that the actions of the Defendants were designed to willfully injure the Defendants, nor does the pleading allege that the decedent was unable to withstand the alleged influence of or was deceived by the actions of the Defendants or that the decedent was unaware of the consequences of her actions in modifying the accounts in question. Finally, Plaintiffs do not allege, nor can they establish any duty to themselves owed by the Defendants. Therefore Defendants are entitled to dismissal under SCRCPP 12(b)(1), and/or (6). In the alternative, the Defendants, would move pursuant to SCRCPP 12(e) for a more definite statement as to any acts for which they may be held individually liable.

B. As to the second alleged cause of action, in that South Carolina has not adopted the tort of Tortious Interference with an Inheritance and the allegations of the alleged cause of action, even if recognized, do not state sufficient facts to meet any requirements for an actionable wrong. Therefore Defendants are entitled to dismissal under SCRCP 12(b)(1), and/or (6). In the alternative, the Defendants, would move pursuant to SCRCP 12(e) for a more definite statement as to any acts for which they may be held individually liable.

7. The Defendant Rose A. Voyles is a citizen and resident of Kershaw County, and based on S.C. Code Ann. §15-7-30 (B) and/or (C), therefore this matter must be heard on removal, if it is to be heard or removed, in the Court of Common Pleas for Kershaw County. Therefore, the Defendants request dismissal of this action, or if removed, the transfer of the same to the Court of Common Pleas for Kershaw County under SCRCP 12(b)(3).

This Motion will be based upon the appropriate South Carolina Rules of Civil Procedure, South Carolina statutory and case law, and such other and further matters as may be appropriately placed before the Court. Defendants also seek the attorneys fees, costs and expenses necessitated by the actions of Plaintiffs under all appropriate statutes, rules, and case law, including but not limited to SC Code Ann. § 15-36-10, et seq.

Respectfully submitted,

By: 

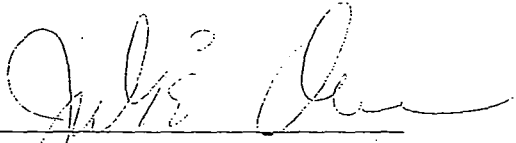
Brian Dumas, SC Bar No. 1786
Peake & Fowler Law Firm, P.A.
9357 Two Notch Road, Suite 103
Columbia, South Carolina 29223
(803) 788-4370/ (803) 788-3872 facsimile
bdumas@peakefowler.com
Attorneys for Defendants

Columbia, South Carolina
February 11, 2010

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
IN THE MATTER OF THE DECEDENT	)	Civil Action No. 2007-ES-40-00686
Mary Rose Duncan	)	
	)	
Howard Alston Duncan Jr., and Thomas	)	CERTIFICATE OF SERVICE
Duncan,	)	
	)	
Petitioners/Plaintiffs,	)	
	)	
vs.	)	
	)	
Rose Ann Voyles, individually and as	)	
Personal Representative, and Mary	)	
Liverman,	)	
	)	
Respondents/Defendants.	)	
	)	

I, Julie Owens, an employee of Peake, Fowler & Associates, P.A., do hereby verify that I served a copy of Return to Motion for Removal and Notice of and Motion to Dismiss and Venue Change Pursuant to SCRCP 12 upon the undersigned by causing a copy of the same to be deposited United States Mail, Postage Prepaid, this 11 day of February, 2010, addressed as follows:

Thomas M. Kennaday, Esquire
 Turner Padget Graham & Laney, P.A.
 1901 Main Street, 17th Floor
 P.O. Box 1473
 Columbia, SC 29202


 Julie Owens
 Paralegal to Brian Dumas

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Howard Alston Duncan Jr., and Thomas Duncan,	)	Civil Action No. 2010-CP-40-0044
	)	
	)	
Plaintiffs,	)	NOTICE OF AND MOTION TO
	)	DISMISS AND/OR CHANGE VENUE
vs.	)	PURSUANT TO SCRCP 12
	)	
Rose Ann Voyles and Mary Liverman,	)	
	)	
Defendants.	)	
	)	

TO: THOMAS M. KENNADAY, ESQUIRE, ATTORNEY FOR PLAINTIFFS:

PLEASE TAKE NOTICE that 10 days after the filing of this Motion, or as soon thereafter as counsel may be heard, the Defendants will move before this Court pursuant to SCRCP 12, or, in the alternative, SCRCP 56 in addition to such other rules and statutes as appropriate, for an Order dismissing the Plaintiffs' Complaint in whole or in part against all or some of the Defendants as follows:

1. For dismissal pursuant to SCRCP 12(b)(1) due to lack of jurisdiction due to Plaintiffs' repeated choice of forum of the Probate Court for Richland County for the litigation of these same issues. Therefore the only jurisdiction this Court may have would be appellate jurisdiction upon the issuance of a Final Order of the Probate Court of Richland County. This court also has no removal jurisdiction under S.C. Code Ann. § 62-1-302(d).

2. For dismissal pursuant to SCRCP 12(b)(8) as the issues as raised by the Plaintiffs in this new action in this Court have been repeatedly raised and litigated in the Probate Court for Richland County in Case number 2007-ES-40-00686 and the repeated litigation by the Plaintiffs of this matter have kept the Estate litigation ongoing in the Probate Court. Clearly, these issues

are already currently pending in another Court or record, therefore this matter should be dismissed.

3. For dismissal of the Complaint in its entirety against all Defendants based upon the rules of prior adjudication in that the issue(s) raised herein are the same issues as raised in another Court, and the parties are virtually identical to that of the other Court, that being the Probate Court for Richland County. Defendants would allege that, based upon the principles of *res judicata* and/or collateral estoppel, the instant action should be dismissed in whole or in part as to Defendants pursuant to SCRCP 12(b)(1), (6), and/or (8).

4. For dismissal of the Complaint in its entirety against the Defendants on the grounds of waiver, in that the Plaintiffs have already repeatedly submitted these identical issues to the Probate Court for Richland County, therefore waiving any right they may have had to have this/these issue/issues determined by this Court.

5. For dismissal of the Complaint in its entirety against the Defendants on the grounds of laches in that the Plaintiffs, knowing their rights to potentially bring this action seasonably in or to this Court, and unreasonably delayed doing so, thereby causing the Defendants to incur expenses and/or enter into obligations, and/or otherwise detrimentally change their positions in the handling of and litigation in the Probate Court for Richland County. Therefore any and all claims against the Defendants should be dismissed pursuant to SCRCP 12(b)(1), (6), and/or (8).

6. For dismissal of the Causes of Action for failure to allege sufficient facts as opposed to the statement of conclusory allegations in the following manner:

A. As to the first cause of action, in that the allegations of the alleged cause of action for Civil Conspiracy do not state sufficient fact to meet the requirement that the actions of the

Defendants were designed to willfully injure the Defendants, nor do they allege that the decedent was unable to withstand the alleged influence of or was deceived by the actions of the Defendants or that the decedent was unaware of the consequences of her actions in modifying the accounts in question. Finally, Plaintiffs do not allege, nor can they establish any duty to themselves owed by the Defendants. Therefore Defendants are entitled to dismissal under SCRPC 12(b)(1), and/or (6). In the alternative, the Defendants, would move pursuant to SCRPC 12(e) for a more definite statement as to any acts for which they may be held individually liable.

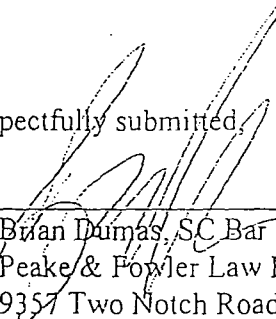
B. As to the second cause of action, in that South Carolina has not adopted the tort of Tortious Interference with an Inheritance and the allegations of the alleged cause of action, even if recognized, do not state sufficient facts to meet any requirements for an actionable wrong. Therefore Defendants are entitled to dismissal under SCRPC 12(b)(1), and/or (6). In the alternative, the Defendants, would move pursuant to SCRPC 12(e) for a more definite statement as to any acts for which they may be held individually liable.

7. The Defendant Rose A. Voyles is a citizen and resident of Kershaw County, and based on S.C. Code Ann. §15-7-30 (B) and/or (C), therefore this matter must be heard if it is to be heard, in the Court of Common Pleas for Kershaw County. Therefore, the Defendants requests dismissal of this action, or the transfer of the same to the Court of Common Pleas for Kershaw County under SCRPC 12(b)(3).

This Motion will be based upon the appropriate South Carolina Rules of Civil Procedure, South Carolina statutory and case law, and such other and further matters as may be appropriately placed before the Court at a hearing to be set on the issues as raised herein. Defendants also seek the attorneys fees, costs and expenses necessitated by the actions of

Plaintiffs under all appropriate statutes, rules, and case law, including but not limited to SC Code
Ann. § 15-36-10, et seq.

Respectfully submitted,

By: 

Brian Dumas, SC Bar No. 1786
Peake & Fowler Law Firm, P.A.
9357 Two Notch Road, Suite 103
Columbia, South Carolina 29223
(803) 788-4370/ (803) 788-3872 facsimile
bdumas@peakefowler.com
Attorneys for Defendants

Columbia, South Carolina
February 11, 2010

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

)

COUNTY OF RICHLAND

) FIFTH JUDICIAL CIRCUIT

Howard Alston Duncan Jr., and Thomas
Duncan,

) Civil Action No. 2010-CP-40-0044

)

) Plaintiffs,

)

) vs.

)

) Rose Ann Voyles and Mary Liverman,

)

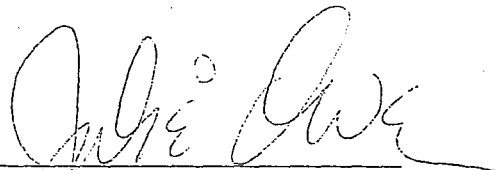
) Defendants.

)

CERTIFICATE OF SERVICE

I, Julie Owens, an employee of Peake, Fowler & Associates, P.A., do hereby verify that I served a copy of Notice of and Motion to Dismiss Pursuant to SCRCP 12 upon the undersigned by causing a copy of the same to be deposited United States Mail, Postage Prepaid, this 11 day of February, 2010, addressed as follows:

Thomas M. Kennaday, Esquire
Turner Padgett Graham & Laney, P.A.
1901 Main Street, 17th Floor
P.O. Box 1473
Columbia, SC 29202



Julie Owens/
Paralegal to Brian Dumas

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Howard Alston Duncan, Jr., and Thomas Duncan

☐ Plaintiff

v.

Rose Ann Voyles And Mary Liverman

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-40-0044

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Thomas M. Kennaday, Bar No. Address: Turner Padgett Graham & Laney, P.O. Box 1473, Columbia, SC 29202 phone: (803) 254-2200 fax: (803) 799-3957 e-mail: other:		Defendant's Attorney: Brian Dumas, Bar No. 1786 Address: Peake & Fowler Law Firm, PA, 9357 Two Notch Rd, Columbia, SC 29223 phone: (803) 788-4370 fax: (803) 788-3872 e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Dismiss Pursuant to SCRPC 12 Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant		Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE	
		CODE: Date:	
CLERK'S VERIFICATION			
Collected by:		Date Filed:	
☐ MOTION FEE COLLECTED: ☐ CONTESTED - AMOUNT DUE:			

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE PROBATE COURT

Estate No. 2007-ES-40-00686

IN THE MATTER OF :)
THE DECEDENT, Mary Rose Duncan)

**PETITION FOR DECLARATORY
JUDGMENT**

Howard Alston Duncan, William)
Thomas Duncan,)

Petitioners,)

v.)

ROSE ANN VOYLES, Individually and)
as PERSONAL REPRESENTATIVE,)
and Mary Liverman,)

Respondents.)

Howard Alston Duncan, Jr. ("Alston") and William Thomas Duncan ("Tom"), through their attorneys, hereby petition the Probate Court for a Declaratory Judgment and such further necessary and proper relief and in support thereof allege as follows:

1. Rose Voyles is the Personal Representative of the Estate of The Decedent, Estate No. 2007-ES-40-00686, having been appointed by an Order of the Richland County Probate Court dated May 29, 2007.

2. Alston, Tom, Rose Ann Voyles, ("Voyles") and Mary Liverman ("Liverman") are the children of Mary Rose Duncan (the "Decedent") and are the sole beneficiaries under the Decedent's Will.

3. The Probate Court has jurisdiction over the subject matter of this action pursuant to S.C. Code Ann. § 62-1-302(a)(1) (2009), which gives the Probate Court exclusive original jurisdiction over all subject matter related to estates of decedents.

4. In 1997, the Decedent executed a Will that devised her assets to her four children equally.

5. At the same time she executed the Will, the Decedent executed a Power of Attorney that named Voyles as her attorney-in-fact. Voyles remained the attorney-in-fact for the Decedent until the Decedent's death on May 2, 2007.

6. At the time the Decedent executed the Will and until April 2004, the Decedent was the sole owner of funds held in a checking account, a savings account, and several certificates of deposit. These accounts were all titled solely in the name of the Decedent and all held by First Citizens Bank of South Carolina.

7. In 2004, Voyles and Liverman became joint account holders with Mary Rose Duncan on the checking account, savings account, and certificates of deposit (collectively, the "Accounts"). Voyles and Liverman were both added to the checking and savings accounts. As to the certificates of deposit, Voyles was added to some of the certificates, while Liverman was added to the other certificates of deposit.

8. The Decedent placed her trust and confidence in Voyles and Liverman and was dominated by and dependant upon Voyles and Liverman.

9. Voyles and Liverman knew that the addition of their names to the Accounts would result their receiving the funds in the Accounts on the Decedent's death and that the funds would not pass under the Decedent's Will

10. It was the Decedent's desire that the funds in the Accounts would be divided equally between her four children upon her death.

11. The addition of Voyles and Liverman to the Decedent's Accounts was the result of the intentional and concerted efforts of Voyles and Liverman to manipulate, encourage, and/or

deceive the Decedent, and to deprive Tom and Alston of their rightful shares of the Decedent's assets to the benefit of Voyles and Liverman.

12. The additions of Voyles and Liverman to the Accounts was invalid because they resulted from the undue influence, intentional interference with an inheritance, and/or civil conspiracy of Voyles and Liverman, and but for such conduct, the Accounts would have been solely owned by the Decedent and would have passed pursuant to the Decedent's Will.

13. Within days of the death of the Decedent and *before the opening of the Estate of Mary Rose Duncan*, Voyles and Liverman closed the majority of the Accounts and distributed the monies from a majority of the Accounts amongst themselves.

14. The funds in the Accounts should rightfully be assets of the Estate to be administered and distributed accounting to the Will of the Decedent.

WHEREFORE, the Petitioners Tom Duncan and Alston Duncan pray for an order declaring the following:

- A. That the re-titling of the Accounts in joint names with Voyles and Liverman was invalid;
- B. That the monies contained in Accounts on the date of death of Mary Rose Duncan were the sole assets of the Mary Rose Duncan;
- C. That the monies contained in the Accounts and the successor accounts at the time of the death of Mary Rose Duncan, plus interest *at the judgment rate*, are assets of the Estate;
- D. That Rose Voyles and Mary Liverman are to return the monies in the Accounts and successor accounts at the time of the Decedent's death, or an equivalent sum, plus interest to be part of the Estate of Mary Rose Duncan; and

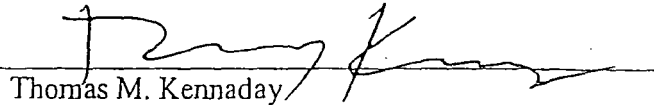
E. That the monies returned are to be administered and distributed pursuant to the terms of the Last Will and Testament of Mary Rose Duncan.

The Petitioners pray for such further relief as may be necessary and proper under the circumstances.

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 5, 2010

By:



Thomas M. Kennaday
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957
tkennaday@turnerpadget.com

**ATTORNEYS FOR HOWARD A. DUNCAN,
JR., AND WILLIAM T. DUNCAN**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Howard Alston Duncan, Jr., and
Thomas Duncan,

Plaintiffs,

v.

Rose Ann Voyles and
Mary Liverman,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.:

COMPLAINT
(Jury Trial Demanded)

JEANETTE W. HERRIDGE
Clerk of Court
C.P.C. & C.S.

2010 JAN -5 PM 3:04

Plaintiffs Howard Alston Duncan, Jr. and William Thomas Duncan bring this action for actual and punitive damages against Defendants Rose Ann Voyles and Mary Liverman and allege as follows:

PARTIES AND JURISDICTION

1. Howard Alston Duncan, Jr. ("Alston") is a citizen and resident of the State of Louisiana and is a son of Mary Rose Duncan.

2. William Thomas Duncan ("Tom") is a citizen and resident of the State of Georgia and is a son of Mary Rose Duncan.

3. Rose Ann Voyles ("Voyles") is a resident of Kershaw County, South Carolina, and is a daughter of Mary Rose Duncan.

4. Mary Liverman ("Liverman") is a resident of North Carolina, and is a daughter of Mary Rose Duncan.

5. The Circuit Court has personal jurisdiction over Voyles as a citizen and resident of South Carolina.

6. The Circuit Court has personal jurisdiction over Liverman because this action relates to business Liverman transacted in South Carolina, contracts Liverman entered into in South Carolina, and tortious conduct Liverman committed in South Carolina.

FACTS

7. In 1997, Mary Rose Duncan, a domiciliary of Richland County, South Carolina, executed a Will that devised her assets to her four children equally.

8. At the same time she executed the Will, Mary Rose Duncan executed a Power of Attorney that named Voyles as her attorney-in-fact.

9. Voyles remained the attorney-in-fact for Mary Rose Duncan until Mary Rose Duncan's death on May 2, 2007.

10. At the time Mary Rose Duncan executed the Will and until April 2004, Mary Rose Duncan was the sole owner of funds held in a checking account, a savings account, and several certificates of deposit. These accounts were all titled solely in the name of Mary Rose Duncan and were all established at First Citizens Bank of South Carolina.

11. The 1997 Will of Mary Rose Duncan gave the Plaintiffs and Defendants each one-fourth of the assets of Mary Rose Duncan.

12. In 2004, Voyles and Liverman became joint account holders with Mary Rose Duncan on the checking account, savings account, and certificates of deposit (collectively, the "Accounts"). Voyles and Liverman were both added to the checking and savings accounts. As to the certificates of deposit, Voyles was added to some of the certificates, while Liverman was added to the other certificates of deposit.

13. The addition of Voyles and Liverman to the Accounts took place in Richland County, South Carolina.

14. Mary Rose Duncan did not drive and was dependant upon others for her transportation.

15. Mary Rose Duncan placed her trust and confidence in Voyles and Liverman and was dominated by and dependant upon Voyles and Liverman.

16. Voyles and Liverman knew that the addition of their names to the Accounts would result their receiving the funds in the Accounts on Mary Rose Duncan's death and that the funds would not pass under Mary Rose Duncan's Will.

17. Upon the death of Mary Rose Duncan, Voyles and Liverman received the funds in the Accounts as the joint account holders.

18. Within days of the death of Decedent, Voyles and Liverman closed the majority of the Accounts and re-distributed these funds between themselves.

19. Voyles and Liverman combined their efforts to intentionally manipulate, encourage, and/or deceive Decedent into adding their names to the Accounts thus converting the Accounts into joint accounts with rights of survivorship in Voyles and Liverman.

20. Voyles and Liverman intentionally and maliciously acted to deprive Plaintiffs of their share of the funds in the Accounts which Plaintiffs would have received under the Will of Mary Rose Duncan.

21. It was Mary Rose Duncan's desire that the funds in the Accounts be divided equally between her four children upon her death.

**FOR A FIRST CAUSE OF ACTION
(Civil Conspiracy)**

22. Defendants combined with the intent and purpose to injure Plaintiffs by depriving them of their inheritance in the assets of their mother, Mary Rose Duncan, held in First Citizens Bank.

23. Defendants acted in concert to deprive Plaintiffs of their inheritance in the financial assets of Decedent by manipulating, encouraging, and/or deceiving Decedent to add Defendants as joint account holders with rights of survivorship to the Accounts of Decedent.

24. The concerted actions of Defendants have damaged Plaintiffs by depriving them of their one-quarter share each of over \$200,000 of Mary Rose Duncan's assets.

25. Tom and Alston Duncan are entitled to actual and punitive damages from Defendants.

**FOR A SECOND CAUSE OF ACTION
(Tortious Interference with an Inheritance)**

26. Plaintiffs each had an expectancy in the funds held in the Accounts.

27. Defendants intentionally interfered with the expectancy of Plaintiffs through tortious conduct of civil conspiracy, the exercise of undue influence, and the breach of fiduciary duties owed to Decedent.

28. But for the tortious conduct of Defendants, Plaintiffs would have realized their inheritance in the funds held in the Accounts.

29. The tortious conduct of Defendants has damaged Plaintiffs by depriving them of their one-quarter share each in over \$200,000.

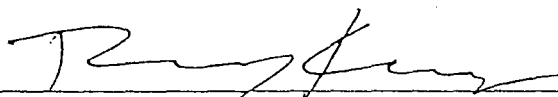
30. Plaintiffs are entitled to actual and punitive damages from Defendants.

WHEREFORE Plaintiffs request a jury trial and pray for an award of actual and punitive damages from Defendants Mary Liverman and Rose Voyles and such other relief as justice requires.

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 5, 2010

By:



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**ATTORNEYS FOR PLAINTIFFS HOWARD
A. DUNCAN, JR., AND WILLIAM T.
DUNCAN**

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2010-CP-40-0044
) 2010-CP-40-2812
)
)
)
Howard Alston Duncan, Jr. and))
Thomas Duncan)
vs.) TRANSCRIPT OF RECORD
)
Rose Ann Voyles and Mary Liverman))
DEFENDANTS) June 29, 2010
Columbia, South Carolina

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE.

A P P E A R A N C E S:

THOMAS M. KENNADAY, ESQ.
Attorney for the Plaintiffs

BRIAN DUMAS, ESQ.
Attorney for the Defendants

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, there were no witnesses called.)

1 THE COURT: This is a motion to dismiss and or
2 change venue; is that correct?

3 MR. DUMAS: Yes, Your Honor.

4 THE COURT: This your motion?

5 MR. DUMAS: It's my motion.

6 THE COURT: Okay, go right ahead.

7 MR.. DUMAS: Thank you, Your Honor. I'm going to
8 give just a brief summary to kind of tell you where we
9 are.

10 THE COURT: Please.

11 MR. DUMAS: Briefly put, this matter involves
12 the death of a lady by the name of Duncan, she had four
13 children. She died in '07. Basically, all four children
14 have been at odds ever since then, okay. This has been a
15 fight going on in probate court and other courts. What
16 has happened at this point is -- and opposing counsel will
17 correct me at any point just so you got a picture. At a
18 point prior to the death, there were some single accounts
19 that Mary Duncan owned, that were made joint accounts with
20 her daughters.

21 THE COURT: Survivorship accounts?

22 MR. DUMAS: Survivorship accounts. At the time
23 of Mary Duncan's death in '07, I believe it was May 2nd of
24 '07. And I got an exhibit which charts this out, which
25 the defendants -- which actually the other side prepared

1 for one of the other hearings, which I believe is pretty
2 accurate. The accounts were all solo as of '02 and '03.
3 As of '02 and '03, they were made joint some with one
4 daughter and some with another daughter. A few years
5 prior to that, Ms. Duncan had executed a will in '97
6 leaving all of her assets when she died equally to her
7 four children. After the will is executed, we got these
8 joint accounts -- I mean, the solo accounts. The solo
9 accounts were made joint in '02 and '03. She dies in '07,
10 okay. Big shocker, when the estate is being probated,
11 they are listed as non-probate assets properly recorded on
12 the inventory and appraisement.

13 THE COURT: Any question about people raiding
14 the accounts prior to death?

15 MR. DUMAS: No, that's not the question.

16 THE COURT: Okay.

17 MR. DUMAS: So what then happens is the estate
18 is rolling through, but ultimately even though some of the
19 property is distributed as it is per the will and per the
20 ownership rights, the issue is raised by the two brothers
21 as to why don't we get our share of this money that was at
22 one time solo and then was made joint. Those claims were
23 at first raised in the probate court and now come to us by
24 way of the actions which we currently have.

25 THE COURT: What did the probate court decide?

1 MR. DUMAS: Probate court side stepped the
2 issue, Your Honor, here's what happened. Two actions were
3 filed and that's what's before the Court now. In the
4 probate court, the Duncan brothers filed an action for a
5 declaratory judgment saying that the sisters wrongfully
6 assisted the mother basically -- and they used other
7 wording in making the accounts joint and they wanted
8 declaratory judgment that the estate should recapture
9 those assets and distribute them under the will. In the
10 probate court, the Duncan brother's also filed an action
11 for a removal under the statute in the circuit court. I
12 filed a mirror image of this motion that's now before you
13 with the probate court.

14 The probate court issued an order and I have a
15 copy for the Court which I think is going to be very
16 relevant. And what the Court did in that and I know
17 opposing counsel has a copy of this. And what they
18 basically did was they said we got no choice but to remove
19 as we see the statute on the declaratory judgment action
20 but all other issues as to the motion to dismiss, change
21 of venue all that, that really needs to be heard by the
22 circuit court, but we don't see any choice that we have as
23 probate court but to remove this to circuit court. At the
24 sometime as the probate court action was filed for
25 declaratory judgment action, the Duncan brothers filed

1 this action filed an action in circuit court for tort
2 tortuous interference with inheritance and civil
3 conspiracy to basically accomplish a tortuous with
4 property rights. Again, the very same factual scenario
5 that at some point that there was a will that was executed
6 in 1997, which was to split the property --

7 THE COURT: Let me stop you, I'm sorry. I'm
8 following you so far. Tell me the causes of actions that
9 were asserted by the defendant in the circuit court.

10 MR. DUMAS: In the circuit court --

11 THE COURT: Tortuous interference on your
12 inheritance rights?

13 MR. DUMAS: That was one and the other was civil
14 conspiracy to essentially violate their property rights.
15 It was a repeat and re-allege on that.

16 THE COURT: Okay, go ahead, please.

17 MR. DUMAS: Now, again, I filed as I told the
18 Court because we weren't sure -- both of us were. And I'm
19 going to say opposing counsel and I had very frank and
20 open discussions. We're not trying to play procedural
21 game or bouncing one against the time limit against the
22 other but just to get some resolution here. The issue
23 comes down to if you look and just look at the forest and
24 not any individual trees in this case. South Carolina
25 doesn't and I can go item by item in my motion, Your

1 Honor.

2 THE COURT: Let me first of all, is your motion
3 directed towards the cause of action for tortuous
4 inference on the inheritance rights and conspiracy?

5 MR. DUMAS: Yes, sir.

6 THE COURT: I practiced a certain amount of
7 probate work myself and I've never heard of such a thing.
8 Do you have any cases or any authority that says that
9 there is such a cause of action or a cause of action in
10 South Carolina?

11 MR. KENNADAY: I do, Your Honor.

12 THE COURT: Good, let me see them.

13 MR. KENNADAY: Okay.

14 THE COURT: And I don't mean to cut you off. My
15 first blush I'm saying I don't think that's --

16 MR. DUMAS: And the latest case I have is
17 Douglas vs. Lophian (sic) which basically states on
18 page -- and I've got copies for opposing counsel, which
19 says that there is no such thing as tortuous interference
20 with inheritance rights in this state. And it goes on to
21 page three. It just says there is no such thing in this
22 state, says we have not adopted -- it is bottom right hand
23 corner of page 3.

24 MR. KENNADAY: I'm going to argue that case in a
25 different way.

1 THE COURT: Curt Moorehead and I were in
2 Anderson, South Carolina took the same passage out of the
3 same case and took 180 degree difference. Unfortunately,
4 the judge fail for and not me, but I understand.

5 MR. DUMAS: But that is where all of this is
6 directed against and just -- and again, I know you will
7 allow me to argue it, but I can go through every
8 technicality. But if we're just looking at the forest
9 here, that's what this whole thing comes -- this doesn't
10 exist in this state. We been told that by the Supreme
11 Court repeatedly.

12 THE COURT: Tell me why it does please.

13 MR. KENNADAY: Thank you, Your Honor. Tom
14 Kennaday for the Duncan brothers. If I can give you just
15 a little bit of little bit more background. Mr. Dumas
16 said that the accounts which were CD's were listed on the
17 estate property. My understanding is there were not. The
18 first the brothers heard that they weren't getting this
19 money was in a petition for settlement of the estate and
20 they weren't there and that's when they raise the issue.

21 THE COURT: These are CD's joint with the ---

22 MR. KENNADAY: CD's that had been moved into the
23 accounts with rights of survivorship. They -- I started
24 to represent them sometime after that happened. We tried
25 to take the depositions of their sisters. They didn't

1 show up. We moved to compel the deposition of their
2 sisters and they resisted. And the Court ruled that we
3 couldn't compel their depositions yet because we hadn't
4 actually initiated an action yet. And I got a copy of
5 that order.

6 THE COURT: That's good. Is that pretty much
7 the gist of the order?

8 MR. KENNADAY: Yeah, we had initiated an action
9 for the petition of settlement and our response was not
10 enough to initiate an action to have the accounts
11 retitled which is what we were ultimately going to ask the
12 circuit court to do and subject to our deposition was
13 going to be. So in response to that, we filed
14 simultaneously a declaratory judgment action in the
15 probate court asking to retitle the bank accounts, which
16 we had filed in the probate court because they have
17 exclusive jurisdiction over that kind of an action. At
18 the same time, we filed an action in the circuit court for
19 damages different which the probate court did not have
20 exclusive jurisdiction over. We then filed a motion to
21 remove in the probate court which was granted and we filed
22 and have pending and we're in negotiations about it. I
23 didn't get it and filed within more than ten days before
24 this. But we have pending a motion to consolidate those
25 actions in declaratory judgment action in the action he's

1 trying to dismiss. Okay. Let's take the tortuous
2 interference with inheritance first. That's the Douglas
3 vs. Voice case. If you look at that case, what the Court
4 did is it says we not adopted tortuous interference with
5 an inheritance, but we don't need to decide whether to
6 adopt it in this case.

7 THE COURT: Point me to the language in there?

8 MR. KENNADAY: I got a highlight a copy for Your
9 Honor. We turn to the second page. It's the bottom then
10 carrying over. Because it was the tortuous interference
11 alleged in that case was against opposing counsel for
12 representing its client. I think in a PR who didn't think
13 that this person deserved an inheritance and so the Court
14 said, well, that counsel is immune, so we don't have to
15 decide whether we're going to recognize tortuous
16 interference with inheritance in it. Then if you go on to
17 the last page under the head note number four there, so we
18 have adopted the closely tort intentional interference
19 with perspective contractual relations, most jurisdictions
20 adopted in the tort of intentional interference with
21 inheritance have required -- then it goes on to say what
22 the elements of intentional interference with inheritance
23 are. It's clear indication that this court is going to --
24 wants to look at this. And it's open to the idea of maybe
25 one day we will recognize this tort. And I'm sure, Your

1 Honor, is familiar with the cases that say novel issues
2 should be dismissed on a motion to dismiss. We should
3 develop the facts of the case, so the Court can understand
4 this cause of action in its full context. I think the
5 Court putting in the elements of the cause of actions is a
6 pretty clear indication that they are open to the idea of
7 recognizing it. And so because it's an novel issue, it
8 shouldn't be dismissed at this stage especially in light
9 of their openness to the idea.

10 Now, on the civil conspiracy, civil conspiracy
11 has been recognize many times in South Carolina and see if
12 I can get a good case for you here. Here's one, this is
13 the Robertson case it lays out the elements of civil
14 conspiracy as one a combination of two or more persons,
15 two for the purpose of injuring the plaintiff which causes
16 the plaintiff special damages. Our allegation here is
17 that the sisters combined to influence their mother to put
18 the account in joint accounts to which would exclude their
19 brothers from that money.

20 THE COURT: Say that again please.

21 MR. KENNADAY: The sisters combine to influence
22 their mother -- one of the sisters by the way was ---

23 THE COURT: Why is that not undue influence
24 case?

25 MR. KENNADAY: It is an undue influence case

1 except that I don't believe owe the brothers a duty under
2 -- as a fiduciary, they owe that to the mother. But that
3 tortuous conduct is -- can be the basis of in fact -- it
4 doesn't have to be tortuous conduct, but that same kind of
5 conduct can be the basis of a civil conspiracy claim. In
6 fact a civil conspiracy, the conduct itself doesn't even
7 have to be -- by itself it was done by a single person
8 doesn't even have to be a tortuous conduct.

9 THE COURT: I understand that.

10 MR. KENNADAY: So we've got the sisters one of
11 whom was an attorney in fact influencing the mother to put
12 the accounts in their names which would necessarily
13 exclude the brothers from those accounts.

14 THE COURT: But don't you have to have
15 independent conduct outside of either the tortuous conduct
16 or the legal conduct conducted in an impressive manner or
17 the proper terminology I'm not saying.

18 MR. KENNADAY: We need an overt act further set.

19 THE COURT: I don't separate and a part from ---

20 MR. KENNADAY: I don't believe this needs to be
21 separate and apart just needs to be in furtherance of a
22 conspiracy. And the acts -- there's a couple of overt
23 acts. One is they all went to the bank together and sign
24 the some of the account changes. And the other one is
25 this money was in about six -- a bunch of CD's over time.

1 And it ended up ---

2 THE COURT: Over what period of time?

3 MR. KENNADAY: From I think '97 when Mr. Duncan
4 died and she got control of these things until her death.
5 And there were about six or eight at the time that they
6 were changed and it came down to six at the time of her
7 death. They were evenly put some in one sister's name and
8 some in another sister's name. At death, there was three
9 CD's each but with different amounts, so that one sister
10 would have gotten more another sister would have gotten
11 less. We've talked to the bank and learn that shortly
12 after the death and before I think the petition for any
13 probate actions were filed, they split the money up evenly
14 into separate accounts. They pulled the money and split
15 it evenly between themselves which we all think is an
16 overt act in furtherance of the conspiracy. So we've
17 allege -- right now all Your Honor is looking at is a
18 12(b)(6) motion to dismiss.

19 THE COURT: I understand, I'm looking at
20 pleadings.

21 MR. KENNADAY: It's clearly an action for civil
22 conspiracy recognized in South Carolina. And the elements
23 are pretty simple and we've alleged those elements.
24 There's also -- we think, Your Honor, at least enough of
25 the recognition of tortuous interference with an

1 inheritance by the Supreme Court to get pass the motion to
2 dismiss, so that when they do look at that, they look at
3 it on a full record.

4 THE COURT: Anything further?

5 MR. DUMAS: Very briefly, Your Honor, and I
6 didn't know if he just needed correction. For what it's
7 worth, I have a copy of the filed inventory and
8 appraisement from the probate court listing all the joint
9 accounts. That was in fact filed with the probate court,
10 I believe, might have been an erroneous representation
11 concerning that this was not given to the probate court.
12 I do have a copy of the inventory of appraisement.

13 THE COURT: I would look at it. I will look at
14 anything outside the pleadings in this case, that's fine.
15 You made a point that my first blush when I heard the
16 argument, I said there is no such animal and I tell you as
17 I stand here today I think there's no such animal still.
18 But, you know, what you said about the novel issues, I'm
19 going to look at this further.

20 MR. KENNADAY: I have another case on that, Your
21 Honor, which is the most often cited cases on that subject
22 is the evidence case.

23 THE COURT: It's been pointed out to me on more
24 than one occasion.

25 MR. KENNADAY: I am not surprised by that. But

1 I think most of those cases there Supreme Court look we
2 already recognize an elements tort. And we don't have to
3 decide that. But here's the elements if we ever do want
4 to decide it that's pretty the good indication that it
5 ought to get past the motion to dismiss.

6 THE COURT: You can read tea leaves better than
7 I can. Let me look at this further and I'll give y'all my
8 decision.

9 MR. DUMAS: The only other thing, Your Honor,
10 just this is more of a matter of I think courtesy to
11 opposing counsel just in terms of cooperation best use of
12 court's time. I know that counsel file and did not have
13 ten days in which to give me warning of his motion to
14 consolidate. I take the position that rather than waste
15 the Court's time again. If the Court turns around and
16 decides to let any of this survive, then there are two
17 matters which do need to be taken up by the Court. The
18 first is the matter of venue. And there is no question
19 but that Rosemary Voyles, the PR of the estate, is a
20 Kershaw County resident, that's not at issue. And my
21 portion of the case where -- and again if it survives, you
22 know, I'm asking that whatever survives is transferred to
23 Kershaw County for that reason.

24 Secondly, again, assuming any of this survives
25 and I'm not taking that presumption cause, you know, as

1 primarily a plaintiff's lawyer, I've been in his position,
2 but the point is there are no factual allegations. I
3 mean, he makes a lot of conclusory statements in his
4 complaint no factual allegations. I did ask as part of
5 the motion to clarify make more definite and certain if
6 any of it survives. Finally, if any of this does survive,
7 I don't want to sit here. I don't want to stand here on a
8 ten-day notice rule on a motion to consolidate just to be
9 a jerk and to make the Court have to hear again and waste
10 time if anything survives. The only thing I would ask is
11 that the Court set time for responsive pleadings on
12 whatever does survive which I maintain should only at
13 best -- well, I don't even think a declaratory judgment
14 action should survive because it's all based upon all of
15 this. But just set a time for responsive pleadings on the
16 declaratory judgment action which was transferred over by
17 the probate court.

18 THE COURT: Isn't that taken care of by the
19 rules? On the motion to dismiss, you have what ten to 15
20 days to file?

21 MR. DUMAS: Well, in terms of what we were
22 attempting to accomplish between counsel was this, Your
23 Honor, we weren't holding each other. What I was hoping
24 to have was whatever is left consolidated. If there's
25 anything left of this complaint that was filed in circuit

1 court wanted it all consolidated into one pleading so that
2 there would only have to be one responsive pleading to
3 whatever is left.

4 MR. KENNADAY: If I could offer a solution on
5 that, Your Honor. I think the probate court removed the
6 action. We didn't get anything from the circuit court
7 excepting and giving notice of number. We called over
8 here and found out that the circuit court just put pro se
9 on all the litigants and that's how we -- so we then got
10 copies of the civil action number and filed the motion to
11 consolidate under both civil action numbers, that's how we
12 knew of the civil action number. So he wouldn't have
13 gotten another civil action. I have absolutely no
14 objection to giving him whatever the rules state a time
15 limit is after your decision for both action.

16 MR. DUMAS: We actually get -- I know we're
17 suppose to do that. We been working with each other on
18 this.

19 THE COURT: Right. So make sure I understand,
20 you have a motion to dismiss, a motion to consolidate all
21 the pleadings in one. And also a motion to change venue
22 -- let me ask you this, I know you have one of the ladies
23 who's a sister who lives in Kershaw County, but the
24 probate's here, removal's here and the pleadings were
25 here. Where does the other sister live?

1 MR. DUMAS: Out of state.

2 THE COURT: Why would that not still if the
3 subject ---

4 MR. KENNADAY: Your Honor, I can addressed the
5 venue.

6 THE COURT: I'm just thinking. Go ahead. I'm
7 probably going to deny that motion by the way.

8 MR. KENNADAY: I think there's two reasons for
9 the venue to stay here. One of them is is the new venue
10 statute couple years old, I guess, 15-7-30 is titled must
11 be actions tried in the county where the defendant
12 resides, but it says in the civil action tried pursuant to
13 this section against a resident individual, which one of
14 the sisters is resident of South Carolina. Resident or
15 defendant must be brought and tried in the county in which
16 the defendant resides at the time of the cause of action
17 arose or most substantial part of the allege act or
18 omission given rise to the cause of action occurred.

19 THE COURT: So the banks were here ---

20 MR. KENNADAY: The banks were here ---

21 THE COURT: I'm going to deny your motion to
22 change venue, that's a good one. So I'm basically looking
23 at a motion to dismiss, a consolidation of all the
24 pleadings?

25 MR. DUMAS: And make more definite and certain

1 for anything that survives.

2 MR. KENNADAY: Just for a moment to address ---

3 THE COURT: I'm sorry to keep cutting you off.

4 MR. KENNADAY: That's all right. I like that.

5 Usually, that's good for the side that's trying to speak
6 when told not to. But some of the cases on civil
7 conspiracy, point out that it's a negligent cause of
8 action and it's not -- it has to be privy of
9 circumstantial evidence. It's actually the Robertson case
10 the one I gave you already. We have allege that they
11 influenced her to do this. They moved the money into
12 their own accounts after it was over. We've alleged those
13 facts. I don't think there's any -- part of the reason we
14 are here we want to take their depositions to find out
15 more. And it's kind of -- they kind of stepped in it a
16 little bit cause if they just let us take the depositions,
17 we might have never brought these actions. But anyway ---

18 THE COURT: Let me ask you this ---

19 MR. KENNADAY: I think there's alleged
20 suspicion.

21 THE COURT: Go ahead, I'm sorry.

22 MR. KENNADAY: No, I'm sorry.

23 THE COURT: No, I want you to finish cause I'm
24 just thinking off the top of my head, but go ahead.

25 MR. KENNADAY: I'm sorry, I just couldn't stop

1 that last thought from coming out, please go ahead.

2 MR. DUMAS: At the end -- has there been
3 proposed distribution of the estate at all?

4 MR. KENNADAY: There was a proposed distribution
5 and that's what triggered the brothers to say wait a
6 minute where is the CD ---

7 THE COURT: And that's when they filed the
8 objections and all this?

9 MR. KENNADAY: Right.

10 THE COURT: It seems like to me at least in
11 procedural basis whether you have to file a separate suit
12 or not, you can file those same claims in your objections
13 to opposed distribution. You don't have two separate
14 actions, then you have the right to engage in discovery.

15 MR. KENNADAY: That's what the -- essentially
16 argue with the probate judge that, hey, we got this
17 petition for settlement and we got this pro se answer that
18 says what about these other accounts and we want to take a
19 deposition pursuant to that. And she said, no, you
20 haven't actually initiated an action for the retitling of
21 these things separate and apart from the estate, so she
22 said we had to do that. I don't think the probate court
23 would have had jurisdiction over the tort claims because
24 they are just seeking damages. They are not part of the
25 probate estate. We're going at it in two different

1 directions. To simplify matters, we filed -- we removed
2 the action that we were told we had to file in the probate
3 court and I moved to consolidate it.

4 THE COURT: Okay.

5 MR. DUMAS: And if I may very briefly, Your
6 Honor, in terms of just causes of action, I think the case
7 law is clear that we at least from the citation from the
8 cases that I handed up that there is no cause of action in
9 this state for wrongful interference with inheritance.
10 But let's go to civil conspiracy for just a moment because
11 if anything wrong, if any wrong was done, the wrong at
12 that point in time was done to the now decedent. Because
13 those brothers had no more right to those funds that were
14 Ms. Duncan's than would anybody in the world. I mean, how
15 -- where would you put a stop on it. I mean, momma has X
16 number of dollars, she decides make it joint with her new
17 husband. Oh, no, my goodness gracious up come the
18 children screaming, oh, no, momma pull the money put it in
19 a joint account with her new husband. I, as the child,
20 have just been cheated of my rightful inheritance. I
21 mean, there's just no stopping. It's -- there must -- if
22 any wrong was done and I'm not assuming there was, but you
23 must look at the civil conspiracy, no matter what it is
24 still a tort. There must be a duty, a duty to the
25 plaintiff. There must be a breach of that duty to the

1 plaintiff which then causes damage and harm to the
2 plaintiff no matter what the tort is. And the only duty
3 that could have existed in '02 and '03 in those joint bank
4 accounts would have been to the decedent not to the now
5 plaintiffs. So the only proper cause of action and course
6 of action is as I believe the Court had suggested, which
7 is bring an action in probate court saying I'm sorry the
8 estate has been cheated X number of dollars because
9 someone took advantage of momma. Now, if you can't get
10 the PR to do it, then you file an action in probate court.
11 You remove the PR claiming that the PR's got a conflict of
12 interest because this is what the PR did. That's where
13 this whole thing needs to be instead of gushing it up with
14 all of this, that and the other. And this court can
15 direct it for simplicities and for economies and for
16 judicial economy because that's what this action should be
17 if there's going to be any action for a claim because no
18 matter what it comes down to when you strip it all out,
19 they're basically bringing a common pleas action saying
20 that the estate was cheated money -- momma was cheated
21 money, therefore we got cheated money. And if the PR
22 ain't doing it now, then we ought to be bringing an action
23 replacing that PR and then bring that action seems to me
24 it's a much simpler solution than all of this that we got,
25 that's my thinking.

1 MR. KENNADAY: Well, you know, maybe I could
2 have done it in a simpler way, but it doesn't mean that I
3 can't do it this way. And the elements of civil
4 conspiracy have been laid out many times and they are a
5 combination of two or more persons for the intent of
6 injuring the plaintiff. There's a duty if you want to
7 apply duty in there, so whoever they are intending to
8 injure and damages. Now, we are going to have a proof
9 issue on damages. We're going to have to prove that but
10 for this interference, you know, they really did influence
11 her. And but for the influence, she wouldn't have made
12 these joint accounts. And but for all of that, they
13 wouldn't have gotten their inheritance. But the fact that
14 it's going to be hard to prove doesn't mean that we don't
15 at least get to try.

16 THE COURT: Well, I don't know someone has point
17 out, I think, is something well taken is civil conspiracy
18 you still have to -- they use to tell us when you go to
19 seminars to keep it simple and you just got to look at
20 your four elements. And if there's no duty, they breached
21 the duty and approximately cause damages. You can always
22 get it that way. What I'm saying is in this case, you
23 have a joint CD with right of survivorship, okay. My
24 understanding of those is that either you have a gift or
25 you have a complaint of as to how much was funded by one

1 of the account holders or not. If it does point, the
2 brothers whether or not sisters were unduly influence
3 momma or not, they don't have standing at that stage to
4 complain, do they?

5 MR. KENNADAY: Yes, they do.

6 THE COURT: Based on what?

7 MR. KENNADAY: Based on South Carolina's
8 recognition of interference with expected contractual
9 relationship.

10 THE COURT: What is expected contractual
11 relationship? They don't have a contract to make a will
12 in this case?

13 MR. KENNADAY: I'm just saying that South
14 Carolina recognizes rights and inexpectancy.

15 THE COURT: Right, but you also as a child don't
16 have a right to expect to inherit; is that correct? I
17 could leave my daughter totally out of my will and she has
18 no right to challenge that unless ---

19 MR. KENNADAY: In this case, we have a will.

20 THE COURT: Right. But back in these days, you
21 didn't because will doesn't vest until momma dies.

22 MR. KENNADAY: But there is a will which says
23 that the brothers will inherit, that's their expectancy.

24 THE COURT: Okay.

25 MR. KENNADAY: And the elements of civil

1 conspiracy been laid out and the courts don't mention duty
2 as a separate element. This is civil conspiracy,
3 combination to injure somebody and damages.

4 THE COURT: With the intent to injury.

5 MR. KENNADAY: Well, yes. And it specifically
6 stated over and over again that the acts done by the
7 conspirators doesn't actually have to be tortuous acts by
8 themselves.

9 THE COURT: Well, if there wasn't an underlying
10 duty owed toward somebody -- I mean, if I -- why would
11 anybody ---

12 MR. KENNADAY: Everybody has a duty not to
13 combine and hurt somebody -- not to combine for the
14 purpose of hurting somebody else and that's basically what
15 civil conspiracy says.

16 THE COURT: Go ahead.

17 MR. DUMAS: Again, Your Honor, if that's true,
18 then every business competitor, every single person -- if
19 you talk about the butterfly affect everything in this
20 life is connected. I mean, the reason for negligence law
21 being what it is is there must be a duty owed to the
22 plaintiff. And at that point in time that those accounts
23 were made joint, those brothers didn't have squat upon
24 which they could have turned around and legally sued their
25 momma to stop her from doing that. That was momma's

1 single account, momma can do with it what she wants to and
2 those boys can't stop her.

3 MR. KENNADAY: Your Honor, I think I see the
4 disconnect. He's right duty is an element of every claim
5 of negligence. Civil conspiracy is an intentional tort,
6 it's not negligence. If you combine with the intent to
7 hurt somebody and actually hurt them, that's civil
8 conspiracy an intentional tort and that's what we've
9 allege. Now, they knew what they were doing and that's
10 our allegation is that they knew what they were doing.
11 And they knew it would hurt the brothers deprive them of
12 this money. And if it wasn't that big of a deal, why did
13 they keep it a secret. Nobody knew about it until after
14 everything was over.

15 THE COURT: You be in probate court and this
16 happen all the time that doesn't give you -- let me ask
17 you this, would the -- your clients -- the brothers have a
18 right to sue the mother for her transferring the monies
19 around and making the account survivorship when she did?

20 MR. KENNADAY: Well, their allegation ---

21 MR. DUMAS: I'm not asking allegation, I'm
22 asking would they have a right to do that?

23 MR. KENNADAY: To sue the mother to put it back?

24 THE COURT: If they had this expectancy
25 interest, why not run through the mother ---

1 MR. KENNADAY: Well, I don't think the mother
2 would have committed a tort on them. The mother was
3 unduly influence by her sisters.

4 THE COURT: Right. I got you, I got you.
5 Anything further, gentlemen?

6 MR. KENNADAY: I have just for Your Honor's
7 convenience a copy of the motion to consolidate, if you
8 need look for that.

9 THE COURT: And just for the record, my
10 understanding is you're not objecting to the motion for
11 consolidation, so we can save judicial economy?

12 MR. DUMAS: Exactly, I'm not going to stand on a
13 ten-day ruling for that. For whatever's left, I put it
14 all together.

15 MR. KENNADAY: And this is an order -- the order
16 from the probate court denying our motion to compel. The
17 depositions where it says we have to initiate an action.

18 THE COURT: Okay. Thank you guys.

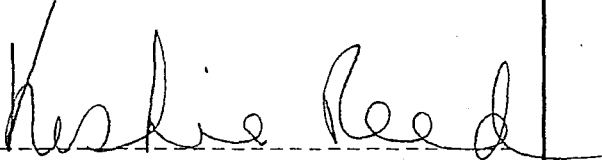
19 END OF REQUESTED TRANSCRIPT
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 28, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Richland
County, South Carolina, on the 29th day of June, 2010.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 2nd day
of February 2011.


Keshia Reed, Court Reporter

Tmk R 088

Richland County Fifth Judicial Circuit - Roster Details
MOTION ROSTER JUNE 29, 2010 COURTROOM 2-E

Court Agency	Richland County Common Pleas	Judge	McIntoch	Roster ID	94
Roster type	Motions Non Jury Roster	Roster Begin Date	06/29/2010	Roster End Date	06/29/2010

Number of motions = 10

Scheduled	#	Time	hr:mn	Description	Filing Party	Filed Date	Case	Case Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
06/29/2010	1	9:30 AM	0:30	Plaintiff's Motion to Sever Third Party Claims, to strike fr	Branch Banking And Trust Co-PLT	03/31/2010	2009CP4007366 Branch Banking And Trust Co vs Lee Jacobs Dailey	Foreclosure 420	John Judson Hearn (803) 771-7900	Tucker S Player (803) 772-8008	
06/29/2010	2	9:30 AM	0:15	Defendant Edens & Avanti Inc's Motion for Summary Judgment	Edens & Avanti Inc-DEF	03/17/2010	2009CP4000903 Victoria Logan vs Edens & Avanti Inc defendant et al	Premises liab 330	Shane Morris Burroughs (803) 268-9800 Herbert W. Louthian Jr (803) 256-4274	Wesley D. Few (803) 254-4190 John D. Hudson (803) 254-4190 Douglas Edward Leadbetter (803) 212-1010	
06/29/2010	3	9:30 AM	0:15	Motion to Compel Discovery	Mike Jones Cars Of Columbia Llc-DEF	02/10/2010	2009CP4006731 Tiffany Vann vs Mike Jones Cars Of Columbia Llc , defendant, et al	Unfair Trade Pra 640	Byron Elvester Gipson (803) 536-9610	Neil S Haldrup (843) 329-9500	
06/29/2010	4	9:30 AM	0:15	Motion for Default Judgment	State Of South Carolina-PLT	02/11/2010	2009CP4000187 State Of South Carolina vs Kebion STA	Special Comp/Oth 699	David A. Spencer (803) 734-8970		
06/29/2010	5	9:30 AM	0:15	Motion for Judgment on the Pleadings	American Express Centurion Bank-PLT	02/12/2010	2009CP4006954 American Express Centurion Bank vs Ben Pendergrass	Debt Collections 110	Jerry T Myers (919) 250-2133	Ben Pendergrass	
06/29/2010	6	11:00 AM	0:15	Motion for Extension of Time to file Expert Affidavit	Bobby Fox Jr-PLT	02/12/2010	2009CP4009123 Bobby Fox Jr plaintiff et al vs Palmetto Health Alliance defendant et al	Notice Med Mal/230	Lara Rettus Harri (854) 582-5472		
06/29/2010	7	11:00 AM	0:30	Motion to Dismiss on behalf of Defendants Richland County Sh	Richland County Sheriffs Department -DEF	02/12/2010	2009CP4005132 Evalena Caloe , plaintiff, et al vs Columbia Police Department , defendant, et al	Wrongful Death 360	Mitchell A. Norrell (803) 289-1800	Robert G. Cooper (803) 737-4242 William H Davidson II (803) 806-8222 Robert David Garfield (803) 806-8222	
06/29/2010	8	11:00 AM	0:15	Motion/Damages	Tonoco LLC-PLT	02/22/2010	2009CP4008962 Tonoco LLC vs Kenneth C Alexander defendant et al	Breach of Cont 140	Gerald D Jowers (803) 765-9620		
06/29/2010	9	11:00 AM	0:15	Motion/Damages	Comfort Group LLC-PLT	02/22/2010	2009CP4008941 Comfort Group LLC vs Kenneth C Alexander , defendant, et al	Breach of Cont 140	Gerald D Jowers (803) 765-9620		
06/29/2010	10	11:00 AM	0:15	Motion to Dismiss and/or Change Venue Pursuant to SCRPC 12	RoseAnn Voyles-DEF	02/16/2010	2010CP4000044 Howard Alston Duncan Jr plaintiff et al vs RoseAnn Voyles defendant et al	Special Comp/Oth 699	Thomas M Kennedy (803) 227-4280	Brian Dumas (803) 788-4370	



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No: 2010-CP-40-0044

Case No.: 2010-CP-40-2812

Howard Alston Duncan, Jr. and Thomas Duncan, ... Appellants,

v.

Rose Ann Voyles and Mary Liverman, ... Respondents.

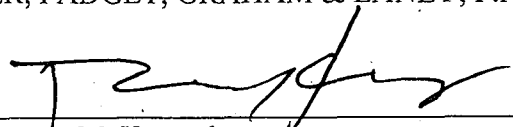
CERTIFICATE OF COUNSEL

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

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.

April 27, 2011

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