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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
BENTLEY PRICE, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000837

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. Luzak, ...Appellant

v.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable Trust, ...Respondents

--and--

Hampton B. Luzak, ...Appellant,

v.

Merrill U. Barringer, ...Respondent,

Coastal Forest Resources Company ("CFRC").....Intervenor/Respondent.

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2. **Did the trial court err in dismissing Ms. Luzak's claim for civil conspiracy on motion of CRFC, which had no interest in these proceedings (*Id.*)?**

3. **Did the trial court err in striking Ms. Luzak's claims for damages against Merrill Light on motion of CFRC (*Id.*)?**

4. **Did the trial court err in granting partial summary judgment to Merrill Light on the February 28, 2012 Will and Trust (Order filed July 6, 2021)?**

5. **Did the trial court err in ordering a bifurcation of the trial of the causes of action brought by Ms. Luzak when there were common issues of law or fact (Orders filed Dec. 30, 2020 and June 7, 2021)?**

6. **Did the trial court err in ordering that the equitable causes of action (Second and Third Causes of Action) set forth in the case of *Hampton Luzak v. Merrill U. Barringer*, 2019-CP-06-1253 and -1294 be tried before the remaining predominately legal causes of action in the consolidated causes of action (*Id.*)?**

7. **Did the trial court abuse its discretion in bifurcating the trial of Ms. Luzak's causes of action (*Id.*)?**

STATEMENT OF THE CASE

The Appellant (Ms. Luzak) originally filed her complaint in the Beaufort County Probate Court on August 26, 2016 after the death of her father, Paul Barringer, in May 2016 and petitioned for removal to the Court of Common Pleas the same day. By order dated September 1, 2016 the Probate Court ordered the removal of Ms. Luzak's complaint and all related proceedings to the Beaufort County Court of Common Pleas. On September 7, 2016 Ms. Luzak filed a nearly identical complaint in the Beaufort County Court of Common Pleas in order to protect the trial court's jurisdiction. The two actions were consolidated by Order of Consolidation of Actions by Consent entered May 19, 2017. The Respondents answered that Complaint. Ms. Luzak filed and served her Amended Complaint on November 23, 2016 which asserts causes of action for damages for various torts, including fraud, conversion, breach of fiduciary duty and self-dealing, tortious

interference with inheritance and gifts, and civil conspiracy, as well as to set aside certain testamentary instruments of decedent Paul Barringer and also transfers and gift(s) for lack of capacity, undue influence, mistake, and fraud. Also, the Amended Complaint sought ancillary relief in the form of the imposition of a constructive trust and resulting trust. The Respondents duly and timely responsively pled.

On May 28, 2019, Ms. Luzak filed an action against Merrill U. Barringer in the Beaufort County Court of Common Pleas asserting causes of action for intentional interference with inheritancy and gifts, constructive trust and injunction, enforcement of a contract not to revoke and injunction, attorneys fees and costs, and civil conspiracy, to which the Respondents duly and timely responsively pled. [1]

In these actions, Ms. Luzak seeks damages from her sister, Merrill Light, her sister's husband, defendant Randy Light,[2] and Merrill U. Barringer, the mother of Ms. Luzak and Ms. Light, for the improper transfer of controlling stock in Coastal Forest Resources Company ("CFRC") and other assets from Paul Barringer's name. Ms. Luzak has also asserted claims to rescind the stock transfer and to set aside amendments to the will and revocable trust of Paul Barringer occurring after the onset of Paul Barringer's dementia on the grounds of undue influence committed by the defendants on Paul Barringer, lack of mental capacity of Paul Barringer, and other related causes of action.

On September 10, 2020 Merrill Light filed her first Motion for Summary Judgment to dismiss all of Ms. Luzak's causes of action. While the first Motion for Summary Judgment of Ms. Light was pending, Ms. Light and Respondent Merrill U. Barringer jointly filed a motion to

[1] Those actions were consolidated for purposes of discovery and trial with the 2016 case by order of consolidation filed December 3, 2019. (Order of Judge Mullen filed Dec. 3, 2019).

[2] Randy Light died on March 16, 2020.

bifurcate the two equitable causes of action involving the purported testamentary powers of appointment associated with Decedent's trusts and to set them for trial before the remaining causes of action. The Honorable Carmen Mullen denied Ms. Light's first summary judgment motion on December 30, 2020. By a separate order filed the same day, Judge Mullen ordered a bifurcation of the two equitable power of appointment related causes of action for a separate trial prior to a trial on all the remaining causes of action.[3]

On May 14, 2021 Merrill Light filed a second summary judgment motion before the Honorable Bentley Price again seeking a ruling that Paul Barringer's February 28, 2012 will and trust are valid documents in opposition to Ms. Luzak's seventh, eighth, and ninth causes of action to set aside the February 28, 2012 will and trust for lack of mental capacity, undue influence and mistake. Ms. Light's second summary judgment motion did not seek to have any of Decedent's later wills and trusts declared valid. On that same day, non-party CFRC filed its Motion for Intervention and Protective Relief ("Motion for Intervention") seeking to strike Ms. Luzak's civil conspiracy cause of action and the vast majority of her damages of approximately $112 million. Following briefing and oral arguments on May 27, 2021, the trial court entered its order granting non-party CFRC's motion on June 7, 2021. On July 6, 2021, the Honorable Bentley Price granted Merrill Light's second motion for summary judgment, ruling that Decedent's February 28, 2012 will and trust were valid. On July 13, 2021 Judge Price denied Ms. Luzak's motion for reconsideration of the order granting non-party CFRC's Motion for Intervention, and on August 4, 2021 denied reconsideration of the order granting Merrill Light's second summary judgment motion.

[3] Ms. Luzak appealed the bifurcation issue to this Court which the Court declined to hear as interlocutory in appeal number 2021-000159. Ms. Luzak has petitioned the Supreme Court for a writ of certiorari on the bifurcation issue which is currently pending.

Additionally, the trial court issued its Order on Motions on June 7, 2021 ordering that trial "proceed on the bifurcated claims only. A trial on the first phase as indicated in Judge Mullen's Order granting bifurcation is set to begin August 30, 2021." The trial court denied Ms. Luzak's motion to reconsider the Order on Motions on July 13, 2021, and Ms. Luzak appealed that order as part of this appeal on July 13, 2021. The appeal of that Order on Motions has been made to preserve Ms. Luzak's rights with respect to bifurcation, and is included in her arguments below on bifurcation.

Ms. Luzak filed and served her Notice of Appeal, regarding the July 13 and August 4 orders, on August 5, 2021.

STATEMENT OF FACTS

CFRC is one of the largest privately held companies in the timber and lumber industries in the country. https://coastalplywood.com/ It was founded and developed by Paul Barringer. Prior to Paul Barringer's purported transfer of CFRC voting stock on September 11, 2012, the company's voting stock was owned 31.2% each by Hampton Luzak and her sister Merrill Light through gifts from their father. The remaining shares were owned 20% by their father and 17.6% by an outside investing family, the Congers. (See Am. Compl., Ex. 3, CFRC "Stock Register as of February 30, 2014"). The company also issued non-voting stock to the shareholders, and Paul Barringer gifted all of his non-voting stock to his children. (Pl.'s Resp. in Opp'n to Def. MBL MSJ as to Pl.'s 7th, 8th & 9th Causes of Action, Ex. 2, Affid. of H. Luzak dated 11.6.20 (hereafter "Affid. of H. Luzak") ⁋⁋ 5-6; *id.*, Ex. 3, affid. of K. Luzak dated 11.6.20 (hereafter "Affid. of K. Luzak"), ⁋⁋ 7-8)). Prior to 2013 Ms. Luzak and her sister Merrill Light each owned approximately 37.1% of the non-voting stock, their brother Victor Barringer owned 8.1% ("Barringer Siblings"), and the Conger family owned the remaining 17.6%. Paul Barringer's gifts of both voting and non-

voting stock to his two daughters had been made in equal amounts so that each daughter owned the same number of shares. (*Id.;* Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. A, Attch. 22, CFRC Stock Register as of 5.7.12). In February 2010, the Barringer Siblings and CFRC entered into a shareholders' purchase agreement (Share Purchase Agreement) granting CFRC the right to purchase any CFRC stock offered for sale to or by any Barringer Sibling, in effect preventing any of the Barringer Siblings from purchasing shares to increase his or her ownership percentage above that set up by Paul Barringer. (*Id.* at Attch. 8, Agrmt Re: Right to Purchase CFRC Shares, 2.1.10).

In approximately 1993, Paul Barringer placed Ms. Luzak's husband, Kevin Luzak, on the board of directors of CFRC's predecessor company. (Affid. of K. Luzak ¶ 2). In 2004, CFRC hired him as the president. (*Id.*) By 2009, Paul Barringer had stepped aside as chief executive officer with Kevin Luzak taking his place as CEO of CFRC. (Am. Compl. ¶ 13; Defs.' M. Light & R. Light's Answ to Pl.'s Am. Compl., ¶ 13.)

The medical records show that as early as 2010, Paul Barringer began experiencing issues with onset of dementia including progressive memory loss and behavioral changes with brain atrophy. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. G, Attch.3, Dr. W. Garrett Rpt. dated 12.27.11). By 2011, family members and co-workers were e-mailing among each other their concerns about Paul Barringer's mental health. These communications included an e-mail from defendant Randy Light.[4] (*Id.* at Ex. A, Attch.25, Em of R. Light to K. Luzak, 2.21.11). Before becoming afflicted with Alzheimer's disease, Paul Barringer did not allow Randy Light to work for CFRC even though Paul Barringer was never told that Randy Light had run at least two Texas-

[4] Randy Light's e-mail to Kevin Luzak on Feb. 21, 2011 stated: "…It is evident to Merrill and I that PBB is starting to experience different health issues that effect his judgement regarding every day decisions personally and business wise. It appears that this makes it harder for you to exercise your authority as President of CFRC if he will not listen. Merrill and I have absolutely no say in the operations of CFRC which PBB has made clear on many occasions. Merrill and I have total confidence in your ability to guide the Company in the direction that will benefit the stockholders the most. Our fear is PBB is going to attempt some irrational move that will harm the profitability of the Company simply to satisfy his desire to underwrite Victor or keep the stock holders graveling." (*sic*)

based real estate companies he owned into bankruptcy, and was millions of dollars in debt from those failed ventures. (*Id*.; *Id.* at Ex. I, M. Light Dep. 533:18 – 535:10).[5]

By December 2011, Paul Barringer had begun seeking medical assistance for cognitive impairment. (See, *e.g.*, Pl.'s Resp. in Opp'n to Def. MBL's MSJ., Ex. G, Attach. 3, Dr. W. Garrett Rpt. dated 12.27.11). In 2012, Paul Barringer and his wife continued to reside at their long-time residence in Hilton Head Island, South Carolina. Merrill Light and Randy Light also lived in Hilton Head Island. The Luzaks resided in New York City at this time. (See Am. Compl. ⁋ 134; M. Light & R. Light's Answ to Pl.'s Am. Compl., ⁋ 134).

After Paul Barringer sought treatment for memory deficits, on February 28, 2012 Merrill Light secretly became co-trustee with Paul Barringer of his purported revocable trust drafted by Merrill Light's long-time personal lawyer. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. A, Attch 11, P. Barringer First Am. & Rst of Trust Agrmt dated 2.28.12). Under that trust, Merrill Light could act independently of Paul Barringer. No one ever told Ms. Luzak what was happening. (*Id.*; Affid. of H. Luzak ⁋ 24; Affid. of K. Luzak ⁋ 28).

From May 2 through May 4, 2012 Paul Barringer was hospitalized in Savannah, Georgia for issues related to mental confusion and urinary tract infection. An examining neurologist noted Paul Barringer had trouble following two-step commands such as touching his right hand to his left ear and showing two fingers upon request and opined that he had confusion with history of urinary retention and apparent aphasia. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. G, Attach. 8, Dr. J. Carter Rpt. of 5.2.12 consult.). On May 30, 2012 he was diagnosed with early onset

[5] These matters are not included in the designations of appellant. They are public court records, referenced here for purposes of citation in the brief in accordance with Rule 208(b)(1)(C), SCACR, and can be provided to the Court pursuant to Rule 212, SCACR. SW Loan OO, LP countercl., *J. Randolph Light Jr. et al. v. Stillwater National Bank and Trust Company et al.*, Case No. 12-0384-A (Tex.Dist.Ct. Smith County (7th Dist.) 2012); Appellant's Brief, Victor *Lissiak Jr. v. SW Loan OO, L.P.*, Appellate Case No. 12-14-00344-CV (Tex.Civ.App. Tyler (12th Dist.) 2014); *In re: The Stretford at the Cascades L.P.*, Case No. 12-60465 (Bank. E.D.Tex. 2012) (petition signed by Randy Light June 4, 2012).

Alzheimer's disease by a leading neurologist at the Medical University of South Carolina. (*Id.* at Ex. G, Attach.12, Dr. D. Bachman notes, 5.30.12)

On May 11, 2012, a few days after he had trouble following simple commands such as touching his ear with his hand, Paul Barringer purportedly executed a stock certificate transferring his voting stock to himself as trustee of his revocable trust. The share certificate was signed by Plaintiff's husband Kevin Luzak as president of CFRC, but the share certificate did not reflect Merrill Light as a co-trustee/shareholder and did not disclose to Kevin Luzak that Merrill Light had been made a co-trustee of Paul Barringer's revocable trust. (*Id.* at Ex. Z, CFRC Stock Certif. No. 14; Affid. of K. Luzak ⁋⁋ 29-31). This was consistent with Merrill Light's growing influence and control over her father and his CFRC stock and concerted efforts to hide all of this from Ms. Luzak.

During the spring of 2012 Paul Barringer had been suffering from extensive confusion and memory lapses regarding company affairs, such as forgetting he directed the sale of the company jet, forgetting the company made a significant commercial real estate investment in Virginia, and forgetting about important board presentations that company management, including Ms. Luzak's husband Kevin Luzak, had made to the board of directors. (*Id.* at ⁋⁋ 12-19, 32-38; Affid. of H. Luzak ⁋⁋ 10-16, 28-37; Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. G, Attach.14, Dr. D. Bachman notes of 6.18.12). Mr. Barringer also became confused about prior board presentation materials Kevin Luzak had given the board in the past 15 months when Merrill Light re-submitted the materials to her father. (Affid. of K. Luzak ⁋⁋ 36-37).

When Paul Barringer was re-introduced to the prior board presentation materials by Merrill Light, he did not recall the prior company meetings, and he accused Kevin Luzak of plotting changes to the company behind his back and of trying to steal company assets. A year earlier,

when the board was initially presented with the materials, Mr. Barringer had been involved in the board presentations and complimented Kevin Luzak on the soundness of the plans at that time. (Affid. of K. Luzak ⁋ 36; Pl.'s Resp. in Opp'n to Def. MBL's MSJ., Ex. N, P. Barringer Em to K. Luzak 2.18.11).

On June 28, 2012, the board of directors, spearheaded by defendant Merrill Light, fired Ms. Luzak's husband, Kevin Luzak, as chief executive officer of CFRC in a special telephonic board meeting. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ., Ex. WW, CFRC Bd. of Dirs. Mtg Minutes, 6.28.12). Decedent Paul Barringer, after receiving coaching from the defendants in the room with him (defendants Merrill Light and Merrill Barringer), voted in favor of Kevin Luzak's removal as did defendant Merrill Light.[6] (*Id.*; *id.* at Ex. PP, Tr. of CFRC Bd. of Dirs. Mtg of 6.28.12 at p.11, lns. 9-12; Am. Compl., Ex. 5 at ⁋ 2, M. Hagler ltr to B. Herring of 6.28.12).

On July 20, 2012 Paul Barringer ostensibly changed his revocable trust by leaving his CFRC voting stock at his death to Merrill Light. The CFRC voting stock aside, Ms. Luzak remained an equal beneficiary with her siblings. (See Pl.'s Resp. in Opp'n to Def. MBL's MSJ., Ex. A, Attch.13, Second Am.&Rst of Trust Agrmt of P. Barringer dated 7.20.12).

On August 3, 2012, Merrill Light called a special shareholder's meeting for the purpose of removing Kevin Luzak from the board of directors. (See Am. Compl., Ex. 13, CFRC Minutes of Special Mtg of Shareholders of 8.3.12) Paul Barringer did not attend this meeting. At that shareholder's meeting, Merrill Light, under the guise of a power of attorney from Decedent Paul Barringer,[7] and without disclosing that she was actually acting as co-trustee, used the combined

[6] Kevin Luzak was prohibited by the corporate attorney from voting due to Mr. Luzak being the subject of the vote, while the remaining director, Mike Hagler, an independent director, voted against Kevin Luzak's removal and disputed the validity of the vote while questioning Mr. Barringer's mental capacity. (*Id*. at Ex. WW, CFRC Bd. of Directors Minutes, June 28, 2012).

[7] As Ms. Luzak understood it at the time. (Affid. of H. Luzak ⁋ 39).

51% voting interest of her and Paul Barringer's voting stock to remove Kevin Luzak as a director and replace him with Merrill Light's husband, Randy Light. (*Id*.). Consistent with the secrecy surrounding Merrill Light's appointment as co-trustee, no one, including Ms. Light, ever informed Ms. Luzak during this meeting that Merrill Light was a co-trustee of the Paul B. Barringer Revocable Trust. (Am. Compl. ¶ 78(a)); Pl.'s MTC Produc.of Docs. Against Def. MUB filed 8/3/2020, Case No. 2019-CP-07-1253 & -1294, Ex. 6 at 10, (Pl.'s Resp. to Def. MUB's 3rd Set of ROGS. to Pl. HL dated 10.22.19).

By two documents dated September 11, 2012, an Assignment of Shares and a Stock Power, Paul Barringer as a co-trustee of the Paul B. Barringer Revocable Trust purportedly assigned and transferred all but one of his voting shares of non-party CFRC to Merrill Light as trustee of her own Merrill Barringer Light Revocable Trust. (Am. Compl., Exs. 15 & 16, Stock Power &Asgmt of Shares, dated 9.11.12). This transfer was carried out with the assistance of Randy Light and others. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. Ex. II, Em of: R. Light & J. Jolley, Jan.7 & 21, 2013; J. Jolley to Decedent, 1.10.13; and R. Light& T. Bryant, 1.24.13). Since Merrill Light already owned 31.2% of the voting stock, Paul Barringer's purported transfer of this 20% block from the Paul Barringer Revocable Trust gave Ms. Light 51.2% of the voting shares of CFRC and control. Thus she ostensibly became the controlling shareholder. (See Am. Compl., Ex. 3, CFRC "Stock Register as of 2.30.14). This transfer to the Merrill Light Revocable Trust occurred while Merrill Light was continuing to serve as co-trustee of the Paul Barringer Revocable Trust. (See Pl.'s Resp. in Opp'n to Def. MBL's MSJ., Ex. A, Attch.13, Second Am. & Rst of Trust Agrmt dated 7.20.12 & Attach. 14, Third Am. & Rst of Trust Agrmt dated 6.12.14). Ms. Luzak was never informed of the purported stock transfer by anyone until CFRC was forced to do so two and half years later (described below). (Am. Compl. ⁋ 84; Affid. of H. Luzak ⁋ 40).

On June 12, 2014, years after Paul Barringer's cognitive impairment rendered him susceptible to undue influence, Paul Barringer, assisted by John Jolley, the Lights' own estate planning attorney, purportedly changed his revocable trust again, this time to eliminate Ms. Luzak as a beneficiary and to leave the share, previously designated for her, to her minor son instead. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. A, Attach. 14, Third Am. & Rst of Trust Agrmt dated 6.12.14). The same attorney for the Lights, who drafted the prior two sets of estate planning agreements in 2012, drafted this third trust restatement. (*Id.*) On each occasion, medical records had already established that Paul Barringer was incompetent due to Alzheimer's disease. (Affid. of H. Luzak ¶ 58; Affid. of K. Luzak ¶ 67).

But the truth eventually came out. In December 2014 when CFRC issued its annual financial statement for the fiscal year ending September 30, 2014, Ms. Luzak discovered a note in the 2014 financial statement about a stock issuance to an undisclosed officer. (Pl.'s MTC Produc. of Docs. Against Def. MUB filed 8.3.20, Case No. 2019-CP-07-1253 & -1294, Ex.6 at 17, Pl.'s Resp. to Def. MUB's 3rd Set of ROGS to Pl. Hampton Luzak dated 10.22.19). Because Ms. Luzak did not believe her father, Paul Barringer, would ever agree to that, Ms. Luzak's attorney, pursuant to Ms. Luzak's statutory shareholder inspection rights,[8] made three written requests to CFRC asking for, among other items, a copy of the stock transfer books of the corporation showing the stock ownership of the company since June 2012. (*Id.*) After the third request CFRC finally submitted on March 13, 2015 its stock register showing the transfer of Paul Barringer's voting stock to Merrill Light's trust. (*Id.*) It was only on March 13, 2015 that Ms. Luzak became aware of Ms. Light's scheme to obtain control of CFRC.[9]

During this same time period, Paul Barringer on February 5, 2015, ostensibly changed his

[8] See Va. Code Ann. §§ 13.1-771 and -772 applicable to CFRC as a Virginia- incorporated entity.
[9] This date is significant since it substantiates that Ms. Light's scheme went undetected for two and a half years.

revocable trust and will for a final time, again with the assistance of John Jolley, the Lights' long-time attorney. This amendment eliminated the share for Ms. Luzak's minor son, thereby eliminating both Ms. Luzak and her son as beneficiaries of Mr. Barringer's estate. (Pl.'s Resp. in Opp'n to Def. MBL's MSJ, Ex. A, Attach. 18, 4th Am. & Rst of Trust Agrmt dated 2.5.15). In 2014 and 2015, Paul Barringer's mini-mental exam scores demonstrated his chronic lack of capacity. (See Issue Four, Section C, Parts Six and Seven below.)

On April 15, 2015, CFRC, controlled by Merrill Light, commenced federal litigation in Virginia seeking, *inter alia*, declaratory relief regarding Merrill Light's proportional interest in CFRC. (Am. Compl., ¶104(b)). Ms. Luzak filed two counterclaims for (1) a breach of contract against defendant Merrill Light and CFRC based on the 2010 Share Purchase Agreement (the "contract claim");[10] and (2) a separate and unrelated counterclaim asserting shareholder derivative claims against CFRC, Travis Bryant, and defendants Merrill and Randy Light involving the 2013 stock sale and option grant to Mr. Bryant. (*Id*. at ⁋ 104(c)). The federal district court ultimately dismissed both of the narrowly drawn claims including the contract claim, finding that the stock transfer to Merrill Light was a gift, not a sale for valuable consideration, which did not trigger the Barringer Sibling Share Purchase Agreement. The dismissals were upheld by the 4th Circuit Court of Appeals.

All of this was started only after Mr. Barringer had been diagnosed with dementia and was accomplished during his progressively worsening dementia, leading to Alzheimer's. On May 30, 2016, Paul Barringer died from Alzheimer's disease. (Am. Compl. ⁋ 117; M. Light & R. Light's

[10] After CFRC moved to drop its declaratory petition, the Eastern District of Virginia federal court re-aligned the parties on August 14, 2015 making Ms. Luzak the named plaintiff and Merrill Light and CFRC the defendants. *Luzak v. Light, et al*, 1:15-cv-501 (E.D.Va. 2015) (Dkt # 89). On August 28, 2015, despite serious questions about his mental capacity, Paul Barringer ostensibly intervened as a defendant in the Contract Claim. (*Id*. at Dkt. # 94). His intervention occurred during a several-month period when he was scoring zero, four, and ten on the 30-point mini-mental exam.

Answ to Pl.'s Am. Compl. ¶ 117).

ARGUMENT

I. Issues One, Two, and Three

Did the trial court err in allowing non-party CFRC to intervene in the action and (1) in granting the relief requested; (2) in finding the motion was timely; (3) in failing to consider whether CFRC had an interest in the property or transaction at stake in this lawsuit; (4) in failing to address the issue of whether this action would impede non-party CRFC's ability to protect its interest; (5) in failing to consider whether non-party CFRC's interests were adequately protected; (6) in striking Ms. Luzak's claim for civil conspiracy; (7) in concluding Ms. Luzak had no standing to pursue damages sustained by her individually; (8) in finding that Ms. Luzak's remedy was limited to commencing a derivative action under Virginia Stock Corporation Act, Va. Code § 13.1-672.1 in order to have standing; (9) that Ms. Luzak was barred from pursuing this action by Article VIII, Section 7 of non-party CFRC's bylaws and therefore lacked standing; (10) in concluding Ms. Luzak's claim for civil conspiracy was an internal claim of non-party CFRC and thereby concluding this court lacked subject matter jurisdiction over the claim; (11) in striking Ms. Luzak's first, second, fourth, and sixth categories of damages for lack of subject matter jurisdiction; (12) in finding that Ms. Luzak is not entitled to recover damages from the 2013 sale of CFRC stock to Travis Bryant based on *res judicata* and concluding that the United States District Court for the Eastern District of Virginia had already adjudicated this issue; and (13) in allowing non-party CFRC to raise issues that did not concern it, but instead related to claims against individual defendants?

A. Background of trial court's ruling on Motion for Intervention.

The trial court granted non-party CFRC's Motion for Intervention in a written order submitted by CFRC that contradicted statements made by the presiding judge during oral arguments made on the record on May 27, 2021. The five paragraphs of the order filed June 7, 2021 provided:

1. Non-party CFRC was granted leave to intervene as of right under Rule 24(a)(2), SCRCP, for the limited purpose of precluding the litigation of derivative claims.
2. Ms. Luzak's civil conspiracy cause of action was dismissed for two reasons: (a) Ms. Luzak's purported lack of standing, and (b) the trial court's purported lack of subject matter jurisdiction over the internal affairs of a foreign corporation pursuant to S.C. Code § 33-15-105(c) and *Pertuis v. Front Roe Restaurants, Inc.* The trial court ruled that Ms. Luzak lacked standing for two reasons: (i) Ms. Luzak did not fulfill the requirements for commencing a derivative action under the Virginia Stock Corporation Act, Va. Code § 13.1-672.1, and (ii) Ms. Luzak did not comply

with the exclusive forum provision in Article VIII, Section 7 of CFRC's bylaws.[11]

3. Ms. Luzak's first, second, fourth, and sixth categories of damages (which were not claims against CFRC) were stricken because the trial court determined they constituted derivative claims under Virginia law. Because the trial court concluded that four categories of damages were ruled to be derivative, Ms. Luzak lacked standing to pursue those damages and the trial court lacked subject matter jurisdiction to adjudicate them.

4. Res judicata barred Ms. Luzak's 2nd category of damages pertaining to stock issued to CFRC's CEO Travis Bryant in light of CFRC's declaratory judgment action filed against Ms. Luzak in 2015 in Virginia federal district court.

5. After finding Ms. Luzak's conspiracy claim and her 1st, 2nd, 4th, and 6th categories of damages were derivative, the trial court declared under the Declaratory Judgments Act that Ms. Luzak may not litigate derivative claims in this action.

The order eliminated 93% of Ms. Luzak's damage claims against Merrill and Randy Light. Non-party CFRC was permitted to intervene for the limited purpose of striking Ms. Luzak's conspiracy cause of action and four categories of her damages, even though none of those damages was sought against the company, and CFRC had nothing at stake in this action, and these claims did not belong to it.

The trial court erred in ruling that non-party CFRC could, late in these cases, momentarily intervene as of right under Rule 24(a)(2), SCRCP to seek and obtain the relief it obtained, then disappear again.

Paragraphs 1, 2, 3, and 5 of the trial court's order turned in whole or in part on a determination of whether Ms. Luzak's conspiracy claim and request for damages against individual persons were derivative or instead could be brought by her directly. Paragraphs 2 and 3 also turned in part on the applicability of the internal affairs doctrine (citing S.C. Code Ann. § 33-15-105(c)), and paragraph 4 was based on res judicata.

[11] Article VIII, § 7 of CFRC's bylaws provides four circumstances in which the circuit court of Fairfax County, Virginia shall be the exclusive forum for litigation related to CFRC. The trial court did not specify which of the four circumstances caused Ms. Luzak to lack standing in this case but, as discussed below at Section D.2 of Issues One, Two and Three, none of these is applicable.

B. Standard of Review

In a motion to intervene as a matter of right under Rule 24(a)(2), the standard of review is whether the judge abused his discretion in granting or denying the motion. *S.C. Tax Comm'n v. Union County Treasurer,* 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988). "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Ellis v. Davidson,* 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004). "[A]n appellate court may make its own determinations concerning questions of law and need not defer to the trial court's rulings." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404–05 (2014).

After granting CFRC's Motion for Intervention in paragraph one of the order, the trial court then proceeded to dismiss Ms. Luzak's conspiracy claim and strike certain damages for lack of standing and subject matter jurisdiction. The trial court did not rule on the sufficiency of the evidence of Ms. Luzak's claim or damages, but instead held the conspiracy claim and damages to be derivative. The trial court's rulings were errors of law and made without evidentiary support. This Court may therefore make its own determinations on the Motion for Intervention.

C. CFRC did not meet any of the elements for intervention as of right under SCRCP Rule 24(a)(2), including the elements that required CFRC to establish the existence of derivative claims.

In South Carolina, a party seeking to intervene as of right must meet the following four factors:

> (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E. 2d 712, 714 (1990).

"[F]ailure to satisfy any one of the four requirements precludes intervention." *Ex Parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993).

1. Timeliness of application**.**

Rule 24(a)(2) requires timely application to intervene as set forth by a four-factor test by the South Carolina Supreme Court: (1) the time since the intervener knew or should have known of the interest; (2) the reason for the delay; (3) the stage of the litigation; and (4) the prejudice to the original parties if intervention is granted, and to the applicant if intervention is denied. *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991); James F. Flanagan, South Carolina Civil Procedure, 286-287 (4th ed. 2020).

(a) *Ms. Luzak's conspiracy claim has long been known to CFRC.*

Ms. Luzak filed her original complaint in the Beaufort County probate court on August 26, 2016 and has been litigating the same claims ever since. Ms. Luzak's original complaint included her cause of action for civil conspiracy in Count 19. CFRC has been well aware of Ms. Luzak's civil conspiracy claim for years.

- Ms. Luzak served in September 2016 the pleadings containing Count 19 for civil conspiracy on defendant Randy Light, who was then chairman of the board of CFRC, and on defendant Merrill Light, who is the purported majority and controlling shareholder and member of the board of directors of CFRC.

- CFRC and its current law firm were present for the hearing on the motions to dismiss heard by the trial Court on March 16, 2017.

- The Amended Complaint containing the same civil conspiracy cause of action was served on CFRC's national counsel in September 2019 as part of the proceedings in Gadsden County, Florida Circuit Court to enforce Ms. Luzak's document subpoena against CFRC.[12]

[12] In July 2017 Ms. Luzak served a document subpoena on CFRC in Gadsden County, Florida where it is headquartered. CFRC objected and refused to produce any documents. In April 2019 Ms. Luzak was forced to institute subpoena enforcement proceedings in Gadsden County, Florida circuit court resulting in four separate hearings in that court. CFRC cannot logically argue it had no notice of the claims pending in this case when it fought a subpoena issued from the trial court and domesticated in Florida for this very litigation.

CFRC did not file its Motion for Intervention until May 14, 2021. Non-party CFRC's Motion filed over four and a half years after the assertion of the conspiracy claim is untimely.

(b) *Ms. Luzak disclosed her damage claims a year and a half before CFRC filed its Motion for Intervention.*

Ms. Luzak produced to all the parties (some of whom are officers and/or directors of CRFC)[13] the expert report of Dr. Charles Alford on December 10 and 19, 2019, wherein Dr. Alford set forth the categories of damages incurred by Ms. Luzak individually as a result of Merrill Light's intentional interference with her inheritance and related causes of action. (CFRC Mot. for Int. and Prot Relief filed 5.14.21, Exs. H & I). Yet, CFRC waited a year and a half to move to intervene, an inexcusable and unexplained delay.

Ms. Luzak has been greatly prejudiced by having to relitigate issues that were already heard over four and half years earlier. For instance, defendants Merrill and Randy Light and Merrill U. Barringer filed motions to dismiss in 2016 that included CFRC's present claim that res judicata bars Ms. Luzak's conspiracy claim. The parties exhaustively briefed and argued the issues in 2016 and 2017, and the trial court, Judge Mullen presiding, ruled that res judicata did not apply. Ms. Luzak then had to relitigate the same issue before a different trial judge upon CFRC's filing of its Motion for Intervention. In contrast, non-party CFRC would have suffered no prejudice by denial of its intervention since it has no interest at stake in this action as set forth below regarding derivative versus direct claims.

2. <u>Non-party CFRC has no interest in the property or transaction at stake in this lawsuit because Ms. Luzak's claims are not derivative.</u>

[13] In 2019 Randy Light continued his role as chairman of the board of CFRC, and Merrill Light as a member of the board of directors and the purported controlling shareholder of CFRC (as a result of documents purportedly executed by Mr. Barringer when he was suffering from dementia and Alzheimer's). It is undeniable that CFRC received Dr. Alford's report as CFRC attached it to its Motion for Intervention as exhibits H and I.

The second factor identified by the South Carolina Supreme Court in *Berkeley Elec. Co-op., Inc., supra,* is whether the intervener has an interest relating to the property or transaction that is the subject of the action. An applicant for intervention must have a direct, substantial, and legally protectable interest affected by the litigation to support intervention. *Ex Parte Reichlyn*, 310 S.C. at 499, 427 S.E.2d at 664. Ms. Luzak's claims in this case against her sister, late brother-in-law, and mother can only be brought by Ms. Luzak. These claims belonged to her exclusively, and any recovery would be paid by those defendants individually since it was their torts in their individual capacities that gave rise to injury to Ms. Luzak. These claims do not belong to CFRC, nor is CFRC exposed to Ms. Luzak for these allegations. The trial court fundamentally erred on this factor by concluding that the claims of Ms. Luzak are corporate derivative claims.

3. Disposition of this action will not impair or impede non-party CFRC's ability to protect any interest of its own.

Since non-party CFRC has no direct, substantial, or legally protectable interest affected by this litigation as stated above, CFRC has no interest to protect by intervening. Ms. Luzak's damages are those she has suffered as an individual as a result of the actions of Merrill Light in her individual capacity as Ms. Luzak's sister and Ms. Light's role as co-trustee of their father's trust. Those actions had a direct effect on Ms. Luzak's inheritance and expectancy of gifts from her father. The harm from Merrill Light's actions, aided and abetted by Randy Light, was inflicted against Ms. Luzak, and Ms. Luzak was the only other person whose inheritance was impacted by the defendants' actions. No other shareholder of CFRC can claim such expectancy of inheritance; thus, the losses incurred by Ms. Luzak are not losses to the corporation or other shareholders. Consequently, non-party CFRC has no interest to protect.

4. Non-party CFRC's interests (if any) are adequately represented by the current defendants.

The last factor that a non-party must demonstrate to support intervention – inadequate representation by the existing parties – is set forth in a three-part test from the Supreme Court:

> (1) whether existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. at 191, 394 S.C.2d at 715.

The Court of Appeals has explained the burden of proof an applicant for intervention needs to show regarding the fourth factor (inadequate representation) required for intervention.

> The burden to show that the representation may be inadequate is on the applicant. When an applicant for intervention and an existing party have the same interests or ultimate objective in the litigation a presumption arises that its interests are adequately represented and the application should be denied unless a showing of inadequate representation is made by demonstration of adversity of interest, collusion, or nonfeasance.

S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. at 260, 368 S.E.2d at 74 (citations omitted).

There is little, if any, daylight between the positions of Merrill Light, CFRC's ostensibly controlling shareholder, and non-party CFRC in the litigation between Ms. Luzak and her family. CFRC does not need to intervene to protect any interests, which it does not have, nor does Merrill Light need CFRC's intervention to protect CFRC's interest or her interest. Merrill Light is acting as the controlling shareholder of CFRC, ostensibly holding 51% of the voting stock of the corporation and controlling the election of all directors to the board. She has concurred in every position taken by non-party CFRC throughout all forums of litigation between the parties because she controls the positions taken by CFRC.

The motion itself shows the extremely close coordination between non-party CFRC and Merrill Light. Included with CFRC's filings are the reports and exhibits of Ms. Luzak's expert Dr. Alford which were served on Merrill and Randy Light and Ms. Barringer, not on non-party CFRC. Non-party CFRC therefore had to receive its copies of the reports from one of those three.

CFRC was also not present at, nor did it participate in, the deposition of Dr. Alford. Therefore, its possession of the transcript excerpts of Dr. Alford's deposition attached to its motion could have only come from the Lights or Ms. Barringer.

This close coordination has existed since the initial filing of this case in 2016. In Merrill Light's first document production on July 18, 2017, she included documents that were exclusively in the possession of CFRC. For instance, she included e-mails of April and May 2012 regarding the transfer of Paul Barringer's voting stock to his trusts in which the only parties to the e-mails were CFRC's current CEO, Travis Bryant, and CFRC's then corporate counsel, Brad Herring. The Lights were not a party on the e-mails, yet the Lights were able to produce those documents that were in the exclusive possession of non-party CFRC when the documents were deemed to be advantageous to Ms. Light and CFRC. (See Pl.'s Mem. In Opp'n to CFRC's Mot. for Int. and Prot. Relief, Ex. 5, Em of T. Bryant & B. Herring Apr. 30 - May 10, 2012).

During the Florida proceedings when Ms. Luzak asked for communications among non-party CFRC, Ms. Light and her Virginia attorneys regarding attorney fees CFRC was paying on behalf of Ms. Light to fight Ms. Luzak in Virginia federal court, both Merrill Light and CFRC asserted the common defense doctrine to claim such communications were attorney-client privileged. (See Pl.'s Mem. In Opp'n to CFRC's Mot. for Int and Prot. Relief, Ex. 6, Tr. of Hr'g 27:13-14, 20-21, 7.23.20). Ms. Light's Florida counsel also advanced the derivative defense argument CFRC has now raised in its Motion for Intervention. (*Id.*, Ex. 7, Tr. of Hr'g 29:22-25, 6.22.20). Non-party CFRC and Merrill Light have closely coordinated their legal positions and communicated their legal strategies throughout the parties' litigation.

Merrill Light has advanced CFRC's derivative claim defense in her own defense in this case also. She amended her answer to raise the affirmative defense that Ms. Luzak's claims are

derivative. Prior to that, Merrill Light's counsel, in her letter to Judge Mullen on August 7, 2020 as part of defendant Merrill Light's first summary judgment motion, asserted that Ms. Luzak's damages were derivative. (*Id.*, Ex. 8, Paylor letter of 08/07/2020, 4th para.). Because Merrill Light is acting as the controlling shareholder of non-party CRFC and serves on its board of directors, she has and can continue to control, coordinate, and advance any argument of CFRC in this litigation.

CFRC's Motion for Intervention should have been denied because its position is adequately represented by the existing parties to this litigation through close coordination with CFRC. In addition, to the extent any issues concerning Virginia corporate law may be raised, Merrill Light is represented in this case by experienced co-counsel licensed and practicing corporate law in the Commonwealth of Virginia.[14]

5. The trial court erred in ruling under the Declaratory Judgments Act that Ms. Luzak may not pursue any and all of her claims.

Because Ms. Luzak has not pursued any derivative claims and for all the reasons stated above, the trial court erred in ruling under S.C. Code § 15-53-20 that Ms. Luzak may not litigate any derivative claims on behalf of CFRC.

D. The trial court erred in finding Luzak's civil conspiracy cause of action was derivative and concomitantly in dismissing her claim.

Upon the intervention allowed to non-party CFRC, the trial court then proceeded to dismiss Ms. Luzak's civil conspiracy cause of action for a lack of standing and subject matter jurisdiction. The court reached that holding in part on the basis that Ms. Luzak's conspiracy claim was a derivative corporate claim under the law of Virginia. Pursuant to the order, because Ms. Luzak did

[14] Ms. Luzak maintains that South Carolina, not Virginia, law governs the issues in this case. *See Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 650, 817, S.E.2d 273, 278 (2018) (holding that where the question before the court does not involve the inner-working of a foreign corporation, the internal affairs doctrine does not bar review of the issues by South Carolina courts applying South Carolina law).

not fulfill the derivative action requirements, she lacked standing to bring her conspiracy claim. As are all her claims, Ms. Luzak's conspiracy cause of action is an individual, non-derivative claim that she is entitled to, and must, bring directly against the individual defendants in their individual capacities.

In South Carolina, a derivative action is when "a shareholder of a corporation . . . brings suit claiming that the entity has failed to assert rights belonging to the entity to the detriment of its shareholders . . .." Nathan Crystal, *The "Good Cause" Exception to Attorney Client Privilege in Derivative Litigation,* 26 Nov S.C. Law 12. The trial court thus found that Ms. Luzak's claims against her sister, brother-in-law, and mother really belong to CFRC. The outcome of this litigation will not result in any financial benefit or detriment for CFRC. Non-party CFRC has no cause of action and has no rights against the individual defendants that Ms. Luzak is asserting. Yet, somehow non-party CFRC seeks to intervene to have Luzak's civil conspiracy claim and/or damages against the individual defendants thrown out. The gravamen of Ms. Luzak's claims is that the individual defendants stole her inheritance. Nothing was taken from CFRC.

Non-party CFRC asserts that Ms. Luzak's claim for damages for civil conspiracy actually belongs to CFRC. "CFRC seeks to intervene for the limited purpose of precluding Ms. Luzak from litigating shareholder derivative *claims that belong to CFRC*." (Motion for Intervention, p. 1) (emphasis added). CFRC's Memorandum in Support of Its Motion for Intervention and Protective Relief (CFRC Memorandum) goes a step further to assert that Ms. Luzak's claims belong "*exclusively*" to CFRC. (CFRC Memorandum, p. 1) Further: "[S]ome of **$104 million** of the **$112** million in damages she seeks is attributable only to alleged injuries suffered, if at all, by CFRC." All of that is incorrect. For example, non-party CFRC somehow alleges that the damages Ms. Luzak suffered from the defendants' civil conspiracy, intentional interference with inheritance

and gifts, and other acts against Ms. Luzak really belong to CFRC. Under CFRC's position, CFRC could bring a claim against Merrill Light because she took from Ms. Luzak.

The civil conspiracy claim and damages that were dismissed resulted from and are based upon Merrill Light's undue influence and tortious interference against Paul Barringer resulting in her improper seizure of property intended by Paul Barringer to go to Ms. Luzak and the conspiracy surrounding all the wrongdoing alleged in this case. Yet CFRC asserts that the claims of the victim of a conspiracy really belong to non-party CFRC despite the fact that the injury caused by that conspiracy was visited upon Ms. Luzak individually by defendants acting in their individual capacity. That position is not tenable.

The Supreme Court has addressed when a claim is derivate or direct: "Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered from the actual harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." *Patterson v. Witter*, 425 S.C, 213, 232, 821 S.E.2d 677, 687 (2018); see also *Weinstein v. Schwartz*, 422 F.3d 476, 478 (7th Cir. 2005) (holding an action by one sibling-shareholder against his other sibling-shareholders to determine ownership of shares in a family corporation gifted to all sibling shareholders from their father was a direct shareholder action, not derivative, despite the case being filed as a derivate suit, under Delaware law applying same two factors set forth in *Patterson* above.) [15]

CFRC claims that Ms. Luzak's civil conspiracy cause of action Count 19 is a "classic derivative claim" by referencing Ms. Luzak's factual allegations that the Light defendants effected

[15] Cf. *Patterson v. Witter*, 425 S.C. at 232, 821 S.E.2d at 687 ("When determining whether a claim is derivative or direct, some inquiries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually.") Ms. Luzak's claims, however, are solely direct individual claims.

a sale of portions of CFRC's business. These allegations were merely evidentiary allegations that showed evidence of special damages required for a civil conspiracy claim at the time the Complaint was filed in 2016.[16] However, the Supreme Court recently expanded the scope of damages recoverable in a civil conspiracy case. Traditionally, a plaintiff was required to plead and prove, and was limited to, special damages associated with a civil conspiracy. As of May 19, 2021, the need for special damages has been removed:

> We granted a petition for a writ of certiorari to consider the narrow question whether South Carolina's requirement of pleading special damages should be abolished. We conclude that it should... We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state.

Paradis v. Charleston Cnty. Sch. Dist., 433 S.C. 562, 861 S.E.2d 774, 775 (2021).[17]

Hampton Luzak has alleged a cause of action for civil conspiracy, asserting that the individual defendants, not CFRC, combined and conspired to secure control of CFRC for Merrill Light, which was then accomplished, with a resulting damage to the extent set out in Dr. Alford's report and deposition submitted to the trial court by CFRC. The damages that Ms. Luzak seeks against the defendants individually, not CFRC, proximately resulted from the consummation of their conspiracy.

The trial court in its order, as did CFRC in its Motion for Intervention, cited the Virginia

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[16] See Rule 9(g), SCRCP, requiring the pleading of special damages when they are claimed. *See also Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016) (overturning jury verdict where plaintiff failed to plead special damages in support of civil conspiracy claim); *see also Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999) (explaining that a claim for damages is a request for relief rather than an assertion of a cause of action).

[17] The Supreme Court enunciated the elements for civil conspiracy going forward as follows: "a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. Id. at 780. The opinion was initially issued eight days prior to the hearing on the Motion for Intervention – *i.e.*, on May 19, 2021, at No. 2018-002025, 2021 WL 1992245 and modified Aug. 18, 2021, 2021 WL 3668152, to add a footnote that intent to harm remains part of the civil conspiracy analysis.

case of *Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001), but the facts and underlying legal principles are not applicable here. The *Simmons* case was a quintessential derivative matter stemming from a classic usurpation of a corporate opportunity when a majority shareholder used corporate assets to set up another entity and then diverted the corporation's business opportunities to the new entity. The Virginia Supreme Court pointed out that the minority shareholder's breach of fiduciary duty claim against the majority shareholder was for an injury to the original jointly-owned corporation — the majority shareholder/defendant took corporate opportunities of the original corporation to his new corporation.

In contrast, Ms. Luzak did not sue Merrill Light and Randy Light in their capacities as officers and directors of CFRC. Instead, she sued Merrill Light for breach of her fiduciary duties as co-trustee of the Paul Barringer Revocable Trust (an estate planning vehicle) and Randy Light for aiding and abetting Merrill Light's breach of her co-trustee duties. These cases involve an intentional interference with inheritance claim with related causes of action for undue influence, lack of capacity, mistake, conspiracy and others. Ms. Luzak's breach of fiduciary duty claims involve non-corporate acts of the defendants. Moreover, defendant Merrill Barringer has never been a shareholder or director of CFRC, yet these cases involve the same claims against her for intentional interference with inheritance and civil conspiracy. The fact that others associated with non-party CFRC may have been involved in the conspiracy with the Barringer family defendants does not make the crux of Ms. Luzak's claim a corporate derivative claim.

CFRC has no claim against the individual defendants for Merrill Light misappropriating her father's property, including stock, to the detriment of Ms. Luzak. Those claims belong exclusively to Ms. Luzak, and they are against the individual defendants for misappropriating property intended for her, which just happens to be stock in CFRC. CFRC did not own the stock

misappropriated by the individual defendants; it had no ownership interest in or claim to that stock and has no claim related to the misappropriation of that stock. These claims no more belong to CFRC than if the defendants who are all individuals had misappropriated Ms. Luzak's cash or jewelry. It makes no sense that one shareholder taking the stock of another shareholder, legally or illegally, involves any rights of the corporation.

1. The trial court erred in finding Luzak must fulfill the requirements for commencing a derivative action under Virginia Code § 13.1-672.1 which is not applicable to Ms. Luzak's claims and has no bearing on the issue of whether the claims are derivative.

Ms. Luzak's present action is founded on wrongs committed in South Carolina involving a South Carolina decedent and his estate being probated in Beaufort County. As set forth in Part E.2 below, conflict of law principles of this state mandate that South Carolina law applies to these proceedings, including the internal affairs doctrine. Even if Virginia law did have any application, Virginia Code § 13.1-672.1 does not address the issue of *whether* Ms. Luzak's civil conspiracy claim or any of her damages are derivative. It merely addresses how a shareholder may commence or maintain a derivative proceeding once it has already been determined that certain claims are derivative.[18] The trial court erred by not understanding that distinction.

2. CFRC's bylaws do not require Ms. Luzak's direct action against Merrill and Randy Light to be heard in Fairfax County, Virginia.

[18] Va. Code § 13.1-672.1 states in part:

"A. A shareholder shall not commence or maintain a derivative proceeding unless the shareholder: . . . [setting forth the time frame in which a plaintiff must be a shareholder to bring a derivative suit]

B. No shareholder may commence a derivative proceeding until: . . . [setting forth procedures for making written shareholder demand on corporation]" Va. Code Ann. § 13.1-672.1(a) and (b) (West).

In contrast, if a claim is not derivative, the owners may not bring an action for damages as a derivative suit under the Virginia Stock Corporation Act. *See Little v. Cooke*, 274 Va. 697, 652 S.E.2d 129 (2007) (holding where damages were not sustained by the limited partnership but were incurred by the limited partners individually, the claim is not derivative and cannot be recovered in a derivative suit, upon applying the Virginia Stock Corporation Act's derivative suit provisions to limited partnerships pursuant to Va. Code § 50-73.62).

Because these cases do not involve any rights CFRC has, the argument that Virginia law applies also makes no sense.

The trial court in paragraph 2 of its order held that Ms. Luzak had not complied with the "Exclusive Forum" provision in Article VIII, Section 7 of CFRC's bylaws and thus lacked standing to pursue her conspiracy claim against Merrill and Randy Light in South Carolina. The "Exclusive Forum" paragraph in the bylaws enunciates four circumstances in which a suit involving CFRC must be heard in the Circuit Court of the County of Fairfax, Virginia.[19]

The order did not state which clause applied to Ms. Luzak's conspiracy claim, nor could it because none of them applies. The provision of clause (i) regarding derivative proceedings does not apply as explained above. Ms. Luzak's suit is not against Merrill Light or Randy Light in their capacities as directors, officer, or employee, but only in their individual capacities and as trustee of the Paul Barringer Revocable Trust; thus clauses (ii) and (iii) do not pertain to this case. Clause (iv) applies to claims against the corporation or its directors, officers, and employees that are governed by the internal affairs doctrine. As explained in part **E.2** below, the internal affairs doctrine is irrelevant to Ms. Luzak's suit. Therefore, the Exclusive Forum provision of CFRC's bylaws does not bar Ms. Luzak from bringing her civil conspiracy claim in South Carolina.

3. The trial court erred in holding Ms. Luzak lacked standing to pursue a direct claim against those who conspired against her after erroneously finding her claim was derivative.

The nature of Ms. Luzak's claims and the facts of this case are antithetical to the purpose

[19] Section 7. Exclusive Forum. Unless the Corporation consents in writing to the selection of an alternative forum, the United States District Court for the Eastern District of Virginia, Alexandria Division, or in the event that court lacks jurisdiction to hear such action, the Circuit Court of the County of Fairfax, Virginia (in such order, the "Chosen Court"), shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a legal duty owed by any current or former director, officer or other employee or agent of the Corporation to the Corporation or the Corporation's shareholders, (iii) any action asserting a claim against the Corporation or any current or former director, officer or other employee or agent of the Corporation arising pursuant to any provision of the Virginia Stock Corporation Act or the Corporation's Articles of Incorporation or these By-laws (as either may be amended from time to time), or (iv) any action asserting a claim against the Corporation or any current or former director, officer or other employee or agent of the Corporation governed by the internal affairs doctrine. CFRC Bylaws (as amended through Dec. 15, 2016), Article VIII, Section 7, cl. (i)-(iv)

of the derivative claim rule. In determining whether a claim could be brought directly by an individual shareholder or must be pursued derivatively, this Court and our Supreme Court have considered the purpose of the derivative action rule as described by the Georgia Supreme Court.

> The reasons underlying the general rule [that shareholders must file derivative actions for losses suffered by the corporation] are that 1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; 3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4) it adequately compensates the injured shareholder by increasing the value of his shares.

Brown v. Stewart, 348 S.C. 33, 50, 557 S.E.2d 676, 685 (Ct. App. 2001) (quoting *Thomas v. Dickson*, 250 Ga. 772, 774-75, 301 S.E.2d 49, 51 (1983).[20]

Ms. Luzak is the only injured shareholder of CFRC. No other CFRC shareholder had their expected interest in receiving Paul Barringer's voting stock by gift or inheritance cut off by the tortious acts of Merrill Light and her co-conspirators. Consequently, there can be no multiplicity of lawsuits. And since Ms. Luzak is the only shareholder capable of bringing her claim, "there is no concern that a recovery by her will prejudice the rights of other shareholders." *Thomas v. Dickson*, 250 Ga. at 775, 301 S.E.2d at 51.

The protection of creditors of CFRC is also not an issue in this case since none of the claims pursued by Ms. Luzak belong to CFRC or affects its assets, and no evidence has been offered by CFRC to support such a position.

Lastly, there was no misappropriation of corporate funds from CFRC, and CFRC would not receive the benefit of any recovery. There would be no recovery by CFRC to flow through to Ms. Luzak as a shareholder to compensate her in whole or even partially.

[20] *See Babb v. Rothrock*, 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991) for the Supreme Court's discussion and consideration of *Thomas v. Dickson*.

The trial court was in error in holding that Luzak's conspiracy claim was derivative, she lacked standing to pursue the claim, and that the court did not have subject matter to adjudicate it.

E. The trial court erred in striking Luzak's claims for damages against Merrill Light.

1. The trial court erred in striking Luzak's first, second, fourth, and sixth categories of damages set forth in her damages report by Dr. Alford as derivative claims.

Ms. Luzak seeks damages against her sister (Merrill Light) and her sister's husband (Randy Light) for their own individual torts of fraud, conversion, unjust enrichment, breach of fiduciary duty and self-dealing,[21] intentional interference with inheritance and gifts, and civil conspiracy. She also seeks similar damages against her mother. Associated with those claims, she seeks the imposition of a constructive trust and other ancillary relief.

Non-party CFRC does not have a dog in this fight. It is an interloper. That is why the trial court commented in the hearing on May 27, 2021: "Ms. Light is still in it. If you are suing her individually, I don't understand what CFRC has to do with any of this." (Hr'g Tr. 103:12-14, 5.27.21). And the trial court confirmed it when it agreed that the damages as to CFRC are gone but that Ms. Luzak could sue Ms. Light "all day long." (*Id.* at 106:4-6.) The trial court also held: "My ruling only applies to CFRC. He [the CFRC attorney] doesn't represent anybody else but CFRC. Period." (*Id.* at 77:16-18). That was correct, but the written order stands contrary to that. The damage claims against Merrill Light and the individual defendants should be re-instated. That is a critical issue of this appeal.

A more blunt way to view this is: if Ms. Luzak's claims for damages *really* belonged to CFRC, as CFRC asserts, then only non-party CFRC would have standing to sue Merrill Light for

[21] Ms. Luzak's Sixteenth cause of action for breach of fiduciary duty and self-dealing is against Merrill Light in her capacity as trustee of the Paul B. Barringer, II Revocable Trust and against Randy Light for aiding and abetting, not against the Lights in their capacities as corporate directors or officers. None of the claims are against the Lights in any of their corporate capacities.

tortious interference with Ms. Luzak's inheritance and gifts, for defrauding Ms. Luzak, for conspiring with her husband against Ms. Luzak, and the like. Yet CFRC is telling the Court that all of these damages belong *exclusively* to CFRC, to the exclusion of Ms. Luzak, the victim.[22]

In its attempt to strike Ms. Luzak's damages, non-party CFRC ignores Ms. Luzak's causes of action – *i.e.*, the nature of the harmful conduct at issue in the case (with the exception of the civil conspiracy cause of action). CFRC does not assert that Ms. Luzak's claims for fraud, breach of fiduciary duty as trustee, intentional interference with inheritance, and conversion are derivative claims. Instead, CFRC resorts to the calculation of damages to claim Ms. Luzak's suit is derivative. CFRC utilizes semantical legerdemain in arguing that those claims belong to CFRC by misdirecting the focus of its argument on the calculation of damages rather than the nature of the claims. See *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. at 35, 512 S.E.2d at 109 (explaining that a claim for damages is a request for relief rather than an assertion of a cause of action). However, "[i]n determining whether a claim is direct or derivative, the central or fundamental inquiry concerns whose right is sought to be enforced by the cause of action." 19 Am. Jur. 2d Corporations § 1923.

(a) *Damage category number one – damages from gain of control related to transfer of voting stock.*

To address the elements of damages more particularly, non-party CFRC seeks to strike the damages asserted against the named defendants for improperly obtaining the voting stock of Paul Barringer and thereby consolidating the majority ownership (control) of the company in Merrill Light, consequently causing the value of Ms. Luzak's holdings in CFRC to decline. The diminution in the value of Ms. Luzak's stock was caused by improper actions of individual family members,

[22] Ms. Luzak has conducted a nation-wide search for cases where a corporation tried to assert inheritance or probate-related claims on behalf of one of its shareholders but was unable to find such a case.

only one of whom also happened to be a co-stockholder, not by actions internal to the company or by the company or by anyone acting on behalf of the company or against the company. Prior to the acquisition of Paul Barringer's voting stock by Merrill Light, Ms. Luzak and Ms. Light owned the same amount of voting stock, and there was no majority control vested in any shareholder, but when Ms. Light improperly received her father's stock, Ms. Luzak's voting shares were then subject to Merrill Light's control of the company. Ms. Luzak's expert, Dr. Alford, has issued his report stating that this gain in control by Merrill Light reduced the value of Ms. Luzak's stock by $62 million. (CFRC's Mot. for Int., Ex. H, Rep. of Charles L. Alford, Ph.D, at 1) ("The difference, or $61,728,933, is the measure of damage from the gain of control (by defendant Light) related to the transfer of voting stock.").

Dr. Alford testified to the same effect in his deposition that CFRC attached to its Motion:

> When one of the owners suddenly gains control, it has to be at the expense of the other owner…What I have valued is the gain that Ms. Light has enjoyed by obtaining control of the company. And that gain was at the expense of, primarily, Ms. Luzak. N (Ex. J to CFRC's Mot. for Intervention, excerpted Alford Dep. Tr. Sept. 22, 2020, at 144-145).

Dr. Alford did not testify that Ms. Light's gain would come at the expense of CFRC.

The damages suffered by Ms. Luzak from Merrill Light's gain of control of the voting stock were unique to her and were not losses to the corporation and were not proportionate to her ownership percentage in CFRC relative to other shareholders and were not derivative. (CFRC's Mot for Int., Ex. J, excerpted Alford Dep. Tr. 9.22.20,132:10-15). No other shareholder of CFRC can make this claim because no other shareholder was a beneficiary of Paul Barringer's will and trust; nor obviously was the corporation.

Ms. Luzak's damage claim is not based upon any action or inaction by or against CFRC or anyone acting on behalf of CFRC. It is a damage claim by Ms. Luzak against Merrill Light and

the named defendants individually for their individual complicity and participation in that wrongful transfer. It is the value of Ms. Luzak's stock that has been significantly diminished.

The South Carolina Supreme Court has stated: "If…corporate mismanagement[23] has caused a particular loss to an individual stockholder, the liability is an asset of the injured individual, remediable by an action in his name. A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (emphasis added).

In Hite, the plaintiff shareholder alleged a co-shareholder obtained additional stock for himself to the exclusion of plaintiff, through a breach a fiduciary duty and negligence, resulting in a diminution of the plaintiff's percentage of corporate ownership. The Supreme Court held that the reduction of plaintiff's individual percentage of corporate control from 33 1/3% to 11.5% is separate and distinct from any general diminution in the value of corporate stock. The court held: "The gravamen of Hite's complaint is clearly a particular loss separate and distinct from that of the corporation." *Id.* at 361, 409 S.E.2d at 342.

In the present case, Paul Barringer's stock was never going to the Congers[24] in any version of Paul Barringer's wills and trusts; therefore, the Congers' percentage share of ownership was not going to change with or without the tortious stock transfer. Nor was the corporation damaged. Not all the shareholders were adversely impacted by Merrill Light's actions. The only shareholder impacted by Merrill Light's actions to obtain her father's voting stock was Ms. Luzak. So Damage

[23] By contrast, Ms. Luzak is not alleging corporate mismanagement, as discussed below.
[24] Members of the unrelated Conger family own approximately 18% of CFRC's voting stock.

Element #1 is a "particular loss" to a specific "individual stockholder." Ms. Luzak's loss is "separate and distinct from that of the corporation," and the transfer of Paul Barringer's stock to Merrill Light as a result of her tortious conduct toward her mentally impaired father was not a corporate management decision. The transfer was a direct shareholder-to-shareholder, family member-to-family member transaction that did not result from acts of "corporate mismanagement."[25]

(b) *Damage category number two – reduced value to Ms. Luzak's shares due to her ownership dilution by stock issuance to new CFRC CEO.*

Once Ms. Light had gained control of CFRC, she used that control to benefit the company's CFO, Travis Bryant, at the cost of Ms. Luzak by issuing stock to Mr. Bryant and diluting the interest and value of Ms. Luzak's stock. That is a damage to Ms. Luzak individually that she asserts for herself against the individual defendants for their acts in their individual non-corporate capacities in improperly seizing control and their conspiracy. The company has no interest in that damage claim. Ms. Luzak does not assert any claim on behalf of the company. The damages she suffered were a consequence of improper gain of control of non-party CFRC, and that is exactly what Dr. Alford was saying when he testified in his deposition: "But it is Ms. Light who has gained control. And her having gained that control means that, essentially, the entire operation of the company is at her disposal…Well, the damage occurred when Ms. Light gained control of the company. The damage has not ended." (CFRC's Mot. For Int., Ex. J, excerpted Alford Dep. Tr. 9.22.20, at 146).

(c) *Damage categories four and six – salary compensation to defendant Randy Light and forgone returns on sales of CFRC timberland.*

In his fourth category of damages, Dr. Alford sets forth the known compensation Randy

[25] The purported transfer was from Paul Barringer as trustee of his revocable trust to Merrill Light as trustee of her own revocable trust.

Light began receiving in 2012, upon his wife Merrill Light gaining control of CFRC, and thereafter in the form of board stipends, advisory fees, and bonuses. The Lights were able to create and maintain this compensation as a result of their tortious conduct that effected the transfer of Paul Barringer's voting stock to Merrill Light.

In the sixth category of damages, Dr. Alford calculated the lost income that resulted from the Lights and Ms. Barringer terminating Ms. Luzak's husband as CEO and in effect ending the plan of Mr. Luzak to liquidate unproductive timberland and convert the proceeds into income producing strategies when Merrill Light seized control of Paul Barringer's voting stock.

In both the fourth and sixth categories of damages, Dr. Alford reduced the damage claim for Ms. Luzak to 37% of the losses incurred to represent Ms. Luzak's share of company profits as a shareholder, thereby isolating the effect of the losses solely on Ms. Luzak. The amounts calculated in these damage categories therefore exclude any benefit that would otherwise accrue to other shareholders.

Ms. Luzak would not have suffered these losses but for the fraud, breach of fiduciary duty, intentional interference with inheritance, and conspiracy carried out by the defendants to transfer Paul Barringer's voting stock to Merrill Light. No other shareholder had the expectancy of receiving the decedent's voting shares. Ms. Luzak was the lone shareholder whose rights were violated by the defendants' wrongful conduct, and CFRC has no damage claims for all of the misconduct associated with and resulting from the misappropriation of Paul Barringer's voting stock by the defendants. Any recovery is Ms. Luzak's alone.

For the foregoing reasons, the trial court erred in the particulars set forth in paragraphs 1-3, and 5 of its order pertaining to derivative actions.

2. <u>The internal affairs doctrine does not deprive the trial court of subject matter jurisdiction to adjudicate Luzak's claims for recovery of damages.</u>

The trial court ruled that it could not hear Ms. Luzak's conspiracy claim because it did not have subject matter jurisdiction to consider claims arising out of the internal affairs of a foreign corporation, citing S.C. Code Ann. § 33-15-105(c). However, "subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Brandt v. Gooding*, 368 S.C. 618, 625, 630 S.E.2d 259, 262 n.2 (2006) (citing, in a case including a civil conspiracy claim, to S.C. Const. Art. V, § 11 (for general trial court original jurisdiction in civil and criminal matters), and *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994). Civil conspiracy is indisputably within the general jurisdiction of the Court of Common Pleas.

The internal affairs doctrine is not a rule of subject matter jurisdiction. "The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. at 650, 817 S.E.2d at 278 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (citation omitted).

But even as a conflict of law principle, the internal affairs doctrine as codified in § 33-15-105(c) does not bar the trial court from hearing Ms. Luzak's conspiracy claim against her sister, brother-in-law, and mother. The South Carolina Supreme Court explained: "The 'internal affairs' of a corporation consist of 'the relations inter se of the corporation, its shareholders, directors, officers or agents.' Restatement (Second) of Conflict of Laws § 302 cmt. a (1971)." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. at 649–50, 817 S.E.2d at 278.

Where the issues before the court concerning a foreign corporation "involve disputes that

reach beyond the confines of the corporation…the application of South Carolina law is appropriate and [ ] the internal affairs doctrine does not bar our review of this issue." *Pertuis*, 423 S.C. at 650, 817 S.E.2d at 278 (applying South Carolina's veil piercing law to a plaintiff's claim against a North Carolina corporation.)

This case pertains to the transfer of assets by the decedent Paul Barringer by gift or pursuant to South Carolina's laws of descent and distribution from the decedent's probate estate. The Restatement section cited by the Supreme Court in *Pertuis* covering the scope of the internal affairs doctrine sets forth an extensive description of the doctrine's scope.[26] Missing from the detailed description, however, is the transfer of corporate shares between shareholders. The Restatement further explains why the transfer of shares is not included within the internal affairs doctrine:

> It should be added that certain issues which are peculiar to corporations or to other organizations do not affect matters of organic structure or internal administration and need not, as a practical matter, be governed by a single law. An example is the transfer of individual shares of a share issue.

Restatement (Second) of Conflict of Laws § 302 (1971).

In a case involving a tender offer for the transfer of shares and quoted by our Supreme Court with approval, the United States Supreme Court held the internal affairs doctrine inapplicable stating:

> Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. *Great Western United Corp. v. Kidwell*, 577 F.2d, at 1280, n.53; Restatement, *supra*, § 302, Comment *e*, p. 310.

[26] "Matters falling within the scope of the rule of this Section and which involve primarily a corporation's relationship to its shareholders include steps taken in the course of the original incorporation, the election or appointment of directors and officers, the adoption of by-laws, the issuance of corporate shares, preemptive rights, the holding of directors' and shareholders' meetings, methods of voting including any requirement for cumulative voting, shareholders' rights to examine corporate records, charter and by-law amendments, mergers, consolidations and reorganizations and the reclassification of shares. Matters which may also affect the interests of the corporation's creditors include the issuance of bonds, the declaration and payment of dividends, loans by the corporation to directors, officers and shareholders, and the purchase and redemption by the corporation of outstanding shares of its own stock." Restatement (Second) of Conflict of Laws § 302, com. a (1971).

Edgar v. MITE Corp., 457 U.S. 624, 645, 102 S. Ct. 2629, 2642, 73 L. Ed. 2d 269 (1982).[27]

Likewise, the Fifth Circuit Court of Appeals in the footnote cited by the United States Supreme Court with approval further explained why the internal affairs doctrine does not apply to the transfer of corporate shares from one shareholder to another.

> [A] tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself. The voting rights of shares and the legal relationship between a corporation and its shareholders does (*sic*) not change because of a tender offer…

Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1280, n.53 (5th Cir. 1978), rev'd sub nom. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979).

In these cases, the exclusive issue before the court is the transfer of shares by Paul Barringer from his estate pursuant to the laws of gifting and descent and distribution applicable to individuals and estates of decedents in South Carolina. The voting rights of each individual share and the legal relationship between CFRC and its shareholders did not change because of the transfer of voting shares from Paul Barringer to one or both of his daughters.[28] All that changed was the power to control the company because Merrill Light purportedly got more voting shares. No change in CFRC itself is effected, nor are its internal affairs implicated; South Carolina law, therefore, governs this case, and the trial court has subject matter jurisdiction to hear Ms. Luzak's civil conspiracy cause of action.

F. Ms. Luzak's damage claims for the transfer of CFRC stock to J. Travis Bryant is not barred by res judicata or any other claim or issue preclusion doctrine; all of Ms. Luzak's causes of action are valid claims of first impression and not precluded by res judicata.[29]

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[27] *Edgar v. MITE Corp.*, *supra*, was cited by our Supreme Court with approval on the role of the internal affairs doctrine in a conflict of law analysis applying South Carolina law to a foreign corporation. *See Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C.at 650, 817, S.E.2d at 278.

[28] The voting shares of Paul Barringer did not transform into non-voting shares following the transfer, nor did any other legal rights between CFRC and the holder of Paul Barringer's voting shares change with the transfer.

[29] Paragraph 4 of the order states that res judicata precludes Ms. Luzak's second category of damages arising from the sale of CFRC stock to J. Travis Bryant.

Economist Dr. Charles Alford submitted a damage calculation report setting forth Ms. Luzak's damages from the transfer of Paul Barringer's voting stock from him individually to his Revocable Trust and then ultimately to Ms. Light's revocable trust. The damages he calculated would be applicable to Ms. Luzak's causes of action specifically addressing the voting stock transfer ("Stock Transfer Causes of Action").[30] The trial court held Ms. Luzak was not entitled to recover the portion of the damage calculations attributable to the dilution of the value of Ms. Luzak's stock as a result of the stock issuance to J. Travis Bryant at the behest of Merrill and Randy Light because of res judicata.

Importantly, Ms. Luzak is not seeking in this action to unwind the stock transfer to Bryant, nor does she assert there was damage to the corporation. Rather she simply asserts the improper seizing of control by her sister and the use of that control to cause damage to Ms. Luzak. Dr. Alford simply identified and quantified that damage to Ms. Luzak by measuring the diminution of her holdings in CFRC. He has not addressed damage to the corporation, nor is there any need to since the claim and damages belong to Ms. Luzak.

More broadly, the doctrine of res judicata (or "claim preclusion") does not prevent Ms. Luzak from filing any or all of her causes of action. Ms. Luzak could not have brought any of her causes of action that she filed in this case in the Virginia federal litigation because she did not have standing to bring them at that time. Moreover, the current claims are based on different causes of

[30] The Stock Transfer Causes of Action cover Ms. Luzak's **Fourth**, **Fifth** and **Sixth** Causes of Action related to the *inter vivos* transfer of Paul Barringer's CFRC voting stock to the Merrill B. Light Revocable Trust on September 11, 2012; the **Tenth** Cause of Action related to the May 2012 transfer of Paul Barringer's CFRC voting stock ultimately to the Paul B. Barringer Revocable Trust; the **Eleventh** cause of Action for fraud and aiding and abetting fraud; the **Twelfth** Cause of Action for conversion and aiding and abetting conversion; the **Thirteenth** Cause of Action for quantum meruit/unjust enrichment; the **Fourteenth** Cause of Action for constructive trust; the **Fifteenth** Cause of Action for resulting trust; the **Sixteenth** Cause of Action for breach of fiduciary duty and aiding and abetting breach of fiduciary duty; the **Seventeenth** Cause of Action for intentional interference with inheritancy and gifts; and the **Nineteenth** Cause of Action for civil conspiracy.

action derived from a different set of operative facts.[31] Ms. Luzak did not and could not bring her claims until Paul Barringer died.[32] The Virginia federal litigation was begun and completed during Paul Barringer's lifetime.[33] Ms. Luzak brought her claims in this case, all for the first time ever, when she finally could under the law: upon the death of Paul Barringer, the settlor of the revocable trust.

II. Issue Four

The trial court erred in granting summary judgment in favor of Merrill Light on the Seventh, Eighth, and Ninth causes of action in that the identical argument had already been ruled upon and also in declaring the February 28, 2012 Will and Trust to be valid because there are genuine issues of material fact that remain as to those causes of action.

A. Background on Merrill Light's summary judgment motions.

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[31] *See Griggs v. Griggs*, 214 S.C. 144, 51 S.E.2d 622 (1949) (holding res judicata did not bar defendant from pleading adverse possession in second action after alleging breach of trust in the prior action, where different facts and evidence supported different causes of action); *see also Moseley v. Welch*, 218 S.C. 242, 62 S.E.2d 313 (1950) (ruling res judicata did not bar appellant's action because new facts altered legal rights of the parties); *cf. Plum Creek Dev. Co., Inc. v. Cty of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)(where the court focused not on the remedies sought but on the identity of the causes of action to determine the applicability of res judicata); *see also Lee v. Spoden*, 290 Va. 235, 245, 248, 776 S.E.2d 798, 803 n.5, 805 (2015) (applying Virginia law on res judicata in explaining that a prior "judgment bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies . . . [O]ur focus is on whether that action is based on the same or a different cause of action.") (internal quotation and citation omitted) (emphasis added).

[32] Under both the South Carolina Trust Code and Virginia Uniform Trust Code, Ms. Luzak did not have standing to bring any of her Stock Transfer causes of action in the Virginia federal litigation. South Carolina Trust Code § 62-7-603 gives a settlor plenary power over a revocable trust during his lifetime. Section 62-7-603 provides: "While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." The Reporter's Comment to this section addresses the effect on the beneficiaries of the settlor's retained powers over a revocable trust, by stating: "This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death of the settlor. . ." S.C. Code Ann. § 62-7-603, cmt. (1st ¶). The Reporter's Comment further provides that a named beneficiary of a revocable trust does not have standing to assert any right of action under the trust during the settlor's lifetime, even during the settlor's incapacity. "Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of fiduciary duty will pass to the settlor's agent or conservator." S.C. Code Ann. § 62-7-603, cmt. (4th ¶).

The Reporter's Comment to S.C. Code Ann. § 62-7-604, addressing post-mortem contests over the validity of a revocable trust and distributions of trust property therefrom, enunciates the principle that it is a settlor and his agents, not the named beneficiaries, who can act on behalf of a revocable trust during the settlor's lifetime, even upon the settlor's loss of capacity.

[33] The breach of contract claim involving transfers for consideration ended on March 17, 2016, pursuant to the order of Dismissal following Ms. Luzak's Motion for Voluntary Dismissal, approximately two and half months before Paul Barringer's death.

The Honorable Carmen T. Mullen designated the case as complex and presided over the case until her recusal on February 19, 2021. While the action was pending before Judge Mullen, the Light defendants moved for summary judgment on "all claims asserted against them in the Amended Complaint." (Def. ML's MSJ filed 9.10.20).[34] Judge Mullen conducted a hearing on this omnibus motion for summary judgment lasting three days: November 17-19, 2020.

A critical portion of that omnibus summary judgment motion involved Ms. Luzak's contention that any estate planning document executed by Decedent Paul B. Barringer after 1998 was invalid for any one or more of a number of reasons: undue influence, mistake, fraud, tortious interference with inheritance, and lack of capacity. After 1998, Decedent purportedly executed wills and/or trusts in February 2012, July 2012, June 2014, and February 2015. The questions of Mr. Barringer's capacity, undue influence and mistake were specifically addressed by Judge Mullen and counsel for Ms. Light. (Dec. 17-19, 2020 Tr.p 251, 253). Judge Mullen denied defendant Light's motion in its entirety. (Order dated 12.30.2020). Judge Mullen's order effectively found that Ms. Luzak had sufficient evidence to create an issue of material fact and preserved Ms. Luzak's contention about the invalidity of any post-1998 estate planning document purportedly executed by Decedent, including but not limited to the will and trust purportedly executed in February 2012. (Order dated 12.30.2020). Merrill Light did not move to alter or amend the judgment and instead waited for five months and a different judge before trying again. On May 14, 2021 Merrill Light again moved for summary judgment, this time focusing only on the

[34] All exhibits and exhibit attachments referenced in this Argument are to the exhibits and exhibit attachments (and corresponding exhibit and attachment letters and numbers) in Plaintiff's Response in Opposition to defendant Merrill B. Light's Motion for Summary Judgment as to the Plaintiff's Seventh, Eighth, and Ninth Causes of Action ("Plaintiff's Response in Opposition"), filed May 24, 2021 in Case Number 2016-CP-07-01919, which incorporated by reference Ms. Luzak's memoranda and exhibits filed November 9, 2020 in the prior summary judgment motion denied by Judge Mullen on December 30, 2020. Judge Mullen denied defendants' prior omnibus motion for summary judgment, which included the causes of action granted in this summary judgment motion by Judge Price.

purported February 2012 will and trust, as to Ms. Luzak's seventh (undue influence), eighth (lack of capacity), and ninth (mistake) causes of action.

B. Standard of Review

The standard of review applicable to Merrill Light's second summary judgment motion on Ms. Luzak's seventh (undue influence), eighth (lack of capacity), and ninth (mistake) causes of action is set forth in Section C, Part Five below.

C. Argument

1. The trial court erred in hearing and granting the Motion for Summary Judgment when that same Motion has previously been heard and denied by a prior judge and no new evidence existed in the Record.

In granting Merrill Light's renewed motion as to the purported February 2012 Will and Trust, Judge Price reversed the prior denial of the very same summary judgment motion that had been decided mere months earlier on the very same arguments, by Judge Mullen, who had been presiding over this case, designated as complex, and who had been deeply involved in all aspects of this complex case for approximately four years. Judge Price reversed Judge Mullen even though *Ms. Luzak had no less evidence*[35]for this repeat summary judgment motion than she had when Judge Mullen denied the same (prior) summary judgment motion on December 30, 2020 as to all the post-1998 estate planning documents, including the February 2012 Will and Trust. Nor has the law changed since December 30, 2020. If Ms. Luzak had a sufficient amount of evidence to create a genuine issue of material fact in the prior summary judgment, she has a sufficient amount now. That evidence did not evaporate or go away, and the issue of material fact did not evaporate or go away.

[35] Ms. Luzak actually had more evidence in her favor for this repeat summary judgment motion than in the prior summary judgment action, as discussed below, especially related to the testimony of attorney John Jolley, who prepared several of the estate and trust documents executed by Paul Barringer after he began suffering from dementia.

Rule 43(l), SCRCP states: "If any motion be made to any judge and be denied, in whole or in part or be granted conditionally, no subsequent motion upon the same set of facts shall be made to any other judge in that action." There was no considerable new discovery produced during the five months between the order on the first summary judgment motion and the hearing on the second summary judgment motion.[36]

Despite Judge Price's expressed statement that he has never "gone against" an order by another judge issued in the same case,[37] he did exactly that: His order contradicts and overturns Judge Mullen's denial of defendants' previous summary judgment motion as to these documents (and others), issued and filed on December 30, 2020.

2. The trial court erred in failing to find that the defendants are estopped from seeking Summary Judgment on the validity of the February 28, 2012 Will and Trust when those same defendants assert the validity of subsequently executed Wills and Trusts that would revoke the February 28, 2012 Will and Trust.

Just as defendants did in their argument to bifurcate (discussed below), Merrill Light asked the trial court to find that cherry-picked documents (in this case, the February 28, 2012 Will and Trust) are valid, while at the same time asserting the validity of subsequent documents, which, if valid, revoke the earlier documents (in this case, the February 28, 2012 documents). A revoked Will is not valid once a subsequent valid Will revoking the prior Will is executed. *White v. Wilbanks*, 301 S.C. 560, 393 S.E.2d 182 (1990).

[36] The defendants may try to assert that the deposition of John Jolley was taken in the interim. That deposition had not been finished by the time of summary judgment. His direct examination by the defendant Merrill Barringer simply restated the content of his certification on the February 28, 2012 will, which was presented at the first summary judgment hearing. That was not new. Ms. Luzak had not yet completed her cross-examination of Mr. Jolley which was concluded after the trial court entered its order on the second summary judgment motion. Also, Ms. Luzak obtained after the trial court's orders certain pleadings from state courts in Texas, the existence of which were not disclosed by the Lights despite Ms. Luzak's discovery requests approved by the trial court, showing the extent of the financial crisis facing the Lights prior to and past February 28, 2012. See footnotes 5, *supra*, and 89, *infra*, and accompanying text.

[37] July 2, 2021 Hearing Transcript, p. 30; see also May 27, 2021 Hearing Transcript, p. 115.

Here, Merrill Light asked the trial court to find valid documents that revoked earlier documents that they also assert are valid - a complete non sequitur. Subsequent to the February 28, 2012 documents, Mr. Barringer purportedly executed new estate planning documents on July 20, 2012, June 12, 2014, and February 5, 2015, each of which revoked "all prior" estate planning documents. Although Ms. Luzak asserts that each of these documents lacks validity, defendants assert that all of these documents are valid. Thus, according to Merrill Light's position that the subsequent documents are themselves valid, the February 28, 2012 Will and Trust would have no meaning or validity because the subsequent documents effectively revoked them.

Despite the trial court's attempted explanation in its order, only one Will and one Trust can be valid. If the February 28, 2012 Will and Trust are valid, then any subsequent Will and Trust cannot be valid because, if valid, any of those subsequent documents would have revoked and invalidated the February 28, 2012 documents. This is further illustrated by the error in bifurcating certain causes of action, discussed below, for trial before the other causes of action; all of the documents have to be considered at the same time and it will be up to a jury to determine when Paul Barringer's dementia and Alzheimer's prevented him from exercising testamentary and contractual capacity.

The error really arises from the court declaring the validity of the February 2012 instruments instead of merely granting summary judgment on the causes of action challenging their validity for defects in Mr. Barringer's mental state. The trial court specifically found in its order: "I hereby grant Defendant's motion and, for the reasons set forth below, find as a matter of law that Mr. Barringer had testamentary capacity, was not subject to undue influence and was not mistaken when he executed the February 2012 Testamentary Documents, and that the February 2012 Testamentary Documents are valid." (Order July 6, 2021, p.1)

In their Joint Motion to Bifurcate Trial filed October 23, 2020, defendants moved to have the trial court hold a separate trial solely on the issue of the "1998 Contract Claims." Defendants' motion sought the bifurcation and separate trial to examine only the 1998 documents. Again, they took inconsistent legal positions. They convinced Judge Mullen that the second and third causes of action — more accurately stated as the "power of appointment issues"[38] rather than the 1998 Contract Claims —in consolidated case number 2016-CP-07-1919 could be resolved by examining only the 1998 documents, which necessarily would have to be valid for the bifurcated trial to do what defendants proposed that trial could do. Of course, if the February 28, 2012 Will and Trust are valid, then those documents would supersede and invalidate the 1998 documents.

Defendants are indeed taking inconsistent factual positions: (1) they argue that the 1998 documents are valid for purposes of the power of appointment trial, even though they are revoked by the February 28, 2012 documents which they assert are valid; (2) they argue that the February 28, 2012 documents are valid, even though they are revoked by the subsequent documents that defendants contend are valid. Judge Price failed to recognize that a revoked document is not valid. Judge Price further erred in determining that defendants could successfully maintain their factually inconsistent arguments; to the contrary, they convinced Judge Mullen to have a separate trial based solely on the 1998 documents which they assert are valid. Ms. Luzak did establish the elements necessary for estoppel, and the court erred by not recognizing that defendants were estopped.[39]

3. The trial court erred in failing to find that material issues of fact are in dispute about the validity of the February 28, 2012 Will and Trust when the defendants assert the validity of subsequent instruments were executed that would revoke the February 28, 2012 Will and Trust.

[38] As demonstrated at the summary judgment, Ms. Luzak's arguments about the power of appointment are not limited to a contract claim, although she has a compelling argument on that issue. Nowhere has Ms. Luzak limited these arguments to only the 1998 documents.

[39] Judge Price states that Ms. Luzak did not even attempt to establish elements of judicial estoppel. That is an erroneous statement. Ms. Luzak's memoranda and argument clearly discussed the factors relevant to estoppel and to judicial estoppel.

For the reasons explained in the prior section, the February 28, 2012 Will and Trust cannot be determined to be valid in a vacuum. If any of the subsequent documents are valid, as asserted by defendants, then the February 28, 2012 Will and Trust are revoked and *cannot be valid*.

4. The trial court erred in finding that the February 28, 2012 Will and Trust were valid as a matter of law when the Motion for Summary Judgment by the defendant Merrill Light sought Summary Judgment only as to the Seventh, Eighth, and Ninth Causes of Action as they related to the February 28, 2012 Will and Trust, ignoring and leaving unaddressed Ms. Luzak's challenge to the validity of those instruments for fraud in her Eleventh Cause of Action and for Interference with an Inheritance in her Seventeenth Cause of Action.

The trial court's conclusion that the February 28, 2012 Will and Trust are valid is also erroneous because defendants sought their summary judgment *only* as to Ms. Luzak's Seventh (Capacity), Eighth (Undue Influence), and Ninth (Mistake) Causes of Action. The court erred by proceeding further and not only granted summary judgment on those three causes of action, but went beyond that and declared the February 28, 2012 instruments to be valid, ignoring other challenges to their validity, such as fraud (Ms. Luzak's Eleventh Cause of Action)[40] and revocation by subsequent testamentary documents found to be valid.

5. The trial court erred in failing to apply the proper standard and construe the evidence in a light most favorable to Ms. Luzak.

The scintilla of evidence rule for summary judgment clearly applies to Ms. Luzak in this case to the extent the burden of proof would rest with Ms. Luzak; however, as to the issues of this summary judgment motion, the burden is actually on defendant, not Ms. Luzak.[41] The trial court

[40] Similarly, Ms. Luzak's Seventeenth Cause of Action alleges intentional interference with inheritance, with the effective result of invalidating documents resulting from such tortious interference. Ms. Light failed to ask Judge Price to rule, and Judge Price failed to rule on the Seventeenth Cause of Action, so Ms. Luzak still has a surviving cause of action as to intentional interference with inheritance as to the 2012 estate planning documents.

[41] *See*, e.g., *Salerno v. Inman ex rel. Estate of Wilbur*, No. 2011-UP-423 (Ct. App. 2011); *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997); *Matter of Estate of Smith*, 419 S.C. 111, 796 S.E.2d 158 (Ct. App. 2012); *Langley v. Lynch*, No. 2015-001941 (S.C. Ct. App. 2017); *Gregory v. Estate of Broughton*, No. 2015-UP-302 (S.C.Ct. App.

erred in its application of the burden of proof.

Despite defendant Light's assertion to the contrary, defendant Light was in a confidential/fiduciary relationship with Mr. Barringer as of February 28, 2012 because, *inter alia*, she was the director in a company in which he was a shareholder and was his partner in a family partnership. Moreover, he reposed trust and confidence in her, which creates a confidential or fiduciary relationship.[42] Because of that confidential/fiduciary relationship, South Carolina law places a presumption against the validity of a revocable instrument, such as a Will or Revocable Trust, and requires the proponent of a revocable instrument to rebut the presumption.[43] Thus, the burden was on defendant Light.[44]

Similarly, when a testator suffers from chronic incapacity, the burden is on the proponent to prove that the Will was executed during a lucid interval. Voluminous medical and other evidence demonstrate that the testator, Paul Barringer, was suffering from chronic incapacity beginning no later than November 2011 and perhaps as far back as 2010, as discussed below. Thus, in addition to the confidential relationship issue, the burden is on defendant as to capacity.[45]

Determining what standard for the burden of proof the Court used in the instant order is problematic because of the language in the order. At one point in the order, the trial court states: "'Since the standard of proof in an undue influence case is unmistakable and convincing evidence,

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2015); *Swiger by & through DeHaven v. Smith*, 426 S.C. 408, 827 S.E.2d 200 (Ct. App. 2019) (citing *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003)).

[42] *See*, e.g., *Chapman v. Citizens & Southern National Bank*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990).

[43] *See* Swiger, *supra* (citing *Hairston v. McMillan*, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010); *Howard v. Nasser*, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005)); *In re Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999); *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983). If the presumption is rebutted in a will contest, then the ultimate burden of proof falls on the contestant.

[44] The same is true for fraud. See *Brock v. Brock*, 218 S.C. 174, 61 S.E.2d 885 (1950); *Devlin v. Devlin*, 89 S.C. 268, 71 S.E. 966 (1911); *Wilson v. Wilson*, 117 S.C. 454, 112 S.E. 330 (1920).

[45] *See Wright v. Lewis*, 5 Rich. 212, 39 S.C.L. 212, 1851 WL 2638, 55 Am.Dec. 714; *Lee v. Lee's Heirs*, 4 McCord 183 (S.C. App. 1827); *Keely v. Moore*, 196 U.S. 38 (1904); *Haghart v. Cooley*, 278 Ala. 354, 178 So.2d 226 (1965).

there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.' *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003)." However, in the portion of the order dealing with undue influence, the trial court states that Ms. Luzak has the burden to establish her case "convincingly and unmistakably." Even if Ms. Luzak were required to show more than a scintilla of evidence, which she has, she cannot be required at the summary judgment stage to establish her case "clearly and convincingly." That was not the applicable standard. Moreover, Judge Price failed to consider the evidence and all reasonable inferences in light of Ms. Luzak, the non-moving party.[46]

6. The trial court erred in stating and applying the test for mental capacity to make a Will and Trust.

Although Judge Price dismisses a concern about Paul Barringer's deficits in short-term memory, among other mental deficits, before and around the time of the execution of the Will and Trust, a deficit in short-term memory is of significant concern when determining whether a testator

[46] When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488,493, 567 S.E.2d 857, 860 (2002) (citation omitted). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id*.; Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-97, 567 S.E.2d at 860 (citation omitted). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). *Turner v. Milliman*, 392 S.C. 116, 708 S.E.2d 766 (2011).

Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co*., 420 F. Supp. 483, 486 (D.S.C.1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101,410 S.E.2d 537 (1990).

"Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

or settlor has sufficient mental capacity. An obvious requirement to making a Will is the ability to know and understand what making a Will is about.

A testator must be capable of understanding "the disposition that he or she is making of [] property, and must also be capable of [] relating these elements one to another and forming an orderly desire regarding the disposition of the property." Restatement (Third) of Property: Wills and Other Donative Transfers section 8.1(b). Merely having the ability to know one's property and the objects of one's bounty is not sufficient[47] — one must know that he or she is making a Will, what it does (including its legal significance), and how it operates. Suffering from short-term memory loss clearly raises the issues of whether a testator has this capacity: if one cannot remember what he just read or what was just explained to him, he cannot have this present ability. The trial court erred by summarily determining that Ms. Luzak produced no evidence of lack of mental capacity, which she clearly did. The trial court effectively required her to prove her entire case at the summary judgment stage and weighed evidence rather than determining whether there was a genuine issue of material fact.

7. The trial court erred in failing to find that medical evidence and non-medical evidence of dementia and impaired cognitive ability in a time period surrounding the execution of the February 28, 2012 Will and Trust were relevant and probative of the testator/settlor's capacity and vulnerability to undue influence and mistake, creating an issue of material fact, and thus erred in failing to find that material facts were in dispute with regard to matters raised in the Motion for Summary Judgment.

(a) *Capacity*.

Mental capacity is determined based on the circumstances and evidence around the time of

[47] Ms. Luzak produced sufficient evidence to call into question Paul Barringer's ability to know his property and/or the objects of his bounty. For example, Ms. Barringer testified Mr. Barringer did not love his innocent young grandson, demonstrating an inability to know the natural objects of his bounty. (Pl.'s Resp. in Opp'n to Def. Merrill B. Light's Mot. for Summ. J., Ex. M, M. Barringer Dep. 177:1-9). As previously stated, Ms. Luzak also produced evidence that Paul Barringer could not remember owning a building or recall that he had ordered the sale of an airplane.

execution of donative documents.[48] Testimony of doctors and others, along with evidence of the behavior of the testator or settlor/donor, can be relevant in showing the existence or lack of mental capacity. The examination of capacity is not limited to the micro-moment of execution of the documents, stripped of evidence of incapacity before and after. The analysis is not done in such a vacuum. The case law is replete with circumstances where the court examined relevant evidence of capacity both before and after the execution of the document.[49] In fact, the cases cited by Merrill Light in her trial memorandum do so.[50] The case law is also replete with circumstances when the court examined relevant evidence of medical testimony both before and after the execution of the document.[51]

Ms. Luzak presented substantial medical and non-medical evidence, including statements from Paul Barringer and from defendant Randy Light, calling into question Paul Barringer's mental capacity to make a Will and Revocable Trust on February 28, 2012.

The medical evidence is compelling. Mr. Barringer was first diagnosed with dementia as early as 2011 and placed on medication for Alzheimer's, having gone to the doctor with "difficulty with cognition for the last one to two years;" He could not remember why he called the neurologist's office in March 2012; He went to the doctor in January 2012 for short-term memory loss; He had trouble in May, 2012 following simple commands such as touching his ear with his

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[48] The law allows evidence, including circumstantial evidence, both before and after the time of execution, to determine whether the testator had capacity at the time of execution. See, e.g., *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 569 S.E.2d 371 (Ct. App. 2002)*; Swiger*, *Cumbee*, and *Byrd*, *supra*.

[49] See, e.g., *Gaddy v. Douglass*, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004); *Macauley*, *supra*. Evidence of prior or subsequent condition is admissible. Moreover, execution under the South Carolina Probate Code does not necessarily occur at one moment. There is no time limit as to when the witness must observe one of the three observable events required nor is there a time limit for when a witness must attest. SCPC § 62-2-502. The cited cases involve courts examining evidence both before and after execution of donative documents.

[50] See, e.g., *Lee*, *supra*, *Hembree*, 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993); *Hairston v. McMillan*, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010) (cases cited by defendant dealing with capacity).

[51] See, e.g., *Gaddy*, *supra*; *Estate of Hicks*, 284 S.C. 462, 327 S.E.2d 345 (1985); *Vereen v. Hardee*, 285 S.C. 206, 328 S.E.2d 666 (Ct. App. 1985); *Garbade v. Garbade*, 260 S.C. 58, 194 S.E.2d 186 (1973).

fingers.[52]

As the *Gaddy* case recognizes, dementia does not improve over time. Mr. Barringer's condition continued to thereafter devolve, consistent with the recognition in *Gaddy*. Mr. Barringer's chronic situation worsened until he was eventually scoring a thirteen, a zero, a four, a ten, and a one on the basic mini-mental test, about which Ms. Luzak's expert opines that a score of 24 shows a deficiency with someone of Mr. Barringer's intellect.[53]

Yet, despite the medical diagnoses that he was compromised as early as 2010, Paul Barringer purportedly executed amendments to his 1998 estate plan in February 2012,[54] July 2012 (purportedly leaving all of his voting stock at his death to defendant Merrill Light),[55] June 2014 (purportedly eliminating Ms. Luzak as beneficiary and substituting her son as beneficiary for her share),[56] and February 2015 (eliminating Ms. Luzak's teenage son as beneficiary).[57] On August 28, 2015, two months after scoring a zero on the mini mental state exam on June 12, 2015 and in close proximity to subsequent scores of four and ten on the same test, he purportedly volunteered to intervene in a federal lawsuit that the company initiated against Ms. Luzak when she questioned a stock transaction with the CEO of CFRC that she thought her father, if competent, would have vigorously opposed.[58] In April 2016, ten days before he scored a one on the mini mental state

[52] For a thorough and detailed list of medical reports of his issues with dementia, see Plaintiff's Response in Opposition, text accompanying notes 26-51, Ex. G, Attachments 1-40.

[53] Ex. K, Dr. Amy Sanders report.

[54] When he had difficulty communicating at a board meeting. See Affid. of K. Luzak, and Ex. F, M. Hagler letter of July 12, 2012.

[55] See Ex. A, Attachment 13, Second Am. and Restatement of Trust Agreement of P. Barringer.

[56] See Ex. A, Attachments 14, 15, Third Am. and Restatement of Trust Agreement and Last Will & Testament of P. Barringer dated June 12, 2014 respectively.

[57] See Ex. A, Attachments 18 and 19, Fourth Am. and Restatement of Trust Agreement and Last Will & Testament of P. Barringer dated Feb. 5, 2015.

[58] See, e.g., Affid. of H. Luzak, ¶ 44.

exam, he executed under penalties of perjury complex tax returns, including a federal tax return 213 pages long.[59]

The effect of the dementia on Mr. Barringer extends beyond medical records:

Kevin Luzak,[60] who was constantly with Paul Barringer over many years as they ran the company together, testified, inter alia, that Mr. Barringer's behavior became erratic starting in early 2011; he had trouble communicating and forming words at a family meeting on February 18, 2012; he could not remember around June 7, 2012 that he ordered the sale of the company airplane; he thought he owned "double the company voting stock" than anyone in the family when he owned far less; in the spring of 2012 he could not remember board presentations from previous board meetings which, when those presentations were given to him by Merrill Light, confused him into thinking Kevin Luzak was "trying to steal the company," even though he had previously commented favorably on the presentations [61]; in the spring of 2012 Mr. Barringer talked about restructuring the company and ultimately giving his share to Kevin, who thought the proposal was irrational and who talked to Ms. Luzak and Merrill Light about the proposal and his concern about Mr. Barringer's compromised reasoning; and Mr. Barringer was confused and incoherent at the April 2012 board meeting, shortly after which he falsely accused Kevin Luzak of throwing a book at Ms. Light and throwing Ms. Light and Mr. Barringer out of the meeting.

[59] Ex. L, 2015 tax return signature page dated April 12, 2016; Pl. Mot. Compel, Nov. 9, 2017 at 5 (Ex. G-Davis dep)

[60] See e.g., Affid. of K. Luzak ⁋⁋ 12, 15, 32, 38, 58-61.

[61] See Affid. of K. Luzak, ⁋ 16 and Ex. A, Attachments 9 and 10, Trust Agreement and Will of P. Barringer, Feb. 28, 2012. It is a sad irony of the case that the proposals were at least in part based on Merrill Light's constant complaints about lack of distributions: Mr. Barringer was very conservative in that regard. Defendant Merrill Light used the very proposal papers created by Kevin Luzak, in part to attempt to help defendant, to betray Ms. Luzak and her husband. That Mr. Barringer, when competent and free from undue influence, was agreeable to some of the proposals for diversification is demonstrated by his participation in the purchase of a $ multimillion apartment building in Virginia. Ex. N – B. Barringer and K. Luzak e-mails of February 18 and 25, 2012.

Ms. Luzak,[62] who had regular interactions with her father, has testified similarly, inter alia, that her father first exhibited clear signs of cognitive problems in 2011, when he began having speech and processing problems; Merrill Light told her that Mr. Barringer was confused and incoherent at the February 2012 board meeting; Mr. Barringer discussed his speech problems at a family meeting in 2011; she and defendant Merrill Light discussed their father's mental issues on numerous occasions prior to June 2012; around this time Merrill Light told her that defendant Randy Light had lost everything and had nothing to give their children; and during the June 28, 2012 board meeting, Paul Barringer made a number of delusional accusations against Kevin Luzak which were supported by Merrill Light who helped to coach Paul Barringer in his motion to have Kevin Luzak removed as president and CEO of the company.[63]

Defendant Randy Light, in emails, expressed concern in February 2011 that Paul Barringer was "experienc[ing] different health issues that effect [sic] his judgement [sic] regarding everyday decisions personally and business wise;" in January 2012 expressed that Paul Barringer was exhibiting "irrational behavior;" and in May 2012 that "[h]e is progressively getting worse as to where he is and what is going on."[64] Tom Evans, a senior CFRC officer, emailed on September 9, 2011 that Mr. Barringer was very confused and not himself.[65] On June 15, 2012, Brad Herring, then serving as CFRC's general counsel, noted there could be a capacity issue as to voting (regarding the June 2012 meeting in which defendants conspired to have Kevin Luzak fired and had to coach Paul Barringer to do their bidding at the meeting).[66]

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[62] See, *e.g.,* Affid. of H. Luzak; see also Affid. of K. Luzak.

[63] See also Ms. Luzak's letter to the board of directors on July 6, 2012. (Ex. O)

[64] See Ex. D, e-mails between R. Light and K. Luzak of Feb. 21, 2011 and May 3, 2012. .

[65] See Ex. E, T. Evans to K. Luzak e-mail, Sept. 9, 2011.

[66] See Ex. P – B. Herring e-mail to K. Luzak, June 15, 2012.

Perhaps most eloquently and compellingly, Michael Hagler, the *independent* director of CFRC and well-respected attorney, wrote numerous communications to Merrill Light and to the board questioning Mr. Barringer's capacity.[67] Referring to board meetings as early as April 2012, Mr. Hagler asserted serious concerns about Mr. Barringer's mental health. "On more than one occasion during the meeting Paul actually cast his vote in the opposite way he meant to cast the vote until he was corrected and coached by whoever was in the room with him."[68]

Mr. Hagler resigned over Merrill Light's refusal to address the obvious issue of Mr. Barringer's mental condition; having gotten what she schemed to obtain, she did not even bother to respond to her fellow board member. General counsel Herring also resigned.[69]

These company-related communications and observations about Mr. Barringer's compromised mental condition followed the June 28, 2012 board meeting where Kevin Luzak was fired, with defendant helping to coach Mr. Barringer to vote in the way she wanted. Significantly, the board meeting and those communications that followed, especially from Mr. Hagler, occurred concurrently with Mr. Barringer purportedly executing an amendment to his revocable trust on July 20 2012, when for the first time he purportedly gave his voting stock, and company control, to Merrill Light, effectively at his death.

Even John Jolley, who represented the Barringers[70] for estate planning purposes beginning

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[67] See Ex. F, M. Hagler letters and e-mails, June 28 – Aug. 23, 2012.

[68] Merrill Light and Merrill Barringer were in the room with him, See Ex. QQ, M. Light to B. Herring e-mail, June 26, 2012.

[69] See Ex. F, M. Hagler letters and e-mails, June 28 – Aug. 23, 2012; Ex. E, B. Herring letter, July 9, 2012.

[70] Jolley had represented the Lights for years, and attorney Richard Rose, a close personal friend of the Lights, directed the Barringers to him for estate planning." See "Order on Mot. to Seal under R. 41.1, SCRCP," filed June 14, 2021, J. Jolley Dep. 200:2-16, Mar. 16, 2021. Jolley served as a proxy for Merrill Light at the August 3, 2012 special shareholders meeting and voted to fire Kevin Luzak as a director of CFRC. Jolley also served as general counsel and corporate secretary for CFRC, among his ties to the Lights. See Ex. R, M. Barringer Answer ¶ 30; Ex. S, J. Jolley Aff. ¶ 5; Ex. T, R. Light Affid. ¶ 3; Ex. U, R. Light Depo. pp. 77-79; Ex. EE, CFRC shareholder meeting minutes, Aug. 3, 2012. Jolley's ability to assess capacity is impeached by his statement that Mr. Barringer's mental capacity

with the documents purportedly executed in 2012, indicated in a conversation with Mr. Hagler in June 2012 that sometimes Mr. Barringer was "not [there]" when he met with him and thought it necessary to email Merrill Light in August 2012 to attempt to get a certification of competency signed, presumably in anticipation of the purported voting stock transfer on September 11, 2012.[71] Mr. Barringer signed a "2012 Tax Organizer" in March 2013, in which he apparently did not know or forgot that he had given away control of his legacy company a few months before – that date ranging from September 11, 2012 to December 31, 2012 to January 24, 2013, according to varying evidence produced by defendants.[72]

(b) *Undue Influence.*

Undue influence occurs when the testator or settlor/donor is coerced into making a Will, Trust, or transfer that the testator or settlor/donor did not want to do but was influenced into doing so.[73] The evidence is necessarily circumstantial because the influence is not typically openly exercised.[74] When the influence was practiced by someone in a confidential or fiduciary relationship with a testator, it is presumed that undue influence occurred, and the proponent has to rebut that presumption.[75] (When the influence was practiced by someone in a confidential or fiduciary relationship with the settlor/donor of an irrevocable lifetime transfer, it is presumed that

"never changed" from 2011 through 2015 (Jolley deposition, Ex. 4 at pp. 192-196); to the contrary, the overwhelming medical and other evidence show that Mr. Barringer's mental capacity did change over that time. Mr. Jolley also admitted to an egregiously improper act by admitting that he arbitrarily chose a date to indicate when the alleged stock transfer from Mr. Barringer to defendant occurred – a date that Mr. Jolley knew had no relationship to reality and that was used under penalties of perjury in Mr. Barringer's gift tax return. Jolley deposition, Ex. 4 at pp. 70-72, 254-268, 273-274.

[71] See Ex. H, J. Jolley Physician's Certification and transcript of M. Hagler – K. Luzak call 4:13-15, June 28, 2012.

[72] See Ex. EEE, Barringer 2012 Tax Organizer.

[73] See, e.g., *Cumbee*, *supra*.

[74] See e.g., *Macaulay*, *Swiger*, *Cumbee*, *Byrd*, *supra*.

[75] See, e.g., *Hairston*, *Swiger*, *Salerno*, *supra*.

undue influence occurred, and the proponent has the ultimate burden of proof).[76]

Although every fact pattern is unique, common factors in undue influence cases involve, inter alia, (1) the susceptibility of the testator or settlor/donor to being influenced, such as being of weakened mental capacity; (2) the opportunity of the perpetrator to practice the influence; (3) the motive of the perpetrator; (4) the disposition or the propensity of the perpetrator to practice undue influence; (5) a change in the pattern of the dispositive plan; and (6) secrecy.[77]

Even though all of these enumerated factors are not required to prove undue influence and certainly not required at the summary judgment level, Ms. Luzak presented substantial evidence of all of these, such as evidence that: (1) Paul Barringer was suffering from mental deficiencies and thus susceptible to undue influence as early as 2011; (2) defendants had ample opportunity to practice undue influence on Paul Barringer because of proximity and confidential/fiduciary relationships[78]; (3) defendants had ample motive to influence Paul Barringer, including defendant Randy Light's involvement around that time in bankruptcies involving tens of millions of dollars, with potential substantial personal liability[79]; (4) defendants had the disposition/propensity to practice undue influence, as demonstrated by defendants' situation involving Randy Light's company bankruptcies and defendant's propensity to usurp fiduciary property for their own uses[80];

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[76] See, e.g., *Brooks v. Kay*, 339 S.C. 479, 530 S.E.2d 120 (2000); *Bullard v. Crawley*, 294 S.C. 276, 363 S.E.2d 897 (1987); *Hudson v. Leopold*, 288 S.C. 194, S.E.2d 137 (1986).

[77] See, e.g., *Russell, supra*; *Matter of Ferrill*, 97 N.M. 383, 640 P.2d 489 (N.M.C.A. 1981); Ex. AA - Restatement (Third) Of Prop.: Wills & Donative Transfers § 8.3, cmt h.

[78] Judge Price states that defendant Light had no role in the planning of the will and trust, yet recognizes that she drove him to the meeting (which of course, gives her the opportunity to influence him). This is a classic factor in many undue influence cases. A perpetrator does not overtly practice influence at meetings with counsel (although mere presence can create influence), but rather outside the meetings with counsel. The Court errs in assuming that no opportunity existed because of defendant Light driving Mr. Barringer to such a meeting.

[79] See footnote 89, *infra*, and accompanying text.

[80] Defendants were also motivated by the opportunity to use the company as their personal purse. For example, 9 days after the purported transfer of the voting stock on September 11, 2012, Randy Light sent an email to Travis Bryant,

(5) there was a change in the dispositive plan, giving defendant Merrill Light unprecedented power as a co-trustee with the ability to act alone, which was especially powerful given Paul Barringer's undisputed weakened mental state; and (6) defendants' long-term concerted effort to keep these actions secret.[81]

In addition to the evidence of Mr. Barringer's compromised mental state as demonstrated above, evidence showing undue influence abounds. For example, in her deposition, Merrill Barringer demonstrated great animus against Ms. Luzak and her husband, Kevin Luzak, as well as their son, her grandson.[82] She further testified that she attended the board meeting at which Kevin Luzak was fired because she wanted to make sure Paul Barringer did not forget anything and she needed to correct him.[83] Merrill Light and Ms. Barringer were present at the June 28, 2012 telephonic board meeting along with Mr. Barringer, at John Jolley's office, the long-time attorney for defendants Merrill and Randy Light.

Perhaps most tellingly, since February 2012, Merrill Light was purportedly serving as the co-trustee of Mr. Barringer's revocable trust at all times when he thereafter amended his revocable trust to purportedly give Merrill Light his voting stock at his death. John Jolley was the Light

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who replaced Kevin Luzak as CEO, suggesting that they defraud the company by conjuring up a way to distribute to Mr. Barringer $5 million net from the company, so that Mr. Barringer could then turn around and gift $5 million to defendants -- $5 million at that time being the exemption amount from federal gift taxation. See Ex. D, R. Light e-mail re: "dividend distribution Merrill," Sept. 20, 2012. Tellingly, Randy Light did not copy Mr. Barringer on the email. There is good reason why defendants fought long and hard to keep this email secret. It shows the motivation for the undue influence to take control of the company to use as defendants' personal purse. This same motivation, along with the disposition and propensity of defendants to take other people's assets, is demonstrated by the payment of defendant's personal legal fees against Ms. Luzak in the Virginia litigation with company funds.

[81] In addition to keeping secret her involvement in the estate plan, defendant Merrill Light testified that defendants never told Mr. Barringer about Randy Light's bankruptcies and business failures. This was an intentional omission and part of the undue influence and deception.

[82] See Ex. M, M. Barringer Dep. 122:4-9; 143:3-25; 157:9-19; 177:1-9. She testified that Ms. Luzak was greedy and cowardly, that Ms. Luzak had married the wrong man, that Kevin Luzak was greedy, and that Mr. Barringer did not love his young grandson Wade.

[83] See Ex. J, M. Barringer Dep. 26:6-23; Ex. M., M. Barringer Dep. 80:15-21, demonstrating that defendants were quite aware of his mental issues.

defendants' lawyer for years, and presumably defendants connected him with the Barringers, and then he became corporate counsel to CFRC when Brad Herring resigned. Jolley was also trustee of numerous trusts for the Light defendants.[84] Further, he served as Merrill Light's proxy at the August 3, 2012 CFRC special shareholder meeting for part of Merrill Light's shares and voted to fire Kevin Luzak from the board of directors. All of this was done under the shroud of secrecy to keep Ms. Luzak from discovering the scheme to put Merrill Light in control of CFRC.

In the spring of 2012, defendant Merrill Light gave Paul Barringer documents from presentations made in his presence starting in the prior year, which he could not remember, and caused him to misconstrue those documents into intense anger at Kevin Luzak.[85] Defendant Merrill Light also testified that neither she nor defendant Randy Light ever told Paul Barringer about defendant Randy Light's two bankruptcies and inappropriate business dealings,[86] the knowledge of which would surely have kept Paul Barringer, if he were capable of competent decision-making at that time, from adding defendant Randy Light to the board and eventually allowing him to become Chairman, or from making an inter vivos transfer potentially exposing his legacy company to Randy Light and his creditors. The Lights lived near the Barringers in Hilton Head Island and were in constant contact. Randy Light testified that he was in constant contact with Mr. Barringer. He also admitted he "communicated with Mr. Jolley regarding general matters regarding Mr. and Mrs. Barringer's estate planning…"[87] Mr. Barringer's purported post-2011 estate planning documents were prepared by John Jolley.

Ms. Luzak is unaware that Ms. Light ever did anything to dissuade or correct Mr. Barringer

[84] Ex. V, R. Light email Oct. 25, 2011 ; Ex. W, M. Light Dep. p. 397, lns. 4-22;

[85] See Affid. of K. Luzak; Affid. of H. Luzak.

[86] See Ex. I, Merrill Light dep. pp. 533-535.

[87] See Ex. X, R. Light dep. p. 270 and Ex. Y, R. Light Resp. to Pl. Req. to Admit, ¶ 10.

in his confusion and anger over the old presentation papers she gave him.[88] Ms. Light never responded to the legitimate concerns about Mr. Barringer expressed by Mr. Hagler or by Ms. Luzak. While Ms. Light was co-trustee of her father's trust, Mr. Barringer was placing his voting stock in that trust, Mr. Barringer was amending his trust to leave all of his voting stock to Ms. Light, and then was gifting Ms. Light that same stock, all of which was done in the darkness of secrecy, never revealing to Ms. Luzak the scheme that was afoot.

Defendant Randy Light's companies were undergoing two bankruptcies in Texas. On May 21, 2012 Mr. Light was personally sued for $25 million on guaranties he had signed.[89] He was seriously underwater in early 2012, and he had to borrow money from Merrill Light to help with the payments.[90] Randy Light was in dire financial straits, which served as a motive for defendants' undue influence. Importantly, Ms. Light testified that defendants never told Mr. Barringer about Randy Light's bankruptcies and business failures.[91] This was an intentional omission and part of the undue influence and deception.

Surely, the Lights were well aware of their pending financial disaster when they persuaded Decedent to transfer his CFRC stock shortly afterwards on September 11, 2012.

Judge Price is particularly in error about the contents of the Will and Trust and the importance of making defendant Merrill Light co-trustee with the sole power to act on behalf of the Trust. According to Judge Price, the focus is merely whether the February 28, 2012 Will and

[88] In contrast, the Luzaks dissuaded Mr. Barringer from taking irrational steps that would benefit the Luzaks at Merrill Light's expense and alerted Ms. Light about Mr. Barringer's irrational plans. See Affid. of K. Luzak, ¶ 14.

[89] *J. Randolph Light Jr. et al. v. Stillwater National Bank and Trust Company et al.*, Case No. 12-0384-A (7th Jud. Dist. Ct., Smith County, Tex.), SW Loan OO, LP countercl., ¶ 25; Pl.'s Resp. Opp'n to Def. M. Light's Mot. for Summ. J. 27).

[90] See Ex. FFF, M. Light dep. 290-91, 536-37; R. Light dep. 144-45.

[91] See Ex. I, M. Light dep. pp. 533-535.

Trust changed beneficiaries, rather than the critical change in fiduciary empowerment.[92]

(c) *Mistake.*

As to mistake, if a testator or settlor/donor suffers from mistake, the part of the Will resulting from mistake is invalid.[93] South Carolina Probate Code § 62-2-601(B) authorizes the reformation of a Will that results from mistake; similarly, South Carolina Trust Code § 62-7-415 authorizes the reformation of a trust that results from mistake. The evidence clearly demonstrates that Mr. Barringer and Ms. Luzak were the victims of mistake. Simply put, if a testator or settlor does not know that he or he is making a Will, what it does, and how it operates, the Will is also the result of a mistake and thus invalid. As discussed above, Ms. Luzak demonstrated substantial evidence of facts that not only showed lack of capacity and undue influence, but that the Will and Trust were the result of a mistake, because he did not intend them to be his Will and Trust.[94]

Once again, however, the Court seemed to require Ms. Luzak to prove her entire case at the summary judgment level rather than applying the proper burden of proof for the summary judgment stage.

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[92] Judge Price continues to demonstrate confusion about the operation of the Will and Trust, stating: "His wife remained the sole beneficiary with a power of appointment" and Mr. Barringer "left all of his assets to the surviving spouse." Order of July 6, pp. 5, 16. That is not an accurate description of the documents, which inter alia named Ms. Luzak as a beneficiary and left whatever interest Ms. Barringer had in trust.

[93] *See Hanahan*, *supra*, citing *Ex parte King*, 132 S.C. 63, 128 S.E. 850 (1925) ("Where a testator is mistaken as to the contents of his Will, the Will may be invalidated in part"); see also Restatement (Third) of Property: Wills & Don. Transfers § 12.1 (2003) (Will based on mistake of fact or law may be reformed).

[94] Defendants contend that there can be no mistake because he left his estate in equal shares to his children. Although that general division is consistent with his long-standing intentions, that does not mean he made no mistake. For example, the February 28, 2012 documents effected a critical change to his prior estate plan by naming defendant Merrill Light as co-trustee with the independent power to act.

III. Issues Five, Six and Seven

The trial court erred in ordering a bifurcation of two isolated causes of action from one of the three consolidated actions, with instructions that those causes of action be tried "first and prior" to any separate and subsequent trial(s) of the remaining causes of action. . ."

A. Standard of Review: The standard of review is abuse of discretion.

The trial of these consolidated cases was ordered to be bifurcated by Order of Judge Mullen on December 30, 2020 (Bifurcation Order). The Order on Motions of the trial court dated June 7, 2021 ordered trial of the first phase of the bifurcated claims begin on August 30, 2021.

Without belaboring what was described above, but to set the stage for this Argument, Judge Mullen ordered that two equitable causes of action in the cases of *Hampton B. Luzak v. Merrill U. Barringer*, 2019-CP-07-01253 and 2019-CP-07-01294, be tried first and for the remaining causes of action in both cases, predominantly legal, to be tried later, as a follow-up to the first trial. (Order 12.30.20). After the trial court denied Ms. Luzak's motion to reconsider, Ms. Luzak appealed those orders on February 12, 2021.That appeal is presently before the Supreme Court pursuant to Ms. Luzak's Petition for a Writ of Certiorari that challenges the Court of Appeals' dismissal of the appeal on the basis that the Bifurcation Order was interlocutory.

Turning to the error of the Bifurcation Order in the current appeal, lest there be any question about the effect of the Bifurcation Order, the trial court did not order that one fact finder hear the first phase and then the same fact finder proceed to hear the second phase, such as when trials are bifurcated for punitive damages, or when the same jury first hears the liability phase, followed by the same jury hearing the damages phase. Instead, the effect of the Bifurcation Order is for one fact finder to first determine the facts and remedy on the equitable causes of action, followed by a separate fact finder later finding its own facts on the legal causes of action at a later trial where the

evidence and facts will be the same. Therein lies the core problem: two separate fact finders make their own independent findings on the same set of facts and evidence.

Ms. Luzak filed her initial case in 2016 against Merrill Light, Randy Light, and Merrill Barringer as Personal Representative, and in 2019 she filed companion cases against Merrill Barringer individually. All of the parties in all these cases consented for the trial court to consolidate the cases pursuant to Rule 42(a), SCRCP, which the trial court did on December 3, 2019 with its Consent order on Ms. Luzak's Motion for Consolidation of Actions. Rule 42(a) provides for such consolidation when separate actions involve common issues of fact or law. The trial court erred in later bifurcating the trial despite there being those common issues of law or fact that led to the consolidation to begin with.

The Bifurcation Order inexplicably plucked two (2) equitable causes of action from the cases against Merrill Barringer and slated them for a trial separate from the predominant legal causes of action, and then it compounded the problem by stating that the equitable causes action would be tried *before* the legal causes of action. That is the exact opposite of the law in South Carolina when there are such common issues of law and fact. That is addressed below. The trial court erred with the bifurcation in three (3) respects: (1) bifurcation with separate trials is inappropriate when there are common issues of law or fact; (2) if such a bifurcation were appropriate, the legal causes of actions are to be tried before the equitable causes of action; and (3) the trial court abused any discretion it had when ordering the bifurcation of the trial and created a procedural chaos wrought with terrible trial inefficiency and essentially requiring the same trial twice with the same witnesses and evidence.

1. <u>Bifurcation with separate trials is inappropriate when there are common issues of law or fact.</u>

All causes of action arise from a common core of facts that are universally applicable to all causes of actions and defenses.

Ms. Luzak has set forth the facts above in her Statement of Facts, and they do not need to be reiterated here, but it should be clear that a common factual thread weaves all of the causes of action together.

The two causes of action slated for trial first under the Bifurcation Order are purely equitable in nature. They seek an injunction against Ms. Barringer from revoking her Will and exercising any power of appointment over the assets of Mr. Barringer inconsistently with her agreement with and promise to Mr. Barringer and the imposition of a constructive trust for the benefit of Ms. Luzak in the subject property. The facts and law supporting such causes of action, and the defenses raised by the Respondents, all revolve around the common core of facts involving the manipulation of Mr. Barringer and his estate plan to vest the family legacy business in Ms. Light to the harm and detriment of Ms. Luzak as set out in the other causes of action.

The parties do not dispute that Mr. Barringer had testamentary capacity when he executed his 1998 Will and Trust, but the parties intensely dispute the validity of his subsequent testamentary instruments that he executed in 2012 (two times), 2014, and 2015 and his gift of stock to Merrill Light on September 11, 2012. That is what this entire litigation revolves around. It is rudimentary probate law that any subsequent valid Will or Trust effectively revokes any prior Wills or Trusts, *White v. Wilbanks*, *supra*, but this litigation focuses on whether *any* of the testamentary instruments after 1998 were valid, or whether the 1998 instruments are the governing instruments, as well as the validity of the gift to Merrill Light of his voting stock.

When the trial court addresses whether to issue the injunction against Ms. Barringer and impose a constructive Trust, it must necessarily determine which Will and Trust of multiple sets

of testamentary documents are the prevailing and governing documents. Since validly executed Wills and Trusts revoke prior Wills and Trusts, the fact finder must first determine if the last instruments in 2015 are valid; if it determines that the 2015 instruments were invalid, then it backs up to the next most recent instruments (2014) to determine if they are valid. That process continues in reverse chronological order until the jury finds valid instruments. Ms. Luzak maintains that the last valid instruments were the 1998 instruments; the Respondents argue that the 2015 instruments were the most recent valid instruments. Each post-1998 document and gift will be subject to challenge for lack of capacity, undue influence, mistake, fraud, and the like.

The evidence presented for that determination will be the same evidence presented by Ms. Luzak in support of her other causes of action that are slated for a clean-up trial after the trial on the two equitable causes of action. Under the Bifurcation Order, two separate trials with two separate fact finders will be asked to determine their separate versions of the facts. This will be true regardless of whether the first trial on the equitable claims is by jury or the bench.

The facts and law will significantly overlap each cause of action, and when facts and law and causes of action overlap, bifurcation is inappropriate. "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice. Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (internal citation omitted); *see also Winthrop Univ. Trustees v. Pickens Roofing and Sheet Metals Inc.*, 418 S.C. 142, 167, 791 S.E.2d 152 (Ct. App. 1996). The Bifurcation Order does not anticipate a common fact finder to find common facts in both phases. The issues in this case are not so distinct that the trial of each alone will not result in injustice, and the evidence relevant to each cause of action

overlaps. It is the remedy associated with each cause of action that is different, not the underlying facts.

This issue will persist regardless of whether the first phase of the trial is by jury or the bench, because the problem lies with having two separate fact finders in a bifurcated trial making their own separate findings on a common set of facts.

2. <u>If such bifurcation were appropriate, the legal causes of actions are to be tried before the equitable causes of action</u>**.**

The trial court erred in ordering any bifurcation, but it aggravated the problem and further erred by ordering that the two (2) equitable causes of action for injunction and constructive trust be tried first, with the legal causes of action to be tried in a second trial. That sequencing of trials is contrary to the declared law of this State and violates Ms. Luzak's right to a jury trial.

Sequencing rules mandate that when a case contains both legal and equitable causes of action and there exists disputed common factual issues relevant to both equitable and legal claims, *the legal claims must be tried first*, with the court in the trial of the equitable claims being bound by the findings of fact made by the jury. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Johnson v. S.C. Nat'l Bank,* 292 S.C. 51, 354 S.E.2d 895 (1987); *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). The South Carolina Supreme Court has stated: "If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the 'most imperative circumstances,' the 'at law' claim must be tried first." *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (internal citations and quotations omitted). The purpose of the sequencing rules is to "assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues." *Id.* at 55, 354 S.E.2d at 897.

This issue is not some esoteric, technical procedural issue; instead, it goes to the heart of Ms. Luzak's right to have a jury determine her case and a single jury to hear it. Only by applying the sequencing rules adopted by the appellate courts of this State can a trial court comply with constitutional, statutory, and case law mandates to preserve a party's right to trial by jury inviolate.

Even if the two (2) equitable causes of action are tried by jury, the judge's order, findings of fact, conclusions of law, and even evidentiary rulings on the equitable remedies can have a binding, or, at least, prejudicial effect on the trial by jury of the legal causes of actions and their elements. Stated differently, anything short of a full jury trial on all legal causes of action before a ruling on the equitable remedies will substantially and severely prejudice Ms. Luzak's right to trial by jury. Under the Bifurcation Order, the equitable remedies suddenly become paramount, and a jury trial on common issues of fact takes a backseat to the trial judge's rulings. There are necessarily disputed issues of fact that are common to all of the causes of action, and that is why the cases were consolidated to begin with. That is why the Order to Bifurcate has far-reaching and inappropriate consequences on the mode of trial and the sequencing of trial beyond the mere label of an Order to Bifurcate.

3. <u>The trial court abused any discretion it had when ordering the bifurcation of the trial and created a procedural chaos wrought with terrible trial inefficiency and essentially requiring the same trial twice with the same witnesses and evidence</u>**.**

The trial of this case will be lengthy. No one can dispute that. It will last weeks. Because each phase of the trial will involve the same facts, each phase of the trial will involve the same witnesses and the same documents. All of the post-1998 estate planning documents and gift must be considered at each trial, and each must be separately considered for lack of capacity, undue influence, fraud, and mistake, which necessarily involves the same witnesses and same documents. Further, a second trial is inevitable regardless of the outcome of the first trial. Even if the

Respondents prevail at a first trial so that Ms. Barringer is determined to have an unfettered power of appointment over the voting stock, that does not avoid, or significantly shorten, a second trial, where capacity, undue influence, fraud, etc., will still be relevant and still require essentially the same witnesses and evidence.

Ms. Luzak has tens of millions of damages claimed against Defendants regardless of the bifurcated equitable causes of action, and the liability and damages portion of the trial will go on regardless of the outcome of any bifurcated trial; the liability and damages portion of the trial will not be avoided or made more efficient by any premature determination of the power of appointment issue. Each phase of the bifurcated trial will also involve agreements and promises between Mr. Barringer and Ms. Barringer to treat each daughter equally and not to exercise the power of appointment, resulting in the same evidence and witnesses.

The intent to simplify the resolution of these cases by bifurcation actually creates a procedural morass that will essentially double the total trial time and will result in two different fact finders each finding their own facts from the same evidence and will violate Ms. Luzak's right to a trial by jury, a single jury.

CONCLUSION

This is not a summary judgment case or one that should be bifurcated into multiple trials. For all the reasons stated above, the trial court erred in entering the aforesaid orders. Hampton Luzak respectfully asks this Court to vacate and reverse the aforesaid orders and remand to the trial court with instructions to try all of Ms. Luzak's causes of action and claims for damages in case numbers 2016-CP-07-1919, -1253, and 2019-CP-07-1294 in one consolidated trial.

Respectfully submitted,

s/ Desa Ballard
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January ____, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
BENTLEY PRICE, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000837

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. Luzak,.....Appellant

v.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable Trust, ...Respondents

--and--

Hampton B. Luzak,.....Appellant,

v.

Merrill U. Barringer, ...Respondent,

Coastal Forest Resources Company ("CFRC").....Intervenor/Respondent.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on January 24, 2022, I served a copy of the **Appellant's Initial Brief** and **Appellant's Designation of Matter** in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

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January 24, 2022
West Columbia, South Carolina

Beth Cogan

From: Beth Cogan
Sent: Monday, January 24, 2022 4:47 PM
To: Ashley Twombley; Lee Walters; Kevin Johnson; kjohnson@johnsonlawyers.com; Harley D. Ruff; Denise Collins; Rich, Ryan G.; Edward J. Fuhr; Johnathon Schronce; Alice Paylor; Bijan Ghom; Charles Molster; Ensley Mahoney; Andrea Smith
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Subject: (Luzak v. Light, et al.; Appellate Case No. 2021-000837) Ltr to COA encl AIB and A. DOM
Attachments: 2022 01 24 Ltr to COA encl AIB.pdf; 2022 01 24 AIB.pdf; 2022 01 24 A. DOM.pdf; 2022 01 24 POS AIB.pdf

Good afternoon,
Please see the attached Initial Brief and Designation of Matter that is being filed today for the above-referenced matter.

Kindest Regards,
-Beth

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January 24, 2022

Via Email (ctappfilings@sccourts.org)
Honorable Jenny Abbott Kitchings
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Re: *Hampton Luzak v. Merrill B. Light, et al.*
Appellate Case No.: 2021-000837

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the **Appellant's Initial Brief and Designation of Matter** in the above-referenced matter. By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard/ekc

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