THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No: 2010-CP-CP-0044
Case No.: 2010-CP-40-2812

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

v.

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

FINAL BRIEF OF APPELLANTS

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III. Is the claim for Civil Conspiracy to deprive a devisee of an expected inheritance a valid claim for damages in South Carolina?

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V. Should South Carolina recognize Tortious Interference with an Inheritance, also known as Intentional Interference with an Inheritance, and Civil Conspiracy to deprive a devisee of an expected inheritance as grounds to re-title assets even if South Carolina does not recognize them as tort claims for monetary damages?

INTRODUCTION

This appeal involves substantive and procedural issues arising from claims that two sisters acted tortiously to interfere with the inheritance of their two brothers. The Appellants are the sons of Mary Rose Duncan, the Respondents are the daughters. Appellants contended in two lawsuits, one in the Probate Court for declaratory judgment and one in the Court of Common Pleas for damages, that the Respondents wrongfully convinced Mary Rose Duncan to add them to bank accounts and Certificates of Deposit that were formerly titled as sole accounts of Mary Rose Duncan. The actions allege Civil Conspiracy and Tortious Interference with an Inheritance as grounds to retitle assets and for damages. As explained more fully in the statement of the case, the Court of Common Pleas dismissed the tort claims on the grounds that South Carolina does not recognize claims for lost expected inheritance, and partially dismissed the Declaratory Judgment action on the same grounds.

On the procedural issue, Appellants request that this Court find the Court of Common Pleas should not have ruled on a motion to dismiss that the Probate Court had already denied. On the substantive issues, Appellants request with this appeal that South Carolina recognize Tortious Interference with an Inheritance and Civil Conspiracy to interfere with an inheritance as causes of action for damages, or at least as grounds to retitle assets.

STATEMENT OF THE CASE

Appellants filed two actions against the Respondents, a Complaint in Court of Common Pleas (R. p. 55) and a Petition for Declaratory Judgment in the Probate Court (R. p. 51). The actions arose out of the Respondents being added as joint account holders with rights of survivorship to checking and savings accounts and certificates of deposit of the parties' mother. Prior to the addition of the Respondents to these accounts, the parties' mother was the sole account holder on all accounts. At the time the Respondents were made account holders, the last will and testament of the parties' mother left her estate to each of the parties of this lawsuit in equal shares, and Respondent Voyles was the attorney-in-fact for the parties' mother. These facts were alleged in the initial pleading for each action.

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

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

moved in the action originally filed in the Circuit Court to dismiss or change venue.

The Probate Court granted the motion to remove and denied the motion to dismiss or change venue by order dated April 15, 2010 (R. p. 4). The removed action was given the civil action number 2010-CP-40-2812 in the Circuit Court.

The Respondents' motion to dismiss or change venue in C/A No. 2010-CP 40-0044, the action originally filed in the Circuit Court, was set for a hearing on June 29, 2010. *See* Motions Roster (R. p. 88). On June 23, 2010, less than 10 days before the hearing on the Respondents' motion to dismiss or change venue in the Circuit Court action, Appellants moved to consolidate the two actions. On June 29, 2010, Judge McIntosh heard the motion to dismiss or change venue in C/A No. 2010-CP-40-0044 and, by consent of the Respondents, heard the motion to consolidate.

On September 10, 2010, Judge McIntosh signed an Order granting the motion to dismiss the tort claims for Civil Conspiracy and Tortious Interference with an Inheritance in C/A No. 2010-CP-40-0044 on the grounds that the "causes of action allege interference with inheritance rights," citing *Douglass ex rel. Louthian v. Boyce*, 336 S. C. 318, 519 S.E.2d 802 (S.C. Ct. App. 1999) (R. p. 2). In the same order, Judge McIntosh denied the motion to change venue and granted the motion to consolidate. Furthermore, Judge McIntosh ordered, "Claims under C/A No. 2010-CP-40-2812 for (1) Civil Conspiracy and (2) Tortious Interference with inheritance rights are also fatally defective and therefore dismissed pursuant to Rule 12(b)(6), SCRCP, inasmuch as both causes of action alleged interference with inheritance rights."

Appellants' counsel received the September 10, 2010, Order of Judge McIntosh

on September 16, 2010. Appellants filed a motion for reconsideration on September 24, 2010 (R. p. 7). The motion for reconsideration was denied without a hearing by form order dated November 19, 2010, (R. p. 1).

FACTS

As this appeal considers dismissals pursuant to Rule 12(b)(6), the facts alleged in the complaints are considered true for the purpose of this appeal. The facts alleged in the complaints are as follows.

Original Common Pleas Action, C/A No. 2010-CP 40-0044:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Original Probate Court action removed to Common Pleas and given C/A No. 2010-CP-40-2812:

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

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

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

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

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

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

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

and savings accounts. As to the certificates of deposit, Voyles was added to some of the certificates, while Liverman was added to the other certificates of deposit.

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

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

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

11. The addition of Voyles and Liverman to the Decedent's Accounts was the result of the intentional and concerted efforts of Voyles and Liverman to manipulate, encourage, and/or deceive the Decedent, and to deprive Tom and Alston of their rightful shares of the Decedent's assets to the benefit of Voyles and Liverman.

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

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

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

STANDARD OF REVIEW

Upon review of the dismissal of an action pursuant to Rule 12(b)(6), "the appellate tribunal applies the same standard of review that was implemented by the trial court." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). That standard is: such a dismissal "will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Id.*

ARGUMENT

I. South Carolina Should Recognize Tortious Interference With An Inheritance And Civil Conspiracy To Interfere With An Expected Inheritance As Tort Claims For Damages.

The Circuit Court's Orders dismissing Appellants' tort claims for Tortious Interference with an Inheritance and Civil Conspiracy, and denying the motion for reconsideration were error. Although South Carolina has not yet recognized Tortious Interference with an Inheritance, also known as Intentional Interference with an Inheritance, neither has South Carolina rejected the cause of action. In *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (S.C. 2001) (affirming the Court of Appeals order cited in the Circuit Court's order that is the subject of this Appeal), the Supreme Court stated that South Carolina has not adopted intentional interference with an inheritance, and that it did not have to decide whether to recognize the cause of action

because alternative grounds precluded such a claim under the facts of the case. *Id.* at 717. In a footnote, the Supreme Court set forth the elements of the tort and cited other jurisdictions and the Restatement (Second) of Torts as recognizing the cause of action. *Id.* at 717 n.4. The elements are: "(1) the existence of an expectancy (2) an intentional interference with that expectancy through tortious conduct (3) a reasonable certainty that the expectancy would have been realized but for the interference and (4) damages." *Id.*

South Carolina should recognize this cause of action. Without it, there will be no discouragement to attempting tortious conduct intended to interfere with an inheritance. While recognizing a right to set aside a transfer for such misconduct[1] would at least not encourage the misconduct, more is needed. Without a recognized intentional tort and the corresponding possibility of punitive damages, the only penalty for succeeding at the misconduct would be the loss of effort expended. The worst case scenario for the malefactor would be a return to the position he or she held before undertaking the tortious conduct.

The inchoate nature of the damages at the time of the initial misconduct is no reason not to recognize the tort cause of action. South Carolina has "adopted the closely analogous tort of intentional interference with prospective contractual relations." *Boyce*, 344 S.C. at 9, 542 S.E.2d at 717 n.4 (citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 179 (1990)). As stated by one of the states recognizing intentional interference with an inheritance, "there is no essential reason for refusing to accord to noncommercial expectancies, such as an expected gift or legacy under a will,

[1] As requested in the next Argument of this Appeal.

the protection courts have generally accorded commercial expectancies." *Nemeth v. Banhalmi*, 425 N.E.2d 1187, 1190 (Ill. App. 2001) (cited by *Boyce*, 344 S.C. at 9, 542 S.E.2d at 717 n.4). The "reasonable certainty that the expectancy would have been realized but for the interference" requirement in the elements of intentional interference with an inheritance is merely an application of the normal standard of proof for future damages. *See e.g. Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 451-452 (S.C. 2008) ("the law does not require absolute certainty of lost profits but only reasonable certainty that the damages are not purely speculative and there exists a fairly accurate method to estimate the lost profits.").

Twenty-four states either recognize or acknowledge tortious interference with an expected inheritance as a cause of action: Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, West Virginia, and Wisconsin. In the remaining 26 states and the District of Columbia, the issue either has not been raised, or the possibility of recognizing the tort under appropriate circumstances has been left open. No state has ruled out the cause of action out entirely. *See* Jared S. Renfroe, *Does Tennessee Need Another Tort? The Disappointed Heir [Fna1] In Tennessee And Tortious Interference With Expectancy Of Inheritance Or Gift*, 77 Tenn. L. Rev. 385 (Winter, 2010) (and the cases cited therein).

South Carolina should join those states that allow the tort. There is no reason tortious conduct should be tolerated just because a tortfeasor acts to prevent a potential right from being realized instead of waiting until after the right has matured. *See e.g.*

Crandall Corp. v. Navistar Intern. Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990).

Moreover, in this case it is alleged that the damages were realized. This is not a case where the effectiveness of the interference is still unknown. The sole accounts of Mary Rose Duncan were converted into joint accounts with rights of survivorship in appellants. The money has been distributed to Appellants. The will of Mary Rose Duncan was not changed after the accounts were converted.

For the foregoing reasons, as to the tort claims brought originally in the Circuit Court under C/A No. 2010-CP-40-0044, Appellants request that this Court reverse the Circuit Court's orders granting Respondents' motion to dismiss and denying Appellants' motion for reconsideration, and hold that South Carolina recognize Tortious Interference with in Inheritance and Civil Conspiracy to interfere with an expected inheritance as tort claims.

Alternatively, if the Court determines that a record more complete than pleadings is required to evaluate whether South Carolina will recognize Tortious Interference with an Inheritance or allow a civil conspiracy claim when a lost expected inheritance is the damages, Appellants request that the Court reverse the Circuit Court's orders with instructions to allow the claims to proceed through discovery pursuant to the rule stated in *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547, 551 (S.C. 2001), "As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss."

II. The Partial Dismissal of The Claim For Declaratory Judgment Should Be Vacated or, Alternatively, Reversed.

The Circuit Court's Orders dismissing the parts of C/A No. 2010-CP-40-2812

based on Tortious Interference with an Inheritance and Civil Conspiracy were procedural and substantive errors. The Respondents' Motion to Dismiss or Change Venue filed in the original Circuit Court action, C/A No. 2010-CP-40-0044, was the only motion set for hearing on June 29, 2010. (R. p. 88) The only other motion on file in C/A No. 2010-CP-40-0044 at the time of the June 29, 2010 hearing was Appellants' motion to consolidate. Respondents consented to hearing the motion to consolidate. Appellants' did not consent to hearing a motion to dismiss or change venue in C/A No. 2010-CP-40-2812. Because there was no notice that a motion in C/A No. 2010-CP-40-2812 would be heard on June 29, 2010, and there was no consent to its being heard, that motion should not have been ruled on. Moreover, that motion was not heard or argued. The undersigned counsel for Appellants did not argue the motion in C/A No. 2010-CP-40-2812 or the viability of civil conspiracy and intentional interference with an inheritance in the context of a declaratory judgment action to re-title assets. For all the foregoing reasons, the Circuit Court Orders partially dismissing claims brought in C/A No. 2010-CP-40-2812 should be vacated.

Furthermore, the Circuit Court should not have ruled on the motion to dismiss the claims removed to C/A No. 2010-CP-40-2812 because the Probate Court already denied the motion to dismiss those claims. (R. p. 4). Therefore, not only was there no motion set for hearing on June 29, 2010 in C/A No. 2010-CP-40-2812, there was no motion to dismiss the claims in C/A No. 2010-CP-40-2812 pending on June 29, 2010. By dismissing claims asserted in C/A No. 2010-CP-40-2812 the Circuit Court improperly overruled the ruling of another judge of an equivalent court, the Probate Court. *See*

Charleston County DSS v. Father, 317 S.C. 283, 454 S.E.2d 307 (S.C. 1995) ("There is a long-standing rule in this State that one judge of the same court cannot overrule another."). Instead of dismissing claims made in C/A No. 2010-CP-40-2812, the Court should have ignored the claims made in C/A No. 2010-CP-40-2812 and ruled only on the motion to dismiss or change venue filed in C/A No. 2010-CP-40-0044.

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

Conspiracy or Intentional Interference with an Inheritance caused the transfer, South Carolina should at least recognize the remedy for that misconduct of setting aside the transfer. Otherwise, South Carolina law would encourage such misconduct.

CONCLUSION

South Carolina should recognize a lost inheritance expectancy as a recoverable form of damages and allow claims for Tortious Interference with Inheritance and Civil Conspiracy to interfere with an expected inheritance. Tortious conduct should not be tolerated just because intervening acts could potentially preclude the tortious conduct from yielding the damages intended to be gained. This is especially done in the present case where the improper gain has been realized.

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