THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2018-CP-40-00726

Appellate Case No. 2020-001257

Leonard R. Jordan, Jr., as Personal Representative of the Estate of Lil B. Jordan, Petitioner, is..... Appellant,

v.

Marian J. Kirk and Lucy J. Fuller are..... Respondents.

REPLY

S.R. ANDERSON
S.C. Bar No. 391
P.O. Box 12188
Columbia, SC 29211
(803) 252-2828
sraatlaw@bellsouth.net

Attorney for Appellant

STATEMENT OF ISSUES ON APPEAL

I. Judge Newman erred by altering Judge Manning's Order.

II. As Judge Newman heard the same issues considered by Judge Manning (and resolved by his November 2, 2018 Order) and concluded that the findings and conclusions of Judge Manning would not be revisited and, in fact, would be incorporated in her Order, Judge Manning's Order, that "the Respondents (jointly) shall turn-over to the Petitioner the amount of $37,739.59 (together with interest after October 9, 2018, until paid.)" (R.p. 5), is law of the case.

III. Judge Newman erred in concluding that the judgment debt was $37,775.74 when the judgment debt awarded in Judge Manning's Order a year earlier was $37,739.59. The judgment debt would include, "interest (at the statutory pre-judgment rate) after October 9, 2018, until paid." Respondents acknowledged that the debt calculation was erroneous. (R.Brief, p. 17; R.p. 57)

IV. Judge Newman erred by ordering, contrary to her conclusion that Judge Manning's Order would not be revisited, that two-thirds of the judgment owed by Respondents be offset (forgiven), resulting in the full judgment debt not being recoverable by the Estate.

V. Judge Newman erred by ordering that, ". . . it would be both burdensome and inefficient for Respondents to be required to pay into the estate their own one-third shares of this award" (R.p. 22), when there was no formal, affirmative claim (counterclaim or motion) whereby Respondents requested this relief (i.e. setoff or forgiveness) and when no evidence was presented at trial, and no findings and conclusions were made touching upon this issue.

VI. Judge Newman's denial of Petitioner's claim for punitive damages was an abuse of discretion.

STATEMENT OF THE CASE

Petitioner was appointed by the Richland County Probate Court as the Personal Representative of the Estate of Lil B. Jordan. Petitioner and Respondents are the three adult children and sole beneficiaries of Lil B. Jordan, who died testate on June 5, 2012.

In his capacity as the Personal Representative of the Estate of Lil B. Jordan, Petitioner commenced this action by filing a Summons and Complaint in the Richland County Probate Court on November 22, 2017. (R.p. 60) In his Complaint, Petitioner asserted three monetary claims on behalf of the Estate of Lil B. Jordan, which, he maintained, were assets (monies) belonging to the Estate of Lil B. Jordan, and which were converted by Respondents to their own use. In their respective Answers, Respondents denied Petitioner's allegations and counterclaimed. (R.pp. 68 and 75)

The case was removed from the Probate Court to the Court of Common Pleas.

By Order filed on November 2, 2018 (R.p. 1), the Honorable L. Casey Manning granted a partial summary judgment on behalf of Petitioner, finding that Respondents had wrongfully converted certain monies belonging to the Estate. Respondents filed a Motion to Reconsider, Alter or Amend on November 11, 2018. (R.p. 36) This Motion was summarily denied by an Order filed on November 20, 2018. (R.p. 7)

By Order filed on December 10, 2018 (R.p. 8), Judge Manning granted a money judgment in favor of Petitioner against Respondents, "jointly and individually in the amount of $37,739.59 plus interest at $5.83 per day from November 2, 2018 until the entry of this judgment." (R.p. 8) This Order did not end the case.

A trial was held on August 20 and 21, 2019. Thereafter, on November 21, 2019, a Verdict and Judgment was entered by the Honorable Jocelyn Newman. (R.p. 10)

A Motion to Reconsider, Alter or Amend the Verdict and Judgment was filed by Petitioner on December 2, 2019. (R.p. 42) On December 17, 2019, Respondents filed a Response to Petitioner's Motion to Reconsider. (R.p. 52) After an unexplained delay of over eight (8) months, Petitioner's Motion was summarily denied by Judge Newman, without comment, by a Form 4 Order filed on August 21, 2020. (R.p. 27)

A Notice of Appeal was filed on September 17, 2020. (R.p. 84)

STATEMENT OF FACTS

On August 10, 2010, Respondent Kirk removed all of the funds held in a Wells Fargo bank account, owned by Lil B. Jordan, which account contained no funds belonging to Respondent Kirk (R.p. 241), and deposited these funds in a Bank of America account solely owned by Ms. Kirk. (R.p. 195, lines 18-23) Ms. Kirk did not inform Petitioner about this transfer in 2010 (R.pp. 197, line 12 – p. 198, line 24) or in 2012, when Petitioner inquired about account balances in his capacity as Personal Representative. (R.p. 245 and p. 198, lines 12-24).

When Decedent died on June 5, 2012, these funds ($21,481.02 more or less) (R.p. 241) were not the property of Ms. Kirk but were, in fact, an asset of Decedent's Estate. (R.p. 202, lines 14-25)

Respondent Kirk also converted $2,480.00 belonging to Mrs. Jordan's Estate. This was the amount of the final long-term care insurance check from Bankers Life Company, which check was issued/received after Decedent's death. It belonged to Decedent, and it had not been held in a joint account at the time of Decedent's death; it was therefore also an asset of Decedent's Estate. (R.p. 107, lines 1-21)

In May 2014, almost two years after Decedent's death, Respondents divided between

themselves both of these two Estate assets. Not coincidentally, Respondent Kirk closed on the purchase of her new house only two weeks after disbursing these funds to herself and her sister. (R.p. 204, lines 10-20)

For another three years, Respondents continued to conceal from Petitioner the existence and disposition of these Estate assets. (R.p. 198, line 22 – p. 199, line 20; p. 205, lines 8-17) Respondent Kirk finally informed Petitioner on July 27, 2017, of her conversion of these Estate assets. (R.p. 102, lines 11-23)

There was one other (a third) claim by Petitioner. This claim also involved monies belonging to Lil B. Jordan, which were held in another Wells Fargo bank account. Respondent Kirk added her name to this bank account in December 2005. Following Decedent's death on June 5, 2012, Respondent Kirk retained possession of the balance of this Wells Fargo account, while representing to Petitioner that the $23,986.92 (account balance) was an asset to be shown on the Probate Court inventory appraisement form. (R.p. 245 and p. 121, line 14-20) In 2015, Respondent Kirk finally made it known to Petitioner that she claimed this account by right of survivorship. (R.p. 173, lines 10-18) It was later learned by Petitioner that Respondent Kirk, in 2014, had divided these monies with Respondent Fuller. (R.p. 204, lines 10-20)

[Petitioner is no longer pursuing this third claim. Nevertheless, these circumstances remain important in considering Petitioner's claim for punitive damages.]

STANDARD OF REVIEW

An action for damages for conversion is an action at law, and the findings will not be distributed on appeal unless found to be without evidence reasonably supporting the findings. See *Carjow, LLC v. Simmons*, 349 S.C. 514, 519, 563 S.E.2d 359, 362 (Ct.App. 2002).

ARGUMENTS

I. JUDGE NEWMAN ERRED BY ALTERING JUDGE MANNING'S ORDER.

APPELLANT'S POSITION STATEMENT: It was improper for Judge Newman to overrule or alter another circuit court judge's Order.

It would not be appropriate for Judge Newman to overrule (i.e. to substitute her own judgment regarding) an Order of Judge Manning, who is still an active judge and who was, at all relevant times, able to hear and decide the remaining issues in this case.

"There is a long-standing rule in this State that one judge of the same court cannot overrule another." *Charleston County Dep't. of Social Services v. Father (in the Interest of Two Minors)*, 317 S.C. 283, 288, 454 S.E.2d 307, 301 (1995). "It is axiomatic (1) that an order not appealed from is the law of the case, and (2) a Circuit Judge does not have the power to reverse the rulings of another Circuit Judge." *Tisdale v. Amer. Life Ins. Co.*, 216 S.C. 10, 56 S.E.2d 580 (1950).

Judge Manning's Order has not been appealed and is now the law of this case.

II. AS JUDGE NEWMAN HEARD THE SAME ISSUES CONSIDERED BY JUDGE MANNING (AND RESOLVED BY HIS NOVEMBER 2, 2018 ORDER) AND CONCLUDED THAT THE FINDINGS AND CONCLUSIONS OF JUDGE MANNING WOULD NOT BE REVISITED AND, IN FACT, WOULD BE INCORPORATED IN HER ORDER, JUDGE MANNING'S ORDER, THAT "THE RESPONDENTS (JOINTLY) SHALL TURN-OVER TO THE PETITIONER THE AMOUNT OF $37,739.59 (TOGETHER WITH INTEREST AFTER OCTOBER 9, 2018, UNTIL PAID.)" (R.P. 5), IS LAW OF THE CASE.

APPELLANT'S POSITION STATEMENT: Judge Newman, in the appealed Order, correctly affirmed and incorporated Judge Manning's (now final and not appealed) Order, and she expressly ordered that Respondents "turn-over" to the Petitioner the established monetary judgment debt. She concluded that the Petitioner was "entitled to recover for the estate" such judgment debt; but then she significantly altered Judge Manning's Order (and her own Order) by

improperly revising and limiting (i.e. offsetting) Respondents' obligation under the judgment – all without any affirmative request or argument for such relief by Respondents and without any findings and conclusions made in that regard.

Respondents urged Judge Newman to revisit the issues resolved by the Order issued by Judge Manning on November 1, 2018, and filed on November 2, 2018. (R.p. 1) Judge Newman agreed, and she permitted testimony on the entire case. Ultimately, she declined to revisit Judge Manning's Order, and she expressly incorporated Judge Manning's Order into her Order. (R.Brief, p. 8; R.p. 19)

Judge Manning's Order, as affirmed by Judge Newman, ordered as follows:

1. That the Respondents (jointly) shall **turn-over to the Petitioner the amount of $37,739.59** (together with interest after October 9, 2018, until paid). (emphasis added)

2. That if the said amount is not paid to the Petitioner, in full, within ten (10) days after the date of filing of this Order, a judgment against the Respondents, jointly and severally, will be entered in said amount (plus additional pre-judgment interest) upon application of the Petitioner. (R.p. 5)

Judge Newman's Order went further. It also stated the following:

> . . . **Petitioner, in his capacity as Personal Representative of Decedent's Estate, is entitled to recover for the estate** the sum of $2,480 in actual damages on his Banker's Life Claim, as well as $1,459.55 in prejudgment interest (from December 19, 2012 to September 10, 2019). (R.p. 19) (emphasis added)
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> . . . The Court also adopts and incorporates the November 2, 2018 ruling with respect to the $21,857.80 that is the subject of Petitioner's Bank of America Claim. **Petitioner, in his capacity as Personal Representative of Decedent's Estate, is entitled to recover for the estate** the sum of $21,857.80 in actual damages on that claim, together with prejudgment interest in the amount of $11,978.39 (from June 6, 2012 to September 10, 2019). (R.p. 20) (emphasis added)

Judge Newman's Order fails to mention Judge Manning's other Orders. Following the entry of Judge Manning's first Order (November 2, 2018), Respondents filed a Motion to Reconsider, Alter and Amend on November 11, 2018. (R.p. 36) This Motion, which only

addressed the bar of the statute of limitations,[1] was summarily denied, without a hearing, by Order Denying Defendant's Motion to Reconsider, Alter, and Amend, filed on November 20, 2018. (R.p. 7) Then, on December 10, 2018, Judge Manning, in accordance with his November 2, 2018 Order, issued an Order for Judgment granting a money judgment to Petitioner for the full amount of the debt owed by Respondents on the Bankers Life and Bank of America Claims. (R.p. 8)

To be clear, none of the three (3) Orders issued by Judge Manning addressed the matter of offsetting (forgiving) a portion of the judgment award. One reason that Judge Manning failed to mention such offset was that no such relief was requested by Respondents. No such relief was requested in Respondents' Answer or in any motion.

At the conclusion of the trial, Judge Newman announced her ruling, leaving undecided only the issue of Petitioner's claim for punitive damages as to the Bank of America account money ($23,858.40). (R.p. 234, lines 19-24) She orally ruled, with regard to Judge Manning's Order, as follows:

> . . . **as to the balance awarded by Judge Manning already, I affirm** that, for lack of better word, **and that will become final judgment in this case.** (R.p. 234, lines 22-24) (emphasis added)

The foregoing ruling was announced just minutes after Respondents' counsel first raised in closing argument, that "there is a set-off argument." (R.p. 228, line 25 – p. 229, line 3)

Judge Newman did not rule that Judge Manning's Order would be modified (avoided) under any legal theory, including offsetting (forgiving).

Based upon her aforesaid conclusions, Judge Newman ordered as follows:

> . . . Petitioner Leonard R. Jordan, Jr., on behalf of the Estate of Lil B. Jordan, is awarded (1) the sum of $2,480 in actual damages plus the sum of $1,459.55 in prejudgment interest on his Banker's Life Claim; and (2) the sum of $21,857.80 in

[1] In other words, said Motion did not raise the issue of offsetting (or forgiving) a portion of the award or make any other argument.

actual damages and the sum of $11,978.39 in prejudgment interest on his Bank of America Claim. (R.p. 22)

Notwithstanding that she expressly affirmed and incorporated (without change) Judge Manning's Order (November 2, 2018) (R.p. 19),[2] Judge Newman then proceeded to significantly alter Judge Manning's Order.

Without any related findings or other explanation, Judge Newman specifically altered Judge Manning's Order as follows:

> . . . [b]ecause it would be both burdensome and inefficient for Respondents to be required to pay into the estate their own one-third shares of this award, Respondents Marian J. Kirk and Lucy J. Fuller may fully satisfy and discharge their obligations under this Order by paying one-third of this award (or $12,591.91) to the estate, together with an instrument renouncing any claims that they may have to that amount. In that event, Respondents will remain liable for any reasonable expenses incurred by the estate in collecting this amount, as determined by the Probate Court. (R.pp. 22-23)

This portion of Judge Newman's Order is without evidentiary support and is contrary to her own ruling, and it should be stricken.

III. JUDGE NEWMAN ERRED IN CONCLUDING THAT THE JUDGMENT DEBT WAS $37,775.74 WHEN THE JUDGMENT DEBT AWARDED IN JUDGE MANNING'S ORDER A YEAR EARLIER WAS $37,739.59. THE JUDGMENT DEBT WOULD INCLUDE, "INTEREST (AT THE STATUTORY PRE-JUDGMENT RATE) AFTER OCTOBER 9, 2018, UNTIL PAID." RESPONDENTS ACKNOWLEDGED THAT THE DEBT CALCULATION WAS ERRONEOUS (R.P. 57)

APPELLANT'S POSITION STATEMENT: Respondents admit that the judgment debt cited in Judge Newman's Order is incorrect. The judgment debt (as calculated below) is the correct

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[2] Judge Newman, by her in-court ruling and by her Order, made it clear that she:

- Affirmed the Manning Order (R.p. 234, lines 22-24);
- Declared that the Manning Order would become a final judgment (R.p. 234, lines 14-16);
- Declined to revisit the Manning Order (R.p. 19); and
- Incorporated the Manning Order (R.p. 19).

amount due (as of November 21, 2020).

Respondents' Response to Petitioner's Motion to Reconsider, filed on December 17, 2019, acknowledges that the Verdict and Judgment:

> . . . includes prejudgment interest only through September 10, 2019 (the date on which Respondents submitted a proposed Order for the Court's consideration). Respondents acknowledge that the final judgment should include an additional 72 days of prejudgment interest . . . . (R.pp. 56-57)

and is also mistaken due to miscalculated prejudgment interest. (R.p. 57)

A correct calculation of the judgment-debt, which includes interest to November 21, 2019,[3] follows:

Judgment Calculation

Amount Awarded (Principal)	$	37,739.59
Interest from November 2, 2018, through December 10, 2018 (39 days), at $5.83 per day (per Judgment)	$	227.37
SUBTOTAL	$	37,966.96
Interest from December 11, 2018, through November 21, 2019 (346 days), at 8.75% per annum (pre-judgment rate)	$	3,130.32
SUBTOTAL	$	41,097.28
Interest from November 22, 2019, through January 14, 2020 (54 days), at 9.50% per annum (post-judgment rate)	$	577.61
SUBTOTAL	$	41,674.89
Interest from January 15, 2020, through May 22, 2020 (129 days), at 8.75% per annum (post-judgment rate)	$	1,267.44
Costs added to Judgment by Order filed on May 22, 2020	$	402.18
SUBTOTAL	$	43,344.51
Interest from May 23, 2020, through November 1, 2020 (163 days), at 8.75% per annum (post-judgment rate)	$	1,617.17
TOTAL as of November 1, 2020	$	44,961.68

[3] Petitioner acquiesces in Respondents' argument that Judge Manning's Order for Judgment was not (then) a "final" judgment. As it has not been appealed, said Order for Judgment is now "final."

NOTE: the judgment-debt continues to accrue interest after November 1, 2020, at the post-judgment rate(s), compounded annually after November 21, 2020.

IV. JUDGE NEWMAN ERRED BY ORDERING, CONTRARY TO HER CONCLUSION THAT JUDGE MANNING'S ORDER WOULD NOT BE REVISITED, THAT TWO-THIRDS OF THE JUDGMENT OWED BY RESPONDENTS BE OFFSET (FORGIVEN), RESULTING IN THE FULL JUDGMENT DEBT NOT BEING RECOVERABLE BY THE ESTATE.

APPELLANT'S POSITION STATEMENT: The offset of two-thirds of the gross judgment debt, which was properly entered against Respondents by two judges, is improper, as it fails to protect Petitioner's ability to pay estate expenses, including attorney's fees incurred by Petitioner in this suit as well as his other estate-related expenses, and will likely result in additional litigation.

As discussed above under Argument II., the judgment awarded by Judge Manning (and affirmed by Judge Newman) was intended to benefit Petitioner (i.e. the Estate). It was not awarded to Mr. Jordan individually. Judge Newman's Order seems to suggest a point-of-view that the suit was initiated by Mr. Jordan personally, rather than in his capacity as Personal Representative of the Estate. The Estate (as opposed to Mr. Jordan personally) is the actual judgment-creditor.

Importantly, the judgment debt, which Judge Manning and then Judge Newman awarded to the Estate (to Petitioner, as Personal Representative of the Estate of Lil B. Jordan),[4] must be collected by the Estate (Petitioner) to pay, first, all Estate-expenses, including attorney's fees incurred by Petitioner in connection with this suit, as well as Petitioner's other expenses, before disbursing the net balance to the three beneficiaries.[5]

It is obvious that setoff language was inserted by Respondents' counsel into Judge

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[4] Judge Manning ordered that Respondents **turn-over** to Petitioner the full amount of the judgment (R.p. 5), and Judge Newman ordered that Petitioner is entitled to **recover** the full amount of the judgment for the estate (R.p. 20). (emphasis added)

[5] As stated by Mr. Jordan, "The estate should have that money and be able to disburse all of that in accordance with the normal practices with the personal representative handling the estate." (R.p. 113, lines 19-23)

Newman's Order purposely to reduce the attorney's fees earned by Petitioner's counsel, who agreed to handle this case on a contingency-fee basis (based upon a percentage of the monies recovered). By significantly reducing the amount recovered, the attorney's fee earned by Petitioner's counsel (subject to approval by the Probate Court) would also be significantly reduced. Respondents would like us to believe that, by adding: "Respondents will remain liable for any reasonable expenses incurred by the estate in collecting this amount, as determined by the Probate Court" (R.p. 23), sufficiently protects Petitioner and his counsel; but based upon Respondents' history of refusing to acknowledge their obligations to the Estate, as well as their demonstration of an unwillingness to pay such obligations, even when sued and after a judgment was entered against them, one should be concerned that this procedure will likely result in additional litigation.

It should be noted that attorney's fees are not sought against Respondents in this case. Attorney's fees are an obligation of the Estate (Petitioner). Simply put, Petitioner must collect sufficient monies to pay estate expenses, and a specified percentage of the gross amount recovered is a customary measuring tool by which a reasonable attorney's fee owed to Petitioner's counsel is calculated. This case was filed on November 22, 2017, and has already been pending for over three (3) years. Under these circumstances, an attorney's fee based upon a percentage of the recovery would be far from over-reaching or unreasonable. To the contrary, to artificially manipulate the figures to reduce the actual recovery in order to reduce the attorney's fee earned by Petitioner's counsel would actually be unreasonable.

Petitioner's attorney's fees and costs (authorized by Decedent's Will) must be deducted from the gross amount recovered from Respondents before the net share, to which each of the heirs is entitled, is determined.

Judge Newman's Order did not address attorney's fees. She had earlier decided that the

matter of attorney's fees was not before her. (R.p. 126, lines 17-24) Respondents' argument is that it is "for the Court to decide whether these ladies should pay in Mr. Jordan's attorney's fees as well so that he doesn't have to suffer that burden himself." (R.p. 232, lines 11-16) Respondents do not seem to understand that Petitioner (i.e. the Estate, not Mr. Jordan individually) is responsible for paying attorney's fees, and that it was within Petitioner's authority (under Mrs. Jordan's Will) to contract, on behalf of the Estate, to pay the same using Estate monies. What doesn't seem right is to expect Mr. Jordan to pay Petitioner's attorney's fees out of his personal share after he successfully produced for the Estate assets, which Respondents willfully converted as their own property (assuming that Respondents actually pay the judgment debt plus interest and court costs), which is the way it will work under Judge Newman's Order.

V. JUDGE NEWMAN ERRED BY ORDERING THAT, "... IT WOULD BE BOTH BURDENSOME AND INEFFICIENT FOR RESPONDENTS TO BE REQUIRED TO PAY INTO THE ESTATE THEIR OWN ONE-THIRD SHARES OF THIS AWARD" (R.P. 22), WHEN THERE WAS NO FORMAL, AFFIRMATIVE CLAIM (COUNTERCLAIM OR MOTION) WHEREBY RESPONDENTS REQUESTED THIS RELIEF (I.E. SETOFF OR FORGIVENESS) AND WHEN NO EVIDENCE WAS PRESENTED AT TRIAL, AND NO FINDINGS AND CONCLUSIONS WERE MADE TOUCHING UPON THIS ISSUE.

APPELLANT'S POSITION STATEMENT: Judge Newman's Order, allowing Respondents' collective, gross shares of the Estate to be applied to offset the judgment debt entered against them, which offset was not the subject of an affirmative defense or counterclaim pled by Respondents, or made by motion or even argued at the trial, is improper and should be stricken.

There was no indication in the pleadings or at the trial that Respondents sought the relief of setoff (other than Respondent's counsel simply mentioning once the word "set-off" during closing argument). (R.p. 229)

Both Respondents included in their respective Answers to Petitioner's Complaint a

counterclaim seeking affirmative relief. (R.pp. 72-73 and 80) By this one-and-only counterclaim, each Respondent claimed damages due to Petitioner's alleged breach of his fiduciary duties. This counterclaim was not pursued at trial or addressed in Judge Newman's Order, and it should be deemed to have been abandoned.

Importantly, neither of Respondents' Answers (with counterclaim) (R.pp. 68 and 75) requests an offset (or forgiveness) of their anticipated shares of the Estate against monies sought in the Complaint. Another important consideration is that, following Judge Manning's Order, Respondents filed a Motion to Reconsider, Alter or Amend on November 11, 2018 (R.p. 36), but that there was no mention in said Motion of an offset (forgiveness) of a portion of the amount awarded to Petitioner.

Prior to Respondents' counsel's preparation and submission of a proposed Order (R.p. 251), which Judge Newman signed (with limited changes), there was no suggestion by Respondents, and certainly no evidence presented, that it would be "burdensome or inefficient" for Respondents (both or either) to pay the judgment amount to Petitioner, as required by Judge Manning's Order. (R.p. 5) No request for a setoff (or forgiveness) was made by Respondents, by a formal pleading or even by oral argument[6] – before it was included in the proposed Order

[6] In closing argument (in the last few moments of the trial), Respondents' counsel did argue that "the estate doesn't have a right to their (Respondents') shares, which they have had for years." (he seems to equate "shares" to monies improperly converted before Decedent's death), that "to have them pay back what they have held for seven years, only to get it back minus attorney's fees is ludicrous" and that "they're supposed to pay the estate's lawyer for recovering that money for them, when it's just going in and coming right back again." He then asserts "that doesn't make any sense." (R.p. 231) Respondents' argument doesn't make sense because it doesn't work this way. Respondents should pay to Petitioner the entire judgment debt so that Petitioner will be in a position to pay the Estate's attorney's fees, the amount of which is determined using the gross recovery (subject to approval of the Probate Court), along with other Estate expenses. Ultimately, Respondents' net share of the Estate will be used to pay attorney's fees and other Estate expenses, just as Mr. Jordan's net share will be used. The purpose of Respondents' last minute argument is an attempt to reduce Petitioner's counsel's attorney's fees, which was not an issue before Judge

submitted to Judge Newman by Respondents' counsel. (R.p. 257)

Respondents failed to take advantage of this avoidance tactic by failing to plead such matter as an affirmative defense. The requirement to plead affirmative defenses (including "matters constituting an avoidance") is set forth in Rule 8(c) of the South Carolina Rules of Civil Procedure. Generally, a failure to plead an affirmative defense is deemed to be a waiver of the right to assert it. *Plyler v. Burns*, 373 S.C. 637, 647, 648 S.E.2d 188, 194 (2007), citing *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002); *Madren v. Bradford*, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct.App. 2008).

VI. JUDGE NEWMAN'S DENIAL OF PETITIONER'S CLAIM FOR PUNITIVE DAMAGES WAS AN ABUSE OF DISCRETION.

APPELLANT'S POSITION STATEMENT: The conversion cause of action proved by Petitioner (as decided by two judges), also established numerous factors (standards) to be considered by the court in evaluating the justification for an award of punitive damages. These factors warrant the entry of punitive damages against Respondents. Petitioner believes that punitive damages should be awarded but that it should not exceed a 1 to 1 ratio to actual damages.

In addition to actual damages, Petitioner also sought punitive damages for Respondents' willful conversion of Decedent's and Decedent's Estate's money. Two judges have found that Respondents were guilty of converting such money. (R.pp. 2-3 and 21-22)

"Punitive damages are recoverable in conversion cases if the defendant's acts have been

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Newman (R.p. 127, lines 22-24) Respondents' counsel even suggests that the estate would somehow "end up getting a windfall," as a consequence of its having to sue Respondents to recover the monies which they converted. (R.p. 233) This argument is ludicrous. Respondents benefit from their taking Decedent's monies will always exceed Mr. Jordan's benefit (unless punitive damages are awarded).

willful, reckless, and/or committed with conscious indifference to the rights of others." *Mackela v. Bentley*, 365 S.C. 44, 49, 614 S.E.2d 648, 651 (2005).

Quoting from *Gamble v. Stevenson,* 305 S.C. 104, 112-13, 406 S.E.2d 350, 354 (1991):

> In South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated." *Harris v. Burnside*, 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973). Lastly, punitive damages may be awarded only upon a finding of actual damages. *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965).
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> . . . the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.

Judge Newman summarily denied Petitioner's claim for punitive damages on the Bankers Life Claim (R.p. 19) and on the Bank of America Claim. (R.p. 20) Judge Newman's Order mentions the eight (8) factors established by *Gamble* (R.p. 19),[7] but there is no indication that Judge Newman actually considered any of these factors (with the exception of concealment). Other than concealment, she did not address or make any findings regarding these factors.

Taking the *Gamble* factors in turn, Petitioner would show the following:

a. Degree of Culpability. In order to establish that the damages suffered by the plaintiff were the natural and probable result of the defendant's conduct, it must be shown that the injury was foreseeable and was the natural and probable result of the defendant's conduct. See *Young v. Tide Craft Inc.* 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978). There were no intervening factors. Respondent Kirk (with the participation of Respondent Fuller) surreptitiously orchestrated

[7] Word for word as expressly stated in Respondents' counsel's proposed Order. (R.p. 254)

the conversion of Decedent's monies, and she admitted doing so. (R.p. 196, line 16 – p. 197, line 18) Respondents' counsel called it "vigilante justice" (R.p. 191, lines 23-25), and Judge Newman called it "self-help;" but it is wrong to sugar coat it. This was "theft." Respondents' actions were malicious, willful and wanton. Respondents' actions directly caused foreseeable injury to the Estate and, ultimately, to one of the three heirs. To make matters worse, the perpetrator of the conversion was Respondent Kirk, a sister, whom Petitioner trusted implicitly. (R.p. 111, line 23; p. 122, lines 8-10; p.136, lines 13-15; p. 138, lines 18-19; p.141, line 25; p. 143, lines 7-11; p. 169, line 23 – p. 170, line 1; p. 171, lines 11-16)

b. Duration of Conduct. The conversion started as early as 2010, but certainly was concluded within a short period after Decedent's death in 2012. Respondent Kirk was first sued in 2016 (earlier suit), and she responded to written discovery requests regarding these monies, and she initially claimed no knowledge of diverted monies belonging to Decedent or the Decedent's Estate. (R.p. 102, lines 11-17) Finally, on July 27, 2017 – about seven years after she took control of most of the converted monies – Respondent Kirk finally admitted to Petitioner her intentional, malicious conduct. (R.p. 102, lines 18-23)

c. Concealment. With regard to the Bankers Life Claim ($2,480.00), Judge Newman's findings that, "[t]here is no evidence that [Respondent Kirk] attempted to conceal this deposit from Petitioner or to prevent him from claiming the funds as an asset of the estate" and that "[a]ny delay in the estate's ability to take possession of the $2,480, then, has been due to Petitioner's own conduct, not to the conduct of Respondent Kirk" (R.p. 20), are not supported by the evidence. Comparing the various willful acts of conversion performed by Respondent Kirk to the lack of knowledge of Petitioner of the existence of this asset and concluding that Petitioner is more culpable than Respondent Kirk for the conversion demonstrate an improper bias at play here (or

maybe only Judge Newman's failure to read closely Respondents' counsel's proposed Order). (R.pp. 20-21 and 255-56)

With regard to the Bank of America Claim, Judge Newman properly acknowledged that "Respondents failed to tell Petitioner of the existence of the Bank of America account and that they neglected to inform Petitioner that they were dividing those funds between themselves in May 2014." (R.p. 20) Respondent Kirk admitted that she concealed her acts of conversion from Petitioner. (R.pp. 198, lines 19-24; p. 199, lines 7-20; p. 205, lines 8-17) She also admitted that, when she shared the money with Respondent Fuller, it was not accidental. (R.p. 217, lines 8-18) As indicated in Judge Newman's Order, ". . . the Court has already found those actions to have been a conversion." (R.p. 20)

Had Respondents confessed to their willful conduct (their conversion of these monies) and also disgorged the monies when they first "remembered" that they had converted same, then Judge Newman's conclusions might make some sense. However, instead of doing the right thing and returning the money to be applied as an Estate asset, Respondents denied any wrong-doing and withheld the money. Even after Judge Manning issued a Judgment against them, they still did not tender any portion of their indebtedness to the Estate, and they continued, through the trial, to make excuses and to deny any culpability.

d. Past Conduct. As discussed in this case, Respondent Kirk admitted, in December 2005, to adding her name to an older Wells Fargo bank account owned by Lil B. Jordan. (R.p. 182, lines 19-23) The parties knew, in December 2005, that their mother was failing in her cognitive abilities, if not incompetent. (R.pp. 116, line 16 – p. 117, line 24; p. 182, lines 2-6) (There is, therefore, an issue of whether or not Decedent was competent at the time to add Respondent Kirk's name to Decedent's bank account.) Following Decedent's death on June 5, 2012, Respondent Kirk

retained control over Decedent's monies. Respondents met with Petitioner in September 2015, to discuss a final disbursement of these monies, which Respondent Kirk claimed amounted to $25,090.00. (R.pp. 108, line 6 – p. 109, line 11) There was no mention to Petitioner at this meeting that Respondents had already, in 2014, divided other Estate monies between themselves. (R.p. 108, lines 11-14) This 2015 meeting was called by Respondents to urge Petitioner to waive his interest in the Wells Fargo account monies (reported to the Probate Court as an Estate asset) because he had allegedly mishandled his investment of their mother's money in 2007-08. (R.p. 217, lines 22-24) Importantly, this is the same rationale (the same excuse) used by Respondents to justify their converting the other monies (Bank of America and Bankers Life Claims) in 2010-12 and dividing it between themselves in 2014. (R.pp. 220, line 25 – p. 221, line 22), about which Petitioner had no knowledge until 2017. (R.p. 108, lines 22-24)

Although Petitioner is no longer pursuing the issue of this Wells Fargo account balance, this circumstance nevertheless demonstrates a pattern of malicious conduct by Respondents with regard to assets of Decedent and demonstrates that Judge Newman's finding that, " . . . Respondents' conduct with respect to the Bank of America account was an isolated incident; otherwise their handing of Decedent's funds and affairs prior to her death was above reproach." (R.p. 22), is contrary to the evidence.

e. Deter Like Conduct.

Petitioner has little concern that Respondents' malicious conduct will be repeated (certainly not insofar as will affect the Estate).

f. Award is Reasonably Related to the Harm.

Petitioner is not seeking an exorbitant punitive damages award. An award of punitive damages with a 1 to 1 ratio to actual damages (with accrued interest) would, in Petitioner's opinion,

be reasonably related to the harm caused by Respondents' conduct. See *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 196, 638 S.E.2d 667, 672 (2006) ("[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution. . . [t]he punitive damages award in this case, which was 6.82 times the actual damages award, was reasonably related to the actual harm suffered.")

g. Ability to Pay.

If punitive damages are awarded, both Respondents have an ability to pay these conservative, punitive damages. For one thing, much of a punitive damages award paid by Respondents would be returned to them upon the final disbursement of the Estate assets to the beneficiaries (unless the court directs another result in light of the purpose of punishment). Furthermore, Respondent Kirk admitted that she purchased a new home in 2014 (R.p. 204, lines 10-23), indicating that she is capable of responding to an award of punitive damages.

It is not required that the plaintiff satisfy all of the *Gamble* factors in order to be entitled to an award of punitive damages. See *Kennedy v. Richland Cty. Sch. Dis. Two*, 428 S.C. 98, 124, 833 S.E.2d 414, 428 (Ct.App. 2019) ("[t]he existence of any of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect," quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003)x).

Further, quoting from *Kennedy,* at 120-21:

> The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) . . . "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning – the conscious failure to exercise due care." *Id.* This present consciousness of wrongdoing justifies the assessment of punitive damages against the tortfeasor, meaning "at the time of his

> act or omission to act the [tortfeasor must] be conscious, or chargeable with consciousness, of his wrongdoing." *Id.* (quoting *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011)). . . To receive an award of punitive damages, a plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard for the plaintiff's rights. S.C. Code Ann. §15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); see also *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480 ("In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights.")

It follows that the standards for a punitive damage award have been met and that the Respondents should be punished for their malicious actions in converting Decedent's money. They acted willfully, wantonly, and with reckless disregard of Petitioner's rights and duties, to deprive the Estate of its assets.

Punitive damages are not compensatory. Punitive damages are "designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible." *Harleysville Group Ins. v. Heritage Cmtys. Inc.*, 420 S.C. 321, 354, 803 S.E.2d 288, 306 (2017) (citations omitted).

In reviewing the reasonableness of a punitive damages award, a court should first consider the degree of reprehensibility of the defendant's conduct. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009) ("Reprehensibility is 'perhaps the most important indicium of the reasonableness of a punitive damages award' . . . This principle reflects the view that some wrongs are more blameworthy than others" (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996)).)

The conduct of Respondents was sufficiently willful and reprehensible to justify an award of punitive damages. The evidence of conversion and the reprehensibility of Respondents' conduct is clear and convincing. To deny an appropriate punitive damages award is contrary to court

decisions involving conversion and where the defendant's willful, wanton or malicious conduct has been shown. To deny Petitioner punitive damages is to reward Respondents for their reprehensible conduct.

CONCLUSION

In conclusion, Appellant requests that Judge Newman's Order be revised: (1) to strike the following:

> IT IS FURTHER ORDERED that, because it would be both burdensome and inefficient for Respondents to be required to pay into the estate their own one-third shares of this award, Respondents Marian J. Kirk and Lucy J. Fuller may fully satisfy and discharge their obligations under this Order by paying one-third of this award (or $12,591.91) to the estate, together with an instrument renouncing any claims that they may have to that amount. In that event, Respondents will remain liable for any reasonable expenses incurred by the estate in collecting this amount, as determined by the Probate Court.

and (2) to award punitive damages in an appropriate amount to punish Respondents for their reprehensible conduct or to remand this case to the lower court with instructions to grant Petitioner's claim for punitive damages in an appropriate amount.

Respectfully submitted,

s/S.R. Anderson
S.R. ANDERSON
S.C. Bar No. 391
P.O. Box 12188
Columbia, SC 29211
(803) 252-2828
sraatlaw@bellsouth.net

Attorney for Appellant

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