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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-5426
App. Case. No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin…….Appellant,

v.

Bridget D. Inman, Muriel C Kennedy, and Patricia Clarkin Smith……. Respondents.

And

Bruce A. Berlinsky, Intervenor.

FINAL BRIEF OF APPELLANT

July 5, 2021

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STATEMENT OF THE CASE

Factual History

Muriel W. Clarkin (hereinafter "Clarkin") is an eighty-seven-year-old widow who has four living children, Charles , Michael (incapacitated), Muriel C. Kennedy (hereinafter "Kennedy") and Patricia Clarkin Smith (hereinafter "Smith"). Kennedy has a daughter, Clarkin's granddaughter, Bridget Inman (hereinafter "Inman"), one of multiple grandchildren of Clarkin. Clarkin's financial reserves and assets have been depleted, limiting Appellant's ability to provide for Clarkin's necessary living expenses and care (R.pp. 476-477).

In 2006, Clarkin executed a note to Wells Fargo Bank, NA (hereinafter "Wells Fargo") for a $100,000.00 home equity line of credit (hereinafter "HELOC"), secured by real property Clarkin owned entirely, located at 602 Atlantic Street, Mt. Pleasant, SC 29464 (hereinafter "Atlantic"), evidenced by a mortgage recorded in the RMC Office for Charleston County in BK L591, PG 244 (R.pp. 679-685). July 7, 2008 said Note and Mortgage were modified to increase the maximum balance of indebtedness to $150,000 (hereinafter "Modification"), which was recorded in the RMC Office for Charleston County in BK E664, PG 769 (R.pp. 686-689). July 7, 2008, Inman purchased real property located at 316 Elrod Drive, Goose Creek, SC 29445 (hereinafter "Elrod") for a

purchase price of $137, 000.00, and a gross amount due from Inman of $138,764.60, as evidence by a deed recorded in the Register of Deeds of Berkeley County in Book 7447, Page 141. (R.pp. 670-674; 478-492). July 7, 2008, Clarkin withdrew $138,085.87 (hereinafter "Disputed Funds") from the HELOC and provided the funds to Inman to purchase Elrod (R.pp. 123; 478-492).

Appellant plead Inman, Kennedy, and Clarkin agreed Clarkin would lend Inman the Disputed Funds, for a time and eventually Inman would procure financing in Inman's name secured by Elrod to repay Clarkin the remaining principle balance of the Disputed Funds (R.pp. 263-280). Appellant plead Clarkin, Kennedy and Inman agreed Inman would pay the monthly finance charges upon the HELOC until Inman repaid Clarkin the Disputed Funds (R.pp. 263-280). Appellant plead Kennedy told Clarkin Kennedy would guarantee payment of the Disputed Funds (R.pp. 263-280). August of 2008 through April of 2017, Inman paid the monthly finance charges upon the HELOC, making 104 consecutive monthly payments amounting to over $70,000.00[1] (R.pp. 478-492; 304-305).

March 27, 2013, Clarkin, through counsel C. Mac Gibson Jr. (hereinafter "Attorney Gibson"), recorded a durable power of attorney in the Charleston RMC Office in BK 0319, PG 644, naming Kennedy attorney in fact for Clarkin and Smith as successor to Kennedy (R.pp. 732-741). August 21, 2013, Clarkin, through Attorney Gibson, deeded a half interest in Atlantic as joint tenants in common with right of survivorship to Smith (hereinafter "Smith Deed 1") (R.pp. 742-745). April 25, 2014, Smith caused Clarkin to withdraw $15,000.00 from the HELOC and provided it to Smith on agreement Smith repay Clarkin (R.pp. 263-280; 646-652). November 18, 2014, Smith caused a deed, not drafted by Attorney Gibson, to be recorded in the RMC Office for

[1] The majority of the payments were applied to accrued interest on the HELOC (R.pp. 86-123).

Charleston County in BK 0441, PG 484, allegedly executed by Clarkin, which conveyed Clarkin's remaining interest in Atlantic to Smith (hereinafter "11/18/14 Deed") (R.pp.746-750).

December 22, 2014, Kennedy filed a petition for order of protection and appointment of a conservator for Clarkin (R.pp. 690-720; 464-475). December 22, 2014 by Ex Parte Order, the Honorable Tamara C. Curry, Probate Judge, declared Clarkin incapacitated and appointed a temporary guardian. (R.pp. 690-720; 464-475). January 7, 2015, Family Services, Inc. was appointed temporary conservator (hereinafter "Appellant"). March 27, 2015, by order in case number 2014-GC-10-0209 (hereinafter "Probate Matter"), Appellant was permanently appointed conservator (R.pp. 244-255).

Appellant plead in January of 2015, Kennedy first met with Appellant, regarding Clarkin's finances and informed Appellant about the Disputed Funds and the agreement. Kennedy told Appellant Inman was making monthly payments on the HELOC. Kennedy told Appellant as of April 25, 2014 Inman owed a principle balance to Clarkin of $132,356.00[2]. Kennedy told Appellant Smith owed Clarkin $15,000 and was not making payments.(R.pp. 263-280; 504-519; 646-652). June 4, 2015, Inman emailed Appellant: "My mom, Muriel Kennedy gave me your name and email . . Would you kindly send me the portion of interest that is associated with my grandmother's loan that was used to purchase 316 Elrod drive so that I can continue making sure the payment is made correctly?" (R.pp. 130-131). June 12, 2015, Appellant responded to Inman:

> "Bridget, I have received your request for the equity line interest to be broken up to address the two parties' debt – however, until Wells Fargo releases the information I have requested (many, many times), there is no way to accurately calculate this. . . In the meantime, you will need to continue making payments on this account, as there is obviously still a substantial balance owed by both parties." (R.pp. 130-131).

June 23, 2015, Inman emailed Appellant:

[2] This is the date Smith received $15,000.00 from the HELOC.

> "I will happily sign over the deed of 316 Elrod Drive, Goose Creek, SC 29445 to Family Services, Inc., Wells Fargo or to my grandmother Muriel W. Clarkin (immediately). . . " (hereinafter "Deed Offer") (R.p. 138).[3]

July 8, 2015, Appellant responded:

> "*Ms. Inman, Given that the property is upside down, the only thing that would do would be to put the burden of collecting payment [rent] and maintaining the property onto Ms. Clarkin. There would be no actual benefit to her."* (R.p. 139).[4]

March 24, 2016, Kennedy emailed Appellant:

> *"Ms. Evans, I received your email. . . . I gave you a Zero balance on her [Clarkin] credit card [separate account from the HELOC] and was told it would be destroyed in January of 2015. It was not destroyed until the end of March and my sister [Smith] used it personal gain.*[5] *The credit line interest on 602 Atlantic [HELOC] street was not evenly distributed. I have gave you the payoff as [sic] the day my sister took an additional $15,000.00 out on the equity line. You calculated the interest on the entire balance not the payoff which had now been reduced even further by my daughter since the day Tricia [Smith] took the additional money and never made her payments."* (R.p. 650).

Appellant sent Smith and Inman monthly payment invoices for their proportional share owed of the monthly accrued interest on the HELOC based upon the principle balance each owed Clarkin (R.pp. 265-266). Smith and Inman made monthly payments to Appellant which Appellant applied to the amount due on the HELOC (R.pp. 265-266). For two years Inman made monthly payments to Appellant, ceasing May of 2017. (R.p. 316, Depo. Pg. 63, ln 11–64, ln 24). Smith made payments to Appellant until she made a large lump sum payment repaying the remainder she owed in March of 2017. (R.p. 91; 638; 640).

February 6, 2017, Inman sold Elrod for $100,000.00 (R.pp. 675-678) and deposited the proceeds of sale of $99,317.71 (hereinafter "Proceeds of Sale") in Inman's Bank account bearing the last four digits 2952. (hereinafter "Inman Account") (R.pp. 481-490). About February 14, 2017, Inman made her monthly payment to Appellant (R.p 637; 479-80). March 21, 2017,

[3] July 7, 2015, Inman emailed the same offer to deed again. (R.p. 139)

[4] Inman lived in Elrod for a time, but thereafter for a period of years she rented it at a loss. (R.pp. 309-310).

[5] Damages Appellant is seeking from Smith in Civil Action 2017-CP-10-5427 (hereinafter "Smith Matter").

Appellant emailed Inman: "It has come to my attention that 316 Elrod has been sold. Please let me know how you intend to make payments on the equity line moving forward – will there be a lump sum payment made or will you continue to make monthly payments?" (R.p. 640). March of 2017, Inman made her monthly payment to Appellant (R.pp. 479-80). March 27, 2017, Appellant emailed Inman: "Please let me know if you will be continuing to make interest-only payments on the account or how you will be proceeding. Patricia has recently made a $13,518 payment." (R.p. 642). April 4, 2017, Appellant emailed Inman: "I am following up again regarding the equity line and the Elrod . . . please call me. . ." (R.p. 641). April 6, 2017, Inman emailed Appellant:

> "What is the current balance as of this email? Please include a break down of how family services arrived at the calculation. Also, please advise what the charge was for on December 14, 2016, Hazard Insurance Premium Payment. . . What is this charge and by whom was this charged, How often was and/or is it being charged? Additionally, what is the current interest rate as of this email?" (R.p. 641).

April 10, 2017, at 9:23 AM Appellant responded:

> The Hazard insurance was a Patricia issue where Wells Fargo required that proof of homeowners insurance be provided to them. She took a while getting that information submitted. . . Once the proof of coverage was finally submitted, they refunded those charges. The current balance is $131,237.90 and the current interest rate is 4.9%. Patricia took out $15,000.00 three years ago and has paid $16,958.00. I have run this into an amortization chart and concluded that her portion of the debt has been met. Since Elrod has been sold, please let me know your intentions with this equity line. Will you be using the proceeds from the sale to pay down your portion of this loan? The sooner we can untangle this co-mingled loan, the better off for all parties. (R.p. 638).

April 10, 2017 at 8:19 PM, Inman responded:

> "Would you please send me the documentation (break down) of how you/family services/ Wells Fargo arrived at the current balance of $131,237.90 and the proof that Patricia paid the $16,958.00?" (R.p. 638).

April 10, 2017, at 9:18 PM Appellant responded:

> "I called Wells Fargo to get the current loan balance and have kept a spreadsheet of all of Patricia's payments to Family Services, which were then forwarded to Wells Fargo – just as yours have been. Both parties had been making regular monthly payments. However at this point, your portion is overdue. Please advise how you will be proceeding. Thank you." (R.p. 638).

April 11, 2017, Inman responded: "The payment for April was mailed. . . Please send me the documentation. There seems to be a discrepancy in calculations with regard to the balance?" (R.p. 638). April 17, 2017 at 7:50 AM, Inman wrote: "I'm going to try and call you at noon today to discuss the payments." (R.p. 645). April 17, 2017, Inman called Appellant and offered to pay Appellant all the Proceeds of Sale, $99,317.71, but requested Appellant not require Inman to continue making monthly payments. Appellant told Inman she would have to continue to make monthly payments because at the time Inman owed Clarkin over $131,000. Appellant told Inman she would send Inman Appellants accounting for the amount owed because Inman believed she owed less to Clarkin. (R.pp. 150-54; 308-09; 646-52). April 20, 2017, Inman emailed Appellant: "[P]lease advise soonest, the feedback from Wells Fargo/Family Services regarding our phone discussion. . ." (R.p. 644). April 20, 2017, Appellant responded: "As we discussed, I will send you a copy of the current equity statement when I receive it." (R.p. 644). Thereafter, Inman never made a monthly payment to Appellant again.

August 16, 2017, Honorable Tamara C. Curry, Probate Judge, signed Appellant's petition to retain counsel to initiate this action against Inman (R.pp. 730-31). September 2, 2017, Inman gave Kennedy the remainder of the Proceeds of Sale in her possession by drafting a $85,000 check from the Inman Account to Kennedy (hereinafter "9/2/17 Transfer" or "Transfer") (R.pp. 306-08, 481, 492). At the time Inman and Kennedy knew Appellant claimed Inman owed Clarkin the Disputed Funds. Inman did not retain sufficient funds to repay Clarkin the Disputed Funds (R.pp. 263 ¶ 106; 286 ¶ 59). Appellant filed this action against Inman October 20, 2017, seeking repayment of the Disputed Funds and an award of prejudgment interest (R.pp. 244-55).[6] October

[6] Cause of Action plead were conversion, unjust enrichment, money had and received, promissory estoppel, quantum meruit, and breach of contract. (R.pp. 244-55).

20, 2017, Appellant also filed the Smith Matter.[7] October 31, 2017, Inman was served. (R.p. 596). November 2, 2017, Kennedy purchased in her own name, $67,000.91 of Apple Inc. stock from Fidelity Investments (hereinafter "Apple Stock"), using the Proceeds of Sale (R.pp. 588-95). Kennedy also contemporaneously paid Bruce Berlinsky (hereinafter "Berlinsky") to represent Inman in this matter (R.pp. 272 ¶ 76; 284 ¶ 40).

Procedural History

December 13, 2017, Inman filed an answer without asserting affirmative defenses or counterclaims (R.pp. 256-60). January 26, 2018, Appellant served Inman with interrogatories and requests for production and admission. February 20, 2018, Inman served deficient admission responses. February 28, 2018, Appellant served Inman a letter asserting some responses were deficient, requesting amended responses and initial responses to interrogatories and requests for production. March 20, 2018, Appellant filed a motion to compel discovery (R.pp. 26-47). April 16, 2018, Inman served deficient responses to the interrogatories and requests for production. April 20, 2018, Appellant served Inman a letter asserting deficiencies in Inman's responses, requesting amended responses and amend responses to admissions. (R.pp. 408-43). June 19, 2018, a hearing on the motion to compel was heard by the Honorable Jennifer B. McCoy. The Court ordered Inman produce amended responses within fifteen days (hereinafter "Compel Order") (R.pp. 2-4) including to identify and produce the location of the Proceeds of Sale (R.pp. 296-97).

July 24, 2018, Inman served partial discovery responses but failed to comply with most of the Compel Order (R.pp. 159-70). November 3, 2018, December 29, 2018, and February 1, 2019, Appellant emailed Berlinsky requesting Inman comply with the Compel Order, but received no response. Berlinksy emailed February 6, 2019, stating he thought the documents had been sent

[7] Smith Matter causes of action: declaratory injunctive relief, fraudulent conveyance, quiet title, conversion, unjust enrichment, money had and received, promissory estoppel, and quantum meruit (R.pp. 690-705).

(R.pp. 159-70). March 6, 2019, Inman produced a copy of receipts for purchase of the Apple Stock (R.pp. 54-57; 162-163; 589-591). The account holder's name was redacted so Appellant requested an unredacted copy (R.pp. 159-70). Inman's Deposition was scheduled and noticed for April 8, 2019, with a cover letter requesting Inman comply with the Compel Order (R.pp. 159-70). April 5, 2019, Inman produced an unredacted copy of Kennedy's Apple Stock statement and a payment history which Inman had created and provided to Berlinksy years earlier (R.pp. 56-57; 159-70; 304, 478-483; 597-603). April 8, 2019, at Inman's deposition she stated for the first time she had provided Kennedy a check for $85,000.00 from the Proceeds of Sale by the 9/2/17 Transfer.

April 12, 2019, Appellant filed a motion to amend the summons and complaint to add Kennedy as a necessary party. April 15, 2019, Appellant filed motions for partial summary judgment and for sanctions.[8] [9] August 9, 2019, Smith moved to intervene in this matter filing a memorandum in support (R.pp. 171, 444).[10] August 19, 2019, a consent scheduling order was filed (R.p. 5). August 29, 2019 in anticipation of the scheduled motion hearing Appellant filed additional exhibits in support of the motions for summary judgment and sanctions (R.p. 560). An Order relieving and substituting counsel for Inman was filed October 14, 2019 (R.p. 7). November 13, 2019, the Honorable Jennifer B. McCoy heard the motions for sanctions and summary judgment (R.p. 658). Judge McCoy took the motions for summary judgment under advisement and continued the motion for sanctions because Berlinksy was no longer counsel and had not been noticed of the hearing (R.p. 352). The motion to amend was concurrently granted by consent order

[8] The matter was called for trial April 22, 2019 and July 29, 2019, but continued due to the pending motion to add Kennedy as a necessary third party (R.p. 658).

[9] The Motion to amend the complaint to add Kennedy, the Motion for Sanctions and the Motion for Summary Judgement were scheduled to be heard July 29, 2019 and August 30, 2019, but Inman and/or Belinsky requested and was granted a continuance (R.pp. 658; 543-559)

[10] The motion was twice scheduled to be heard in the fall of 2019 and both times Smith requested and was granted a continuance (R.p. 658).

(R.p. 10).[11] The matter was called for trial the week of November 18, 2019, but continued because of the Order granting leave to add Kennedy as a defendant. December 3, 2019, Appellant's amended complaint was filed. December 13, 2019, Appellant filed a memorandum in opposition to the motion to intervene prior to the scheduled hearing which was subsequently continued (R.p. 493). December 20, 2019, an Order denying Appellant's motion for summary judgment was filed finding material issues of fact remained (R.p. 13). December 30, 2019, Inman filed the motion to strike two paragraphs of the amended complaint (R.p. 180). February 25, 2019, Kennedy filed her motion to dismiss (R.p. 194).

June 3, 2020, the Court noticed all counsel of record the motions to strike, to compel, to dismiss, for sanctions and to intervene would be heard the week of June 22, 2020, stating counsel should submit memorandum and if counsel wish the matter to be heard virtually they should make such a request (R.p. 520).[12] June 9, 2020, Appellant served notice of the motion for sanctions hearing on Berlinksy. (R.p. 540). June 22, 2019, Appellant filed and served on all counsel memorandums in opposition to the motions to dismiss, to compel, to strike, and to intervene (R.p. 662), and emailed the Judge's law clerk a copy of Appellant's amended memorandum in opposition to the motion to intervene attaching DeJong to the email (R.p. 521). June 22, 2019, Appellant emailed the Judge' law clerk, Berlinksy and other counsel a copy of a number of documents in support of Appellant's motion for sanctions including the motion, the transcript of the June 2018 motion to compel hearing, Appellant's counsel's affidavit for attorney's fees, additional exhibits filed August 29, 2019, a memorandum in opposition to Inman's motion for

[11] Berlinksy would not consent to the Motion to Amend, Inman's Subsequent counsel consented upon retention.
[12] Karen DeJong (hereinafter "DeJong") Smith's counsel never requested a hearing on the motion to intervene nor submitted any updated memorandum.

continuance filed August 29, 2019, and Inman's affidavit filed November 13, 2019 (R.p. 542). June 23, 2019, Berlinksy emailed a memorandum in opposition (R.pp. 615-19).

June 24, 2020, The Honorable Bentley Price heard Inman's motions to compel and to strike, and Appellant's motion for sanctions. The hearing was continued to resume June 30, 2020 (R.pp. 354, 377). Present were Inman's current counsel, Kennedy's counsel, Appellant's counsel, and Berlinsky. June 30, 2020, the hearing resumed and Kennedy's motion to dismiss was heard along with a continuation of the motions to strike and for sanctions (R.p. 380). July 9, 2020, the Court filed a form Order, without written basis for the orders which granted Kennedy's motion to dismiss, granted Inman's motion to strike, denied Inman's motion to compel, granted Smith's motion to intervene, and denied Appellant's motion for sanctions (R.p. 19). July 20, 2020, Inman filed a motion to reconsider the order granting Smith's motion to intervene (R.p. 211). July 20, 2020, Appellant filed a motion to reconsider the orders granting Kennedy's motion to dismiss, Inman's motion to strike, Smith's motion to Intervene, and denying Appellant's motion for sanctions (R.p. 214).[13] July 24, 2020, Inman filed an amended answer (R.p. 281). July 27, 2020, Iman filed a motion withdrawing Inman's motion to reconsider the order granting Smith's intervention (R.p. 243). July 30, 2020, the Court filed a form Order denying Appellant's motion to reconsider which states: "After the Motion to Reconsider was filed: The original motion granting Karen Dejong's Intervention is moot considering Patricia Smith intervention. The Motion to Reconsider all other motions is Denied (R.p. 22)." July 30, 2020, Appellant's counsel emailed Judge Price's law clerk, attaching counsel of record, stating: "Julie, I don't understand Judge

[13] 6/20/20, Appellant inadvertently filed its motion to reconsider in the Smith Matter, case number 2017-CP-10-5427 instead of this matter, case number 2017-CP-10-5426. The Court inadvertently accepted the motion in the Smith matter with the incorrect case number (R.p. 724). The next morning, upon Appellant's receiving the Court's notice of acceptance in the Smith matter, Appellant's counsel promptly contacted the court informing them of the mistake and refiled the motion in this matter (R.p. 214). Appellant's counsel also emailed counsel and court and informed them of the mistake (R.p. 656).

Price's Order on the Motion to Reconsider. Can you please clarify. . . as the [sic] Plaintiff's Motion to Reconsider the Motion to Intervene what is Judge Price's Ruling?" The email resulted in an email chain between Judge Price and counsel of record as to the basis for the Judge's ruling (R.pp. 653-657). August 15, 2020, Appellant, filed and served the notice of Appeal in this matter.

ARGUMENT

I. KENNEDY'S MOTION TO DISMISS

Brief Introductory Statement

It is undisputed Kennedy is in possession of the majority of the Disputed Funds. The court's last substantive order, prior to granting Kennedy's motion to dismiss, was a denial of Appellant's motion for partial summary judgment as to Inman's liability for all legal and equitable causes, based upon a finding genuine issues of material fact remained (R.p. 13). Thereafter Kennedy ambiguously moved before the court to grant her motion to dismiss because the court must find Appellant's legal and equitable causes of action against Inman lack merit based upon what Kennedy alleged was an unequitable act by Appellant.

Statement of Relevant Facts

Appellant alleges Kennedy offered to guarantee Inman repaid Clarkin if Clarkin lent Inman the Disputed Funds to purchase Elrod. Appellant alleges on or about January 27, 2015, Kennedy first met with Appellant regarding the conservatorship and Clarkin's finances and she informed Appellant of Clarkin's loan to Inman, stating that Inman was current on her payments and Inman was as of November 25, 2014, responsible for repaying $132,356.00 in principle to Clarkin.[14] Contemporaneous with the filing of the Complaint Inman made the 9/2/17 Transfer to Kennedy without Kennedy paying consideration for the Transfer. Appellant alleges Inman and Kennedy knew at the time of the Transfer Appellant claimed Inman owed Clarkin the Disputed Funds and

[14] November 25, 2014, is the date Smith withdrew $15,000.00 from the HELOC. Kennedy calculated what Inman's principle balance owed was from that date.

Inman did not retain sufficient funds to repay Clarkin. Kennedy paid Inman's retainer fees and costs to retain Berlinksy. November 2, 2017, two days after Inman was served, Kennedy took Proceeds of Sale form the Transfer and purchased the Apple Stock using an account with a third-party stockbroker titled in Kennedy's name. Neither Kennedy nor Inman, despite a history of regular communications with Appellant divulged to Appellant the 9/2/17 Transfer until April 5, 2019, despite the Compel Order. Based upon these acts and omissions Appellant asserted causes of actions against Kennedy for equitable lien, fraudulent conveyance, civil conspiracy, constructive trust, and unjust enrichment.

Kennedy filed the motion to dismiss asserting Appellant lacked standing because at present Clarkin is not listed as a title holder to Atlantic in the records for Charleston County.[15] Kennedy alleges because Inman offered to deed Elrod to Appellant in or around 2015[16], Appellant "cannot possibly recover on any of its equitable causes of action against Defendant Kennedy, because Plaintiff's refusal negates any equitable justification to claim the proceeds of the sale of the [Elrod]."(R.pp. 194-96). As to Fraudulent Conveyance Kennedy alleges the Transfer "cannot possibly be fraudulent since the Amended Complaint alleges the property was unconditionally offered to Plaintiff prior to sale."[17] As to civil conspiracy Kennedy alleges Inman's Deed Offer to Appellant in 2015, negates any possibility Inman and Kennedy's actions in 2017 regarding the Transfer and the nondisclosure thereof, sought to injure Appellant.

[15] A lis pendens is currently filed on Atlantic in relation to the Smith Matter where Appellant is seeking to declare the 11/18/14 Deed void.

[16] In 2015, Appellant responded to Inman's offer stating because the value of Elrod at the time was substantially less then what Inman owed Clarkin and because Inman was renting Elrod without making a profit accepting the deed to Elrod would only be a burden and not a benefit Clarkin. Thereafter Inman continued to make her monthly payments to Appellant and eventually sold Elrod two years later for $38,000 less than she had purchased it for.

[17] Appellant did not allege the offer was unconditional.

The motion was heard June 30, 2020 wherein Kennedy asserted under the standard of review that because Appellant quoted a statement from Inman's deposition in the Amended Complaint, then the court was obligated to take the veracity of that statement as a fact, namely that Inman's intent by the Deed Offer was to benefit Clarkin and would have been a benefit. Kennedy alleges because Inman made the Deed Offer and Appellant declined the Deed Offer, Appellant acted inequitably and is equitably estop receiving a finding of merit as to all causes of action against Inman. Kennedy further asserts this alleged inequitable conduct toward Inman derivatively estops a meritorious finding as to all of Appellant's causes of action against Kennedy. Kennedy alleges "Fraudulent Conveyance, obviously, is for the purpose of fraud. But since the proceeds of the property are the same legally as the property itself, by first offering the property to the plaintiff, they have negated the element of fraud."[18] As to Civil Conspiracy, Kennedy alleges the Inman 2015 Deed Offer totally negated all possibility Inman and Kennedy sought to injure or cause damage to Plaintiff at the end of 2017 and thereafter, through injurious acts and omissions by Inman and Kennedy toward Appellant. Kennedy stated: "So they did not conspire to harm her. If they had tried to harm her, they would never have offered or Ms. Inman would never have offered the property first to the plaintiff." (R.pp. 387-90).

Standard of Review

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.

[18] Intent to defraud is not an element necessary to prove a fraudulent conveyance without consideration.

The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245 (2007) "A Rule 12(b)(6) motion should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved at trial in support of his claim. The function of a motion to dismiss is to test the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *In re Derivium Capital, LLC*, 380 B.R. 429, 435 (Bankr. Ct. D. S.C. 2006)

Argument

A. Fraudulent Conveyance

"Under § 27-23-10, a transfer made without valuable consideration will be set aside as a fraudulent conveyance if the grantor was indebted to the plaintiff at the time of the transfer and the grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect. If there is valuable consideration, the transfer will be set aside only where the grantor was indebted at the time of the transfer and had an actual intent to defraud creditors imputable to the grantee." *Future Group, II v. Nationsbank*, 478 SE 2d 45, 48-49 (1996). "The Statute of Elizabeth provides: Every gift, grant, alienation, bargain, transfer . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages . . . must be deemed and taken ... to be clearly and utterly void." *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). "Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony. . .

Fraudulent intent in such instances can usually be shown only by a consideration of the attendant facts and circumstances, a resort to which must usually be had in order to distinguish between transactions which are bona fide, and those which are not. The Courts frequently must resort to evidence or circumstances which are not properly explained, when such circumstances lead to the belief that a fraudulent intent was present. . . Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as "badges of fraud". The badges tend to excite suspicions as to the bona fides of a challenged conveyance. Unexplained, they may warrant an inference of fraud. . . Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, [and] the reservation of benefit to the transferor. . . Although it has been said that a single badge of fraud may stamp a transaction as fraudulent, it is more generally held that while one circumstance recognized as a badge of fraud may not alone prove fraud, where there is a concurrence of several such badges of fraud an inference of fraud may be warranted." *Coleman v. Daniel*, 261 S.C. 198, 208-210, 199 S.E.2d 74 (1973).

In this case Kennedy did not pay consideration for the 9/2/17 Transfer and thereafter on November 2, 2017, two days after Inman was served, Kennedy took more than $67,000.00 dollars of the funds from the Transfer and purchased Apple Stock held by a third party stock broker titled in Kennedy's name.

Without consideration there is no requirement to show actual intent to defraud in pleading fraudulent conveyance. (Am. Com ¶ 115; Inm Am. Ans ¶ 66). Kennedy is Inman's mother and Iman admits they have a confidential and/or fiduciary relationship. (R.p. 276 ¶115; 286 ¶66). The

law imposes the burden on Kennedy to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence, which Kennedy has not met. Inman admits Kennedy and Inman knew at the time of the Transfer Appellant claimed Inman had an obligation to repay Clarkin the Disputed Funds (R.pp. 266, 275 ¶¶32, 105, 106; 283, 286 ¶¶18, 58, 59). Inman did not retain sufficient funds to repay Clarkin after the Transfer. (Rpp. 277 ¶116; 287 ¶ 67). Appellant plead the elements necessary to assert fraudulent conveyance. Inman even concedes in her answer to the Amended Compliant all of the elements of fraudulent conveyance have been met save for her obfuscating response to Appellant's allegation Inman failed to retain sufficient funds to repay Clarkin.[19]

Although no consideration was paid for the 9/2/17 Transfer, if the element of intent to defraud was required, facts as alleged in the Amended Complaint and supported by Inman's answer to the Amended Complaint establish a sufficient number of badges of fraud occurred in this circumstance. The court should have found Appellant plead a satisfactory cause of action for fraudulent conveyance even if intent to defraud was a required element. Appellant plead and Inman admitted Inman and Kennedy knew at the time of the Transfer Appellant claimed Inman owed Clarkin more than $131,000. Appellant alleges Inman failed to retain sufficient funds to repay Clarkin. Appellant plead and Inman admitted Kennedy paid Inman no consideration. Appellant plead and Inman admitted a confidential and fiduciary relationship existed between Inman and Kennedy. Inman knew Appellant claimed she was obligated to Clarkin and Inman made the Transfer to Kennedy after Appellant's counsel was retainer and just prior to Appellant filing this action. It can be inferred Inman feared the pendency or threat of litigation. Appellant plead and Inman admitted she transferred the entirety of the Proceeds of Sale which remained her possession.

[19] July 24, 2020 Inman filed her answer to the amended complaint. The court did not file the Order denying Appellant's Motion to Reconsider until July 30, 2020.

(R.pp. 274-75 ¶¶ 89, 104, 105; 285-86 ¶¶ 48, 58). Finally, Appellant plead and Inman admitted despite the Transfer Kennedy was retaining the $85,000 and/or the Apple Stock for the benefit of Inman. (R.pp. 271, 274-75 ¶ 71, 94 104; 284, 286 ¶¶ 38, 58). Appellant plead evidence of five generally recognized badges of fraud, which Iman concedes are true. Appellant plead sufficient allegations as to Fraudulent Conveyance. It was an error of law to grant Kennedy's Motion to dismiss Appellant's cause of action for Fraudulent Conveyance.

B. Civil Conspiracy

"The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. . . in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. . . An unexecuted civil conspiracy is not actionable. The conspiracy becomes actionable, however, once overt acts occur which proximately cause damage to the plaintiff." *Hackworth v. Greywood at Hammett, LLC,* 385 S.C. 110, 115, 682 S.E.2d 871 (Ct. App. 2009)(citations omitted). "[I]n civil actions the conspiracy is not the gravamen of the charge, but may be both pleaded and proved as aggravating the wrong of which plaintiff complains." *Todd v. SC Farm Bureau Mut. Ins. Co.,* 276 S.C. 284, 292, 278 S.E.2d 607 (1981). "Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence . . . The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. An unlawful act is not a necessary element of the tort. Because

the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505 (2006). "An action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues. . . Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 610, 538 S.E.2d 15 (Ct. App. 2000). In *Benedict College v. Credit Sys*, the court addressed how attorney's fees and costs can constitute special damages in a civil conspiracy cause of action stating: "Here, the damages NCS sought under the civil conspiracy claim did not overlap with the damages sought under its breach of contract claim against the College. Under its civil conspiracy claim, NCS sought to recover "the costs and attorney's fees associated with the defense of the College's allegations. Thus, while the contract claim could be construed to seek the costs and attorney's fees NCS incurred to prosecute the College's alleged breaches of the Collection Agreement, it could not be construed to seek the costs and fees NCS incurred in defending against the College's claims. Accordingly, the circuit court erred in finding NCS's civil conspiracy claim sought the same damages as its breach of contract claim." 400 S.C.538, 546-547, 735 S.E.2d 518 (Ct. App. 2012). Moreover, attorney's fees and costs are neither recoverable damages or even awardable in a cause of action for fraudulent conveyance. *See. Judy v Judy* 403 S.C. 203, 742 S.E.2d 672 (Ct. App. 2013).

Appellant plead Inman contemporaneous with Appellant filing the complaint in this matter made the Transfer to Kennedy. Kennedy did not pay Inman consideration. November 2, 2017, two days after Inman was served Kennedy took the majority the funds from the Transfer and purchased Apple Stock held by a third-party stockbroker titled in Kennedy's name. These allegations

Appellant also plead in its cause of action for fraudulent conveyance. However, in support of its cause of action for Civil Conspiracy Appellant also plead additional overt acts which Inman and Kennedy undertook in furtherance of the conspiracy and which are the proximate cause of Appellant's special damages. The additional overt acts are: 1) Inman and Kennedy by secrecy or concealment and in a covert and clandestine nature failed to disclose the Transfer to Appellant for over a year and an half despite discovery demands and the Compel Order. (R.p. 276 ¶ 115). 2) Appellant plead and Inman admits Kennedy paid *all* of Inman retainer fees and costs for Inman's representation in this matter up to present. (R.pp. 272, 275, ¶¶ 76, 77, 105, 106, 121; R.pp. 284, 286 ¶¶ 40, 58, 59, 69). Neither of these allegations are factual allegations upon which Appellant relies for seeking relief under its cause of action for Fraudulent Conveyance or any other cause of action. Appellant alleges but for these two overt actions intended to hinder and delay Appellant's ability to prosecute this action to a conclusion, Appellant would have already been afforded a final merits hearing over a year ago. (R.pp. 277-78 ¶¶ 122, 123; R.pp. 508-09, 514-16; R.pp. 396-398). Further Appellant alleges special damages, in addition to the damages of delay in prosecuting this action, in the form of attorney's fees and costs incurred in prosecuting this action against Kennedy, which would not have been incurred but for the additional overt actions of conspiracy between Inman and Kennedy to injure Appellant. Appellant adequately plead a cause for civil conspiracy. Further Appellant is entitled to plead causes in the alternative. It was an error of law for the court to grant Kennedy's Motion to Dismiss Appellant's cause of action for civil conspiracy.

C. Unjust Enrichment

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff."

Dema v. Tenet Physician Services-Hilton, 383 S.C. 115, 123,678 SE 2d 430 (2009). "The remedy for unjust enrichment is restitution. To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Inglese v. Beal*, 403 S.C. 290, 297, 742 SE 2d 687 (Ct. App. 2013). "To be conferred nongratuitously, the plaintiff must confer the benefit either (1) at the defendant's request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and the defendant understands or ought to understand that the plaintiff expects compensation and looks to him for payment." *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221 (Ct. App. 2012)

Kennedy is Clarkin's daughter and Inman's mother. Inman concedes a confidential relationship exists between Inman and Kennedy. (R.pp. 276 ¶ 114; R.p. 286 ¶ 66). Appellant plead prior to Clarkin loaning Inman the Disputed Funds, *and in order to entice*, Clarkin to loan Iman the Disputed Funds, Kennedy stated to Clarkin in the presence of third parties Kennedy would guarantee Inman's repayment of the Disputed Funds (R.p. 270 ¶ 69). Appellant plead in January of 2015, when Appellant first began acting as conservator, Kennedy was the first to inform Appellant of the existence of the agreement and acknowledged Inman's obligation to repay Clarkin. (R.p. 271 ¶ 70). Appellant plead Inman, Kennedy and Clarkin all agreed Clarkin would loan Inman the funds to purchase Elrod, providing Inman a period of time to subsequently procure financing in Inman's name secured by Elrod, which Inman would then use to repay Clarkin. Appellant plead Inman, Kennedy and Clarkin agreed Elrod would expressly or impliedly serve as security for the obligation to repay Clarkin the Disputed Funds, and that this agreement created a duty and obligation between Inman and Kennedy to Clarkin, (R.p. 273 ¶¶ 81-86). Appellant plead

Kennedy derived a benefit from the agreement between Inman, Kennedy, and Clarkin. (Am. Com R.p. 273¶ 83). In February of 2017, Inman sold Elrod for $99,317.71, and on September 2, 2017, transferred $85,000 of the Proceeds of Sale to Kennedy by the Transfer. November 2, 2017, Kennedy took the funds from the Transfer and purchased the Apple Stock holding it for the benefit of Inman. (R.pp. 274 ¶¶ 89,92-94; R.p. 285 ¶¶ 48, 51).

Appellant plead the Disputed Funds belong to Clarkin and in justice out to be repaid to Appellant. Appellant plead upon Kennedy's request Clarkin agreed to loan the Disputed funds to Kennedy's daughter to purchase Elrod. Appellant plead Kennedy realized both the benefit of Clarkin making the loan to Kennedy's daughter and further received the benefit, through the Transfer, of possession of the majority of the Proceeds of Sale. Kennedy further received the benefit of having invested those Proceeds of Sale in her own stock accounts realizing the gains that have occurred from that stock over the last 3 years. Appellant clearly plead a non-gratuitous benefit was conferred upon Kennedy from which Kennedy realized a benefit in a circumstance which is was reasonable for Clarkin to expect repayment of the benefit Kennedy had requested, but Kennedy has retained the benefit which in justice and equity should be paid to Appellant as conservator for Clarkin. It was an error of law to grant Kennedy's Motion to Dismiss Appellant's cause of action for unjust enrichment.

D. Constructive Trust

"[A]n action to declare a constructive trust or establish an equitable lien is in equity. . . the appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Doe v. Roe*, 475 S.E.2d 783, 784 (Ct. App. 1996). "A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. A constructive trust arises

whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty. Generally, fraud is an essential element giving rise to a constructive trust, although it need not be actual fraud. In order to establish a constructive trust, the evidence must be clear and convincing." *McNair v. Rainsford*, 330 S.C. 332, 356-57, 499 S.E.2d 488 (Ct. App. 1998). "[E]quity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust. Further, a constructive trust is permitted to be proved by parol evidence despite the statute of frauds." *Whitmore v. Adams*, 273 S.C. 453, 457-58, 267 S.E.2d 160 (1979) "A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy." *Doe*, 475 S.E.2d 786-87. "A confidential or fiduciary relationship exists when one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 500, 392 SE 2d 789 (1990). "Confidential relation. A fiduciary relation. It is a peculiar relation which exists between . . .principal and surety, landlord and tenant, parent and child, . . . appointor and appointee under powers. In these and like cases, the law, in order to prevent undue advantage from the unlimited confidence or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties. It is not confined to any specific association of parties. It appears when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence,

or, on the other, weakness, dependence, or trust, justifiably reposed. The mere existence of kinship does not, of itself, give rise to such relation. It covers every form of relation between parties wherein confidence is reposed by one in another, and former relies and acts upon representations of the other and is guilty of no derelictions on his own part." *Chapman v. C&S Nat. Bank of SC*, 302 S.C. 469, 476, 395 S.E.2d 446 (Ct. App. 1990). "A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption." *Gordon v Busbee*, 397 S.C. 119, 140, 723 S.E.2d 822 (2011).

Kennedy is in possession of a majority of the Disputed funds which Kennedy acquired through the Transfer and then Kennedy converted a majority of the Transfer funds to the Apple Stock. Appellant plead the existence of five badges of fraud associated with the Transfer. Appellant plead the existence of a principal and surety relationship between Clarkin and Kennedy (R.p. ¶ 69). Kennedy during the motion hearing noted to the court that a landlord tenant relationship exists between Kennedy and Clarkin. (R.p. 384, lns. 14-22). Appellant plead as a result of the agreement between Kennedy, her mother Clarkin, and Inman, Kennedy owed duties to Clarkin regarding the agreement. (R.p. 273 ¶ 84). The pleadings before the court evidence the existence of a confidential relationship between Clarkin and Kennedy. Therefore, the burden of proving the imposition of a constructive trust over the Disputed Funds and/or Apple Stock, which are in Kennedy's possession should be shifted to Kennedy, to present evidence to rebut the

presumption she did not acquire the Disputed Funds and/or Apple Stock through undue influence. Appellant sufficiently plead a cause for constructive trust. It was an error of law to grant Kennedy's motion to dismiss Appellant's cause of action for constructive trust.

E. Equitable Lien

"In equity, to charge property means to impose a burden, duty, obligation or lien; to create a claim against the property. A charge is a lien, incumbrance, or claim which is to be satisfied out of the specific thing, or proceeds thereof, to which it applies. A lien is not property in the thing to which it attaches, but more properly constitutes a charge upon the thing." *First Federal of Charleston v. Bailey*, 450 S.E.2d 77, 80 (1994) "An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be proceeded against in equity for payment of a claim. For an equitable lien to arise as to specific property, there must be a debt, a duty or obligation owing from one person to another, a res to which the obligation attaches, which can be described with reasonable certainty, and an intent, expressed or implied that the property serve as security for the payment or obligation. *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244 (Ct. App. 1985). "An equitable lien is a mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered. Even though an equitable lien is not judicially recognized until a judgment is entered declaring its existence, the lien relates back to the time it was created by the conduct of the parties. . . Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. For one to have notice of an outstanding equitable interest, one need not know the identity of the third party or the extent of his interest. It is sufficient

that one either knows or ought to know that some third-party interest exists." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 250-52, 715 S.E.2d 348 (Ct. App. 2011)

Clarkin provided the Disputed Funds to Inman to purchase Elrod. Appellant plead the agreement between, Kennedy, Iman and Clarkin was Clarkin would provide Inman the funds for a time to allow Iman the time to procure financing in her own name secured by Elrod and then Inman would use the funds she financed with Elrod as security to repay Clarkin. Appellant plead it was agreed between Kennedy, Inman, and Clarkin that Inman would make the monthly required payments under the terms of the HELOC until Inman repaid Clarkin. Appellant plead Kennedy was the first to inform Appellant of the agreement January of 2015, informing Appellant that as of April of 2014 Inman was obligated to repay Clarkin more than $132,000, and at the time Inman was current in making the monthly payments. Inman made monthly payments for nearly a decade. Shortly after Appellant became conservator in 2015, Inman made the Deed Offer to Appellant, but Appellant declined saying that it would be a burden and not a benefit to Clarkin and noting that value of Elrod at the time was significantly less than the amount Inman owed Clarkin. In February of 2017, Inman sold Elrod for $37,000.00 dollars less then she had purchased Elrod for in 2008. Given Inman purchased Elrod just prior to the national mortgage foreclosure crisis and great recession, coupled with the sale price of Elrod in 2017, it can be inferred that from 2008 to 2017 Inman was unable procure financing in an amount based upon the equity value of Elrod as security that would have been sufficient to repay Clarkin the Disputed Funds. Inman placed the Proceeds of Sale in the Inman Account. After the sale of Elrod Inman made her monthly payments to Appellant for February, March and April of 2017. After making her April payment to Appellant Inman offered to pay Appellant all the $99,317.71, Proceeds of Sale but did not do so. In April of 2017, Inman was responsible for paying Clarkin $131,237.90. It is undisputed, after offering to

pay Appellant the Proceeds of Sale, Inman has not paid Appellant or Clarkin anything. September 2, 2017, Inman drafted a check from the Inman Account to Kennedy in the amount of $85,000, which was derived from the Proceeds of Sale. Kennedy and Inman knew in September of 2017, that Appellant claimed Inman owed Clarkin $131,237.90. November 2, 2017 two days after Inman was served in this matter Kennedy took $67,000.91 and of the funds from the 9/2/17 Transfer and purchased the Apple Stock titled in Kennedy's name.

Appellant plead specific funds were used to purchase Elrod and it was agreed Elrod would stand as security for the funds, with Kennedy additionally guaranteeing repayment of the funds. Appellant plead previous statements made by both Kennedy and Inman evidence Kennedy and Inman's acknowledgement of the obligation to repay Clarkin. Inman sold Elrod and the Proceeds of Sale can be traced directly from the sale to deposit in the Inman Account. Then the vast majority of the Proceeds of Sale can be traced from the Inman Account to Kennedy's possession via the Transfer. Finally, the majority of the funds from the Transfer can be traced from the Transfer to Kennedy's Apple Stock purchase. Appellant adequately plead a cause for equitable lien. It was an error of law to grant Kennedy's motion to dismiss Appellant's cause of action for equitable lien.

F. Standing

"[T]he United States Supreme Court [in] Lujan set forth the "irreducible constitutional minimum of standing," which consists of the following three elements: First, the plaintiff must have suffered an `injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not `conjectural' or `hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." Third, it must be `likely,' as opposed

to merely `speculative,' that the injury will be `redressed by a favorable decision.'" *Spaw v. SC Dept. of Nat. Resources*, 345 S.C. 594, 601, 550 S.E.2d 287 (2001).

Kennedy alleges Appellant lacks standing because the 11/18/14 Deed alleges to transfer Clarkin's remaining interest in Atlantic to Smith. Title to Atlantic is not an injury for which Appellant is seeking relief in this matter,[20] and does not have a causal connection to the subject matter in dispute.

Appellant standing in the shoes of Clarkin is a real party in interest who has suffered an injury in fact. Kennedy is possession of a majority of the Disputed Funds. The injury is the loss of Disputed Funds caused by Inman and Kennedy not repaying Clarkin the Disputed Funds. Additional injuries are the damage caused to Appellant by having to prosecute this action against Kennedy and delays which the Transfer and the subsequent failure to disclose the Transfer have caused Appellant in being able to prosecute this action. These damages would not have occurred but for the acts of Kennedy and Inman regarding the Transfer and the subsequent concealment of that fact. Finally, based on the record before the court Appellant would assert the court will find in Appellant's favor at a final hearing on the merits. Appellant has standing to prosecute its causes of action against Kennedy. To the extent the Court based its ruling on a lack of standing it was an error of law for this court to grant Kennedy's Motion to Dismiss.

G. Alleged Inequitable Conduct of Appellant.

"Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations. . . Although these `maxims' were generalizations of experience based on the results of prior cases, they eventually developed into a loose set of `rules' designed to bring some coherency to the body of decided cases and some consistency to future decisions. Maxims

[20] Appellant is seeking to have the 11/18/14 Declared void in the Smith Matter.

developed, at least in part, to reflect the attempt by the courts of equity to create guiding principles, in the same way that the legal courts developed binding precedent. . . Thus, we view maxims only as offers of guidance in equitable cases." *Regions Bank*, 394 S.C. at 249. "A party claiming equitable estoppel must show: 1) a lack of knowledge and the means of knowledge of truth as to facts in question; 2) justifiable reliance upon the conduct of the party estopped; and 3) prejudicial change in the position of the party claiming estoppel. Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. *Evins v. Richland County Historic Preservation Com'n*, 341 S.C. 15, 532 S.E.2d 876 (2000). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372 (Ct. App. 1998). "The expression `clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others. The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity." *Wachovia Bank, NA v Coffey*, 398 S.C. 68, 75, 698 S.E.2d 244 (Ct. App. 2010). "[E]quity only intervenes when the circumstances so require, but to do so, a court must be aware of all of the circumstances before it acts. Thus, the parties must be allowed to develop the record accordingly." *Mr. T v. Ms. T.*, 378 S.C. 127, 135, 662 S.E.2d 413 (Ct. App. 2008).

The foundational thread throughout Kennedy's motion to dismiss is Kennedy's false allegation the Amended Complaint uncontrovertibly alleges that in or around 2015, Inman made an unconditional Deed Offer to Appellant and Appellant by declining to accept the Deed Offer, must be found to be equitably estopped from recovery as to causes both legal and equitable which Appellant has asserted against both Inman and Kennedy. This includes causes with allegations of

actions and inactions of Inman and Kennedy in 2017 and thereafter. Kennedy asserts under the standard of review the court must accept as true the veracity of Inman's quoted deposition testimony in paragraph 88 of the Amended Complaint. Inman testified by making the Deed Offer she intended to benefit Clarkin and had Appellant accepted it would have been a benefit.

To the extent the circuit court granted Kennedy's motion to dismiss based upon a finding Appellant must be equitably estopped from prevailing on its causes of action against Kennedy, such a ruling was an error of law for four reasons. First, the court should only apply equitable estoppel or unclean hands as a defense to relief sought upon the parties having fully developed the record and the court becoming aware of all the circumstances. A motion to dismiss is not an appropriate stage to grant such relief. Second, Kennedy has not presented evidence of grounds for Appellant to be equitably estopped from asserting causes of action against Kennedy. Inman made the Deed Offer to Appellant who declined stating it would be of no benefit to Clarkin. Kennedy has not established she lacked knowledge of this. Kennedy did not justifiably rely on Appellant declining the Deed Offer to Kennedy's detriment and was not prejudiced by this act. Kennedy did not change her position based upon Appellant declining the Deed Offer. Kennedy's knowledge of the situation in 2015 was not any different then Appellant's. Both parties understood that until Inman repaid Clarkin she had to make the monthly payments which Inman did through April of 2017. Appellant did not mislead Kennedy. Third, Kennedy has not presented evidence Appellant acted with unclean hands regarding the agreement between Kennedy, Inman, and Clarkin, in any manner or misconduct which was prejudicial to Kennedy. Fourth, Appellant did not plead any terms of Inman's Deed Offer, including whether the offer was conditional or unconditional. Paragraph 88 quoted Inman's 2019 deposition testimony stating: "So I offered the home. I didn't want it to be a rental, but I thought it would be best if Family Services could deed it back – I deed

it back to them. They could then have it as a rental property. Not they manage it, but have a rental property management, have it as a rental property for my grandmother, as an asset to her, and use it as income for my grandmother." Appellant plead the quoted testimony to show in 2015 Inman by her own statements acknowledged to Appellant the existence of her obligation to repay Clarkin. For purposes of the motion to dismiss the court must accept as true that in April of 2019, two years into this litigation Inman made that statement. However, the court does not have to accept as true the veracity of Inman's stated intent. Prior to the hearing on the motion to dismiss Inman never asserted Appellant declining the Deed Offer amounted to inequitable conduct. There is no evidence or allegation before the court of a duty or obligation on the part of Appellant to have accepted the Deed Offer. The court has made no finding as to Inman's actual intent in making the Offer, nor a finding of any reliance by Inman on a misrepresentation by Appellant that Appellant would accept the Deed Offer. The Offer and Inman's intent in making the Offer has no bearing on whether Appellant by declining the Deed Offer acted with unclean hands towards Inman or Kennedy. Appellant noted at the hearing there was evidence already filed in the record of this matter that accepting title to Elrod would have been a burden and not a benefit to Clarkin (R.p. 395-96). Prior to Kennedy filing the motion to dismiss Appellant file a motion for summary judgment attaching to the motion Exhibit "E" which contains an email dated July 8, 2015, from Appellant to Inman wherein Appellant responds to Inman's Deed Offer stating: "Ms. Inman, Given that the property is upside down, the only thing that would do would be to put the burden of collecting payment [of rent] and maintaining the property onto Ms. Clarkin. There would be no actual benefit to her." (R.pp. 138-139). Prior to Kennedy filing the motion to dismiss Inman, on November 12, 2019, filed a copy of her entire deposition transcript in this matter wherein she testified that she did not generate any income from renting Elrod (R.p. 310).

The pleadings and records before the court contain sufficient allegations and evidence for the court to make inferences reasonably deducible therefrom, viewed in the light most favorable to Appellant, inferences which should have directed the court deny Kennedy's motion to dismiss based upon equitable estoppel, unclean hands, or some other supposed inequitable conduct on the part of Appellant. To the extent such was the basis for the court's ruling in granting Kennedy's motion to dismiss it was an error of law.

II. INMAN'S MOTION TO STRIKE ALLEGATIONS

Statement of Relevant Facts

From 2008 to April of 2017, Inman, pursuant the agreement with Clarkin made the monthly payments upon the monthly accrued finance charges for the HELOC. Appellant became conservator January of 2015, and Inman began making her monthly payments to Appellant in response to Appellant's monthly invoices to Inman. February 6, 2017, Inman sold Elrod and received the Proceeds of Sale of $99,317.71. February 14, 2017, Inman made her monthly payment to Appellant. March 21, 2017, Appellant emailed Inman asking if after the sale of Elrod she was going to continue making her monthly payments and/or make a large lump sum payment instead. Inman did not respond, but thereafter made her March monthly payment. March 27, 2017, Appellant again emailed Inman asking the same question, and emailed again on April 4, 2017. April 6, 2017, Inman emailed Appellant asking to provide the current amount it claimed Inman owed. April 10, 2017, Appellant responded again asking how Inman intended to make payments going forward. April 10, 2017, Inman responded asking for further clarification of how Appellant determined the amount it claimed Inman owed, to which, Appellant responded and noted Inman's payment for April was due. April 11, 2017, Inman responded the April payment was in the mail and noted she believed there was a discrepancy in the amount Appellant claimed Inman owed. April 17, 2017, Inman emailed that she would call Appellant to the discuss the payments. That

day, Inman and Appellant spoke on the phone and Inman offered to pay Appellant the entire Proceeds of Sale but requested she not be required to make any further payments. Appellant told Inman she would have to continue to make payments because at the time Inman owed Clarkin over $131,000. During the conversation Appellant told Inman she would send Inman Appellants accounting for the amount owed. April 20, 2017, Inman emailed asking about the accounting and Appellant's conversations with Wells Fargo with regards thereto. Appellant responded and said she would send the monthly statement when she received it from Wells Fargo. Appellant's case manager testified by Affidavit that at the time of the conversations she believed Inman and Appellant were having discussions as to the manner of payment. Though Inman was asserting discrepancies as to the amount owed, Appellant testified she had no reason to believe Inman disputed the existence of her obligation to repay Clarkin. Inman was current on her payments and had always made her monthly payments in the past (R.pp. 646-648). Inman never made a monthly payment to Appellant again.[21] Inman testified in her deposition as follows:

> Q. Did you ever think you should give some of that money back to your grandmother, the money from the sale of Elrod, the $99,000 you received in February of 2017? Did you ever believe that you should give some of that money back to your grandmother?
> A. Did I ever believe. Well, I did try --I've contacted Family Services, to Kelley, and I did try to offer the whole thing, the hundred -- the – or what I walked away -
> Q. The $99,000?
> A. Yeah, I did. I did make attempts to give that lump sum to them to show my appreciation for the gift, and they did not -- that was not enough. They did not want it.
> Q. Why did--
> A. They wanted whatever -- they wanted more than whatever their total balance was that they said was on my grandmother's loan.
> Q. So why didn't you just give them the 99 and say this is what I have?
> A. Because I chose not to. . .
> Q. Why did you choose not to?
> A. I chose not to.
> Q. Can you please give me a reason why you
> chose not to?

[21] The communications from March and April of 2017 are set forth in greater detail herein above with citations.

A. I don't like how -- okay, here's the real reason.
Q. Okay
A. I don't like how Family Services is managing my grandmother. And I feel like if I gave them the 97,000 --
Q. Ninety-nine.
A. Or whatever it was. Okay, y'all have that. Whatever it is, that bottom-line dollar amount, that they would totally mismanage that and blow it on legal fees or totally -- it wouldn't go towards my grandmother.
Q. Okay.
A. It wouldn't go truly towards taking care of my grandmother. It would go to pay you and her and whoever else they're suing.
Q. So that is why you chose not to give the $99,000 to Family Services?
A. Yes (R.pp. 308)

September 2, 2017, Inman made the Transfer to Kennedy. This matter was filed on October 20, 2017. December 13, 2017, Inman filed an answer and did not assert affirmative defenses or counterclaims. Inman was deposed in this matter April 8, 2019, and disclosed to Appellant, for the first time, the facts regarding the 9/2/17 Transfer. April 12, 2019, Appellant filed a motion to amend the complaint to add Kennedy as a necessary third party. April 15, 2019, Appellant filed a motion for summary judgment and attached to the motion as exhibits business records of Appellant regarding the 4/17/17 conversation and an Affidavit of Appellant's case manager testifying to the conversation. August 29, 2019, Appellant filed additional exhibits in support of Appellants motion for summary judgment including deposition excerpts. November 12, 2019, Inman filed the transcript of her deposition. November 13, 2019, at the hearing before the Honorable Jennifer McCoy, Inman's counsel asserted for the first time an objection to Appellants exhibits in support of the motion for summary judgment which related to Inman's April 17, 2017, statement offering Appellant the Proceeds of Sale. Inman asserted that they were settlement negotiations. Judge McCoy stated in response "This isn't evidence. This is an argument he's making. I mean, I understand what you're telling me, but I disagree with you, respectfully." (R.pp. 330-31) Inman consented to an order permitting Appellant file the amended complaint on November 13, 2019.

December 3, 2019, Appellant filed its amended complaint. December 30, 2019, Inman filed the motion to strike paragraphs 90 and 91 of the Amended Complaint asserting the allegations constitute evidence offers of settlement excluded under Rule 408, SCRE. The Paragraphs state:

> 90. Defendant offered to provide Plaintiff the Proceeds of the Sale of the Subject Property, but did not do so.
> 91. Defendant testified in her deposition that she offered Plaintiff the entire proceeds of sale of the Subject Property stating: "I did make attempts to give that lump sum to them to show my appreciation for the gift." (R.p. 308 lines 23-25).

Standard of Review

"A motion to strike language from a pleading, as irrelevant or immaterial, is generally within the discretion of the judge." *Sams v. Sams* 247 S.C.467, 469, 148 S.E.2d 154 (1966).

Argument

The motion was heard June 24, 2020 and the hearing was resumed June 30, 2020. June 24, 2020, Inman's counsel stated: "I think it's immaterial. And it's clearly not admissible evidence and they don't need to put it in there for one thing to prove their case. *If they want to try to prove that later on that's a decision for a trial judge. But I object to some materiality in this complaint and I don't think I should have to answer it.*" (R.p. 369 lns. 3-5). Appellant asserted four grounds for why the court should deny Inman's motion to strike: 1) Appellant did not allege the allegations for the purpose of proving the amount claimed owed. Appellant asserted the allegations in the Amended Complaint for the purpose of proving prior to this action Inman did not dispute the existence of her obligation to repay Clarkin, but after the action was initiated Inman asserts the Disputed Funds were a gift. The statements impeach Inman's subsequent statements in this action and go towards her credibility as a witness. Inman cannot on the one hand say she never believed an obligation existed because the disputed funds were a gift and at the same time claim her pre-litigation statements acknowledging the existence of the obligation should be excluded because they were settlement negotiations as to an obligation Inman now claims she never believed existed.

At the time of the statement there was no dispute as to the existence of the obligation that required resolution or settlement. Statements plead do not address an amount owed, but do impeach Inman's post litigation testimony. The pleadings are not settlement negotiations they are evidence of statements as to business negotiations over a lump sum payment versus monthly payments; 2) the statement was an admission against the interest of Inman which is also admissible for impeachment purposes; 3) striking pleadings is a drastic remedy, and the admissibility of the allegations is best left determined by a trial on the merits; and 4) pleadings are not evidence admissible to a jury for its deliberations.

July 9, 2020, the Court filed the form order granting Inman's Motion to Strike without written basis for the ruling. July 21, 2020, Appellant filed its motion to reconsider the order. Appellant in its motion to reconsider requested if the Court is unwilling to amend its Order to deny the Motion, the Court file an amended Order stating the Motion to Strike is granted, however, the Court is not making an evidentiary ruling as to the admissibility of evidence at a hearing or trial on the merits regarding Inman's statements or her intent in making said statement, as are alleged in Paragraph 90 and 91 of the Amended Complaint. Appellant quoted *Sams* "[W]e do not think that the rights of the parties should be determined by this court merely on the pleadings. We intimate no opinion as to the answers to the ultimate questions raised by the stricken defense. We hold simply and only that such questions should be decided, and can be decided much more soundly, in the light of all the facts and circumstances adduced upon the trial." *Sams*, 247 S.C.at 470-71." July 24, 2020, Prior to the Court issuing an order as to Appellant's motion to reconsider, Inman filed an answer to the amended complaint admitting the allegations of Paragraphs 90, 91. July 30, 2020 the Court filed a form four Order denying Appellant's motion to reconsider without written basis for the ruling. The July 30, 2020 Order does not address Appellant's request for an

amended order stating the court's Order should not be interpreted as an evidentiary ruling.[22] For the reasons set forth herein above as are more fully set forth in Appellant's memorandum in opposition to the motion to strike (R.p. 620), this Court should find the court abused its discretion in granting Inman's motion to strike. Further Appellant would request this Court explicitly find the court abused its discretion by failing to clearly state the order was not an evidentiary ruling as to the admissibility of evidence related to Inman's statements in offer of the Proceeds of Sale.

III. SMITH'S MOTION TO INTERVENE

Statement of Relevant Facts

August 7, 2013, Clarkin, through her attorney Gibson, recorded a deed in the RMC Office of Charleston County, which devised to Smith a half interest in Atlantic as joint tenants with rights of survivorship. Smith paid no consideration for the Deed and accepted the half interest with full knowledge Atlantic was encumbered by the Mortgage (R.pp. 524, 742). November 18, 2014, Smith recorded the 11/18/14 Deed, which was not drafted by Gibson, for which no consideration was paid. (R.p. 746). October 20, 2017, Appellant filed this matter and the Smith Matter. In the Smith Matter Appellant is seeking to have the 11/18/14 Deed declared void as well as seeking monetary damages for funds Smith improperly appropriated, converted to her own use and benefit, failed to repay, and/or which in justice and equity belong to Clarkin (R.pp. 706-720). Wells Fargo was a named defendant in the Smith Matter due to the Mortgage on Atlantic which secures the HELOC.[23] November 28, 2017, Smith filed an answer in the Smith Matter which did not assert an affirmative defense, counterclaim, or cross-claim (R.pp. 721-23). August 9, 2019, Smith filed

[22] Inman's counsel conceded at the hearing June 24, 2020, that admissibility of such evidence at trial is a trial judge determination. (R.p. 369 lns. 3-5). The Court by granting Inman's motion, without stating the Order is not an evidentiary ruling, appears to have made an evidentiary ruling at the pleading stage of the case, which a judge at a merits hearing may interpret as the law of the case.

[23] Wells Fargo was subsequently dismissed by consent order with the consent of Smith.

to Intervene (R.p. 171) in this matter by motion and memorandum (R.p. 444).[24] The motion to intervene was scheduled to be heard November 13, 2019 and December 16, 2019, in both instances Smith requested and was granted a continuance (R.p. 658). December 13, 2019, Appellant filed a memorandum in opposition to the motion to intervene. June 3, 2020, the Court noticed all counsel of record the motions to strike, compel, dismiss, for sanctions and to intervene would be heard the week of June 22, 2020. The court requested counsel submit memoranda and if counsel desired a virtual hearing to inform the court (R.p. 520). DeJong nor any other counsel of record requested a hearing on the motion to intervene. June 22, 2019, Appellant filed an amended memorandum in opposition to the motion and submitted its memorandums and exhibits, including Judge Youngs Order, to the court by email attaching DeJong (R.p. 521). July 9, 2020 the Court granted Smith's motion to intervene without written basis. July 30, 2020, the Court denied Appellant's motion to reconsider by Order stating: "After the Motion to Reconsider was filed: The original motion granting Karen DeJong's Intervention is moot considering Patricia Smith intervention. The Motion to Reconsider all other motions is Denied." Appellant's counsel, by email sought clarification of the Order. After an email chain between the parties counsels and Judge Price (R.pp. 653-57), clarity as to the order on the motion to intervene remained cloudy.

Standard of Review

"[T]he courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Pitts v. Jackson Nat. Life Ins.* 352 S.C. 319, 338, 574 S.E.2d 502 (Ct. App. 2002). "[T]he standard for review of a Rule 24(a)(2) motion is whether the judge abused his discretion in granting or denying the motion. The burden to show that the representation may be inadequate is

[24] DeJong began representing Smith in the Smith matter the end of May 2019; Appellant moved to disqualify DeJong as counsel July 2019 (R.p. 522) and DeJong was disqualified as counsel for Smith in the Smith matter by Order of Roger M. Young filed October 10, 2019 (R.p. 539).

on the applicant. . . Under Federal Rule of Civil Procedure 24(b), which is identical to the South Carolina Rule in all relevant respects, permissive intervention is wholly discretionary with the trial court and a court will be reversed on appeal only for abuse of discretion." *S.C. Tax Commission v. Union County Treasurer*, 295 S.C. 257, 260-62, 368 S.E.2d 72 (1988).

Argument

Intervention under Rule 24(a)(2), SCRCP

Rule 24(a)(2), SCRCP, states: "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties." "Accordingly, [Smith] must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that [she] is in a position such that without intervention, disposition of the action may impair or impede [her] ability to protect that interest; and (4) demonstrate that [her] interest is inadequately represented by other parties." *Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant,* 302 S.C. 186, 189, 394, S.E.2d 712 (1990) (citations omitted). "Intervention of right requires a direct, substantial, legally protectable interest in the proceedings. . . failure to satisfy any one of the four requirements precludes intervention." *Ex parte Reichlyn*, 427 S.E.2d 661, 664 (1993). "[A] party must have standing to intervene in an action pursuant to Rule 24, SCRCP. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a real party in interest. A real party in interest is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Ex parte Government Employee's Inc. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699

(2007). "[T]he prospective intervenor [must] demonstrate that without its intervention, the disposition of the case may impair or impede its ability to protect its interest. To meet that requirement, a party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene." *Berkeley Electric Cooperative, Inc.* 302 S.C. at 190. "Courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial." *Davis v. Jennings,* 304 S.C. 502, 504, 405 S.E.2d 601 (1991) (citations omitted). "[C]onstructive notice. . . is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts." *Anderson v. Buonforte,* 365 S.C. 482, 492, 617 S.E.2d 750 (Ct. App. 2005)

In *Ex parte Government Employee's Inc. Co.*, "GEICO brought a declaratory judgment action against Cooper to determine the parties' rights pursuant to an automobile insurance policy issued to Goethe. . . GEICO denied Cooper's claim, alleging that Cooper is not a Class I insured because he is neither the spouse nor resident relative of Goethe. After GEICO denied Cooper's claim to stack coverage, Cooper filed an action in family court seeking an order validating his common law marriage to Goethe since 1991. GEICO petitioned the family court to permit it to . . . intervene pursuant to Rule 24, SCRCP. As grounds supporting its motion, GEICO alleged that the family court's decision on the parties' common law marriage would impact GEICO's ability to protect its interests under the insurance policy issued to Goethe." The court stated: "We find that GIECO does not have "an interest relating to the property or transaction which is the subject of the

action" as required by Rule 24(a)(2), SCRCP. Additionally, we hold that the family court correctly found GEICO lacked standing because GEICO does not have an interest in the subject matter of the family court action. Stated differently, GEICO has no real interest in whether Cooper and Goethe have a valid common law marriage. GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court. This interest is insufficient to warrant GEICO's intervention in Cooper's family court action under Rule 24(a)(2), SCRCP. . . GEICO does not have standing to intervene in the family court action because it does not have an interest sufficiently related to the subject matter of the action." 373 S.C. at 134-39.

In *Bailey v Bailey*, the "case originated out of divorce proceedings between appellants, Joel Dean Bailey and Wanda Massey Bailey. Respondents, Attorneys Evander Jeffords and James T. McLaren, initially represented Ms. Bailey in the divorce action. Claiming an interest in a settlement arrived at between appellants without respondents' knowledge, the respondents successfully moved to set aside the family court order approving appellants' settlement agreement. [The Court] reverse[d] the rulings of the family court and vacate[d] the orders permitting respondents to intervene." The Court stated: "To have standing, a party must have a personal stake in the subject matter of a lawsuit. In South Carolina, a party must also be the 'real party in interest.' . . . In this instance, the real interest lies with the parties in the divorce action—the appellants—and they alone have a real proprietary interest in the subject matter of the proceedings. We find that respondents' interest as claimants asserting a right to attorney fees is peripheral and not the real interest at stake. Therefore, we hold that respondents lack standing to intervene in appellants' lawsuit." 441 S.E.2d 325 (1994). The possibility parties may settle an action resulting in a settlement in which the interest of the intervenor and the parties might clash is not sufficient for intervention as of right. *See. S.C. Tax Commission* 295 S.C. at 261-262.

Intervention under Rule 24(b)(2), SCRCP

Rule 24(b)(2), SCRCP, states: (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24, SCRCP. "Unlike subsection (a), subsection (b) authorizes permissive intervention by an applicant when . . . the applicant's claim or defense and the main action have a question of law or fact in common. To warrant intervention under Rule 24(b) an applicant should ordinarily show he . . . has a claim or defense involving a question of law or fact in common with the main action. A mere general interest in the subject matter of the litigation is not sufficient. . . The typical situation for which the Rule was designed is one where the prospective intervenor might institute or be called upon to defend a separate proceeding that would substantially duplicate the one in question. With this analogy to permissive joinder, it seems clear the better rule is that permissive intervention should be allowed only where the prospective intervenor has a cause of action or defense it could bring or assert. . . The above view is strengthened by the interpretation of the requirements of Rule 24(b) by the federal courts. Federal courts have held that a party seeking permissive intervention under a discretionary right must establish a basis for federal subject matter jurisdiction independent of the court's jurisdiction over the underlying action." *S.C. Tax Commission,* 295. S.C. at 262-64.

Rule 12(b)(8), SCRCP

Rule 12(b)(8), SCRCP, states: ""Every defense, in action or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (8) another action is pending between the same parties for the same claim." "The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; our supreme court traditionally interpreted that statute narrowly, stating that

it only applied when there was identity of parties, causes of action and relief. . . we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings . . .” *Capital City Ins. Co. v. BP Staff, Inc.* 382 S.C. 92, 105-06, 674 S.E.2d 524 (Ct. App. 2009)

A. Standing

Smith by motion asserted she should be permitted to intervene *because Atlantic is the subject of this action*, therefore if she is not permitted to intervene the disposition of the action may impair her ability to protect her interest in Atlantic. No real property, including Atlantic, is the subject of this action. The subject of this action is the agreement between Kennedy, Inman and Clarkin involving the Disputed Funds used to purchase Elrod. Further transactions which are the subject of this are the 9/2/17 Transfer and Kennedy and Inman’s acts and omissions thereafter in relation this action. Smith does not claim a direct interest in the Disputed Funds, she claims an interest in Atlantic, for which she paid no consideration and took title to with full knowledge the Mortgage. The HELOC is not the subject of this action. Only Clarkin and Wells Fargo are contractual parties to the HELOC. Appellant has not asserted Inman, Kennedy, or Smith are a privity party the HELOC and obligated to Wells Fargo under its terms. Smith does not have a legal interest the Disputed Funds or the HELOC[25].

Smith’s motion to intervene is analogous *Ex parte Government Employee’s Inc. Co.* and *Bailey*. Smith claims she should be entitled to intervene because she alleges to have an interest in financial implications of a settlement or final judgment in this matter. Smith does not have and has not asserted a cause of action or defense which would provide the court independent subject matter jurisdiction over such a cause or defense. Smith does not possess a legal interest in the financial implications of this matter, but for sake of argument if she did that interest would only be a mere

[25] The accounting history of the HELOC is evidence of the amount claimed owed for the Disputed Funds.

general interest, peripheral to the transactions which are the subject matter of this action. Smith has not alleged and cannot prove she has a direct, substantial, legally protectable interest in the subject matter of this action. Smith lacks standing to intervene in this matter under Rule 24(a) and 24(b), SCRCP. It was an error of law to find Smith had standing to intervene.

B. Timeliness

This matter and the Smith Matter were both filed October 20, 2017. Smith has had full knowledge of the existence of this matter since 2017, and an inference of constructive notice should be implied here. Smith did not move until August of 2019. Thereafter Smith sought to have the motion continued multiple times resulting in a delay in ruling until July of 2020. Smith has provided no reason for her delay. By the time Smith filed the motion Appellant and Inman had already exchanged discovery, Appellant had deposed Inman and the matter had twice been called for trial. Given the stage of litigation of this matter, allowing Smith to intervene would be prejudicial to Appellant. Additionally, Appellant will be prejudiced by intervention because it will unnecessarily confuse issues between this matter and the Smith matter. Appellant purposefully, sought to avoid that confusion by filing this matter and the Smith matter separately. Because Smith waited two years to file her motion, because Smith has not set forth a reason for delay, because of the stage of this litigation and because allowing Smith to intervene would cause Appellant great prejudice, Appellant would assert Smith's motion to intervene was untimely. It was an abuse of discretion for the court to grant Smith's motion to intervene.

3. Disposition of this matter will not impede Smith's ability to protect her interest.

The only interest Smith claims is in Atlantic which is not the subject of this action. No party has asserted any cause of action seeking relief as to anyone's title interest in Atlantic. Smith took title to Atlantic with full knowledge of the Mortgage and without paying consideration. Smith

has not alleged how the disposition of this matter will impair or impede Smith's title interest in Atlantic. It was an abuse of discretion for the court to grant Smith's motion to Intervene.

4. Rule 12(b)(8), SCRCP

In the Smith Matter Appellant is seeking to have the 11/18/14 Deed declared void, which would impact Smith's interest in title. In the Smith Matter Wells Fargo was a named defendant who appeared. If Smith wished to assert a cause of action regarding her interest in Atlantic then the Smith Matter was appropriate forum to do so. All of individuals claiming an interest in Atlantic Appellant, Smith and Wells Fargo, were already parties to the action. It was an abuse discretion by granting Smith's motion Intervene when she was precluded by Rule 12(b)(8), SCRCP.

IV. APPELLANT'S MOTION FOR SANCTIONS AS TO INMAN AND BERLINKSY

Statement of the Relevant Facts

January 26, 2018, Appellant served Inman with interrogatories and requests for production, and admission. February 20, 2018, Inman served Appellant with deficient admission responses. February 28, 2018, Appellant served Inman a letter as to the deficient responses, requesting amended responses, and initial responses to interrogatories and requests for production (R.p. 25). March 20, 2018, Appellant filed a motion to compel. (R.p. 25). April 16, 2018, Inman served responses to the interrogatories and requests for production. April 20, 2018, Appellant served Inman a letter as to her deficient responses, requesting amended responses as well as amended responses to the requests for admissions previously requested. (R.p. 408). June 19, 2018, a hearing on the motion to compel was heard by the Honorable Jennifer B. McCoy. The Court ordered amended responses within fifteen days of the Order (R.p. 2). June 19, 2018, the following statements were made:

Mr. Keys: The only other thing as to the where the money is right now I need to know more than an amount. I need to see a bank statement saying this is here or that it went to a mortgage because if I've got to –we're talking about a

hundred grand. If I have an issue of waste I need to be able to take further motions to address the court about that. . .
The Court: Okay. What do you say to that?
Mr. Berlinsky: Well, at this point it's her money. They haven't proved they are entitled to it. But I'll certainly –
The Court: --- do you have any problem ---
Mr. Berlinsky: -- I'll certainly let them know where the money is ---
The Court: --- providing the bank name that it's deposited ---
Mr. Berlinsky: --- yes, I'll let them know what bank it's in and ---
The Court: --- thanks, and we'll go from there ---
Mr. Berlinksy: --what's there.
The Court: Okay. All right. And the amount. . .(R.pp. 296 ln. 13 – 297 ln. 10)

July 19, 2018, Plaintiff sent Berlinsky a Notice of Deposition of Inman by certified mail. The cover letter also requested compliance with the Compel Order.[26] July 24, 2018, Inman produced four additional documents, but failed to comply with most of the Compel Order (R.p. 159). November 3, 2018, December 29, 2018, and February 1, 2019, Appellant emailed Berlinsky but received no response. Berlinsky responded February 6, 2019, stating he thought the documents had been sent (R.p. 159). March 6, 2019, Inman produced a copy of receipts for purchase of the Apple Stock (R.p. 159).[27] Appellant served Berlinsky with the notice of deposition of Inman for April 8, 2019, and a cover letter requesting compliance with the Compl Order (R.p. 159). April 5, 2019, Inman produced an unredacted copy of Kennedy's Apple Stock statement (R.pp. 56-57, 159). April 5, 2019, Appellant's counsel stated to Belinsky that compliance with the Compel Order, including production of proof of all payments Inman made on the HELOC, would reduce the time the deposition would take. Minutes later Berlinksy emailed a payment history which Inman created and provided to Berlinksy years earlier. (R.pp. 133, 159-70, 304, 478-492, 598-601). April 8, 2018, at Inman's Deposition she stated for the first time she provided Kennedy a check for $85,000.00 from the Proceeds of Sale. Appellant asked if she had provided the Check in

[26] The Notice and cover letter were returned to send unsigned. There was not an error in address. (Mtn Sanc)
[27] The account holders name was redacted and Appellant requested an unredacted copy. (Mtn Sanc)

discovery pursuant to the Compel Order. Inman stated she believed so. Appellant stated she had not. Inman stated she would produce a copy. (159-70, 306-08, 478-492).[28][29]

April 12, 2019, Appellant filed a motion to amend the complaint to add Kennedy as a third party.[30] April 15, 2019, Appellant filed a motion for partial summary judgment and a motion for sanctions.[31] [32] August 29, 2019, in anticipation of scheduled motion hearings, Appellant filed additional exhibits in support of the motions (R.pp. 560-606). October 2019, O'Connell was substituted as counsel for Berlinsky. Inman finally fully complied with the Compel Order on or about November 13, 2019.

June 24, 2020 during the motion for sanctions hearing Appellant set forth a list with dates of Inman's continual delays and non-compliance with the Compel Order (R.pp. 372 ln. 21 – 376 ln. 9). During the motion hearing the court stated:

> So my concern is when the Motion to Compel was granted what was the delay in over a year and these [sic] not produced within the timeframe in which the Judge ordered?" Berlinsky responded: "I thought we have provided those things. I have absolutely no excuse otherwise." (R.p. 376 lns. 15-25).

June 30, 2002 at the resumption of the motion hearing Berlinsky stated: "As I said earlier, you know, you've got my brief, it was inadvertent and not intentional" (R.p. 393 lns. 21-23). July 9, 2020, the court filed a form four order denying the motion. (R.p. 19).

Standard of Review

"[T]he courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are

[28] Affidavit filed November 13, 2019, Inman testified she provided Berlinksy a copy of the check upon retention, or shortly thereafter. Inman first produced a copy of the check as an exhibit to the affidavit filed 11/13/19.
[29] During the deposition Inman personally was given actual notice of non-compliance with the Compel Order
[30] Berlinsky whose fees were all paid by Kennedy (R.p. 272 ¶ 76; R.p. 284 ¶ 40), would not consent to the motion to amend.
[31] April 22, 2019, and July 29, 2019 the matter was called for trial, but continued due to the pending motion to amend to add Kennedy as a party (R.p. 658).
[32] The Motions to Amend, for Summary Judgment and Sanctions were scheduled to be heard July 29, 2019 and August 30, 2019, but Inman and/or Berlinksy requested and were granted continuances (R.pp. 658; 543-559)

reviewable." *Pitts,* 352 S.C. at 338. "A court must consider four factors when determining the appropriate discovery sanction: the nature of discovery sought, the discovery stage of the case, willfulness, and the degree of prejudice. If the court does not consider these factors, an abuse of discretion occurs." Richardson v. TWENTY-ONE THOUSAND AND NO/100 DOLLARS US CURRENCY, SC, Op. No. 5732, (Ct. App. June 17, 2020). "An abuse of discretion may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law. The appealing party bears the burden of demonstrating that the lower court abused its discretion." *Davis v. Parkview Apartments,* 409 S.C. 266, 282, 762 S.E.2d 535 (2014).

Argument

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading v. Tire Service Equipment,* 334 S.C. 193, 199, 511, S.E.2d 716 (Ct. App. 1999). "The sanction should be aimed at the specific misconduct of the party sanctioned. Furthermore, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure." *Karppi v. Greenville Terrazzo Co. Inc.*, 327 S.C. 538, 543, 489 S.E.2d 679 (Ct. App. 1997). "In those cases in which South Carolina appellate courts have reviewed dismissals of actions under Rule 37(b)(2)(C), the courts have generally upheld the trial court's decision to use dismissal as a sanction only when necessary to protect the rules of discovery or when there was evidence of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants." *Rickerson v. Karl,* 412 S.C. 215, 221, 770 S.E.2d 767 (Ct. App. 2015). "In Downey, [this Court] examined the prejudice prong of a discovery sanction: . . .The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial.

Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Richardson.*.

In *Griffin Grading* the court stated: "If there was ever a case where striking a party's pleading was an appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery. . . Tire Service's counsel admitted at oral argument that the failure to comply with certain discovery in this case was "indefensible" but asserted that Tire Service should not be punished for acts committed by its previous counsel. . . the acts of an attorney are directly attributable to and binding on the client." *Griffin Grading* at 199-200. "[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney." *Goodson v. Amer. Banker Ins. Co. of Fla* 295 S.C. 400, 403, 368 S.E.2d 687 (Ct. App. 1988).

In *McNair v. Fairfield County,* this Court upheld the trial courts order striking an answer based upon the trial court's finding of willfulness in failing to comply with a motion to compel discovery: "The defense still has not produced documents 7½ months after this Court passed an Order granting plaintiff's motion to compel. The delay caused by defendant is a further prejudice to plaintiff's right to have his claim heard. . . The defendant's failure to make any attempt to comply with the court order compelling discovery is a blatant violation of Rule 37(b)(2), SCRCP."

Inman asserts non-compliance with the Compel Order is not attributable to her acts or omissions but rather is attributable to Belinsky. The acts of an attorney are attributable to their client. Inman had a duty to monitor her case and confirm compliance with the Compel Order. (R.p. 370). The nature of the discovery sought was of great importance because part of the discovery compelled was revealing the location of the Proceeds of Sale. Inman did not disclose the 9/2/17

Transfer until April of 2019. Given the nature that discovery and extended lapse of time before disclosure, an inference of bad, faith, misconduct, willful disobedience, or a callous disregard for the rights of Appellant, by Inman, can be presumed. The matter was first called for trial in April of 2019, and again in July and November of 2019. Appellant could not proceed forward with trial as a direct and proximate result of Inman's non-compliance with the Compel Order. April 8, 2019, during Inman's deposition Appellant put Inman notice of her noncompliance with the Compel Order. Appellant immediately thereafter filed this motion for sanctions. However, Inman remained non-compliant until November of 2019. Rather, Inman and/or Berlinsky sought successfully to continue the motion for sanctions, motion to amend the complaint to add Kennedy, and the motion for summary judgment. This case is analogous *Griffin Grading* and *McNair*. Inman failed to disclose the location of the Proceeds of Sale in defiance of the Compel Order for eight months. Then Appellant put Inman on actual notice of the non-compliance at her deposition. However, this did not alter Inman's behavior and her non-Compliance with the Compel Order continued for an additional 7 ½ months. Given the nature of the discovery sought, the significant delays, the willful non-compliance with the Compel Order, and the fact that but for the non-compliance this case would have already been tried, it is clear Appellant suffered significant Prejudice. Under *Richardson* prejudice to Appellant must be presumed and Inman has not established a lack of prejudice. The court did not consideration the four *Richardson* factors. It was error of law and abuse of discretion to deny Appellant's motion for sanctions.

CONCLUSION

Based upon the allegations, facts and arguments set forth herein above, Appellant respectfully requests this Court issue a decision reversing all of the findings and rulings of the circuit court found in the July 9, 2020, Order which granted Kennedy's Motion to Dismiss, Inman's Motion to Strike and Smith's Motion to Intervene while denying Appellant's Motion for Sanctions.

RESPECTUFLLY SUBMITTED,

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