STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

HOWARD ALSTON DUNCAN, JR. AND THOMAS DUNCAN,

APPELLANTS,

V.

ROSE ANN VOYLES AND MARY LIVERMAN,

RESPONDENTS.

FINAL BRIEF OF RESPONDENTS

BRIAN DUMAS
Attorney at Law
718 Clemson Road
Columbia, SC 29229
(803) 699-4996/Fax (803) 699-4995
briandumasattorney@sc.rr.com
ATTORNEY FOR RESPONDENTS

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STATEMENT OF THE CASE

Appellants (Howard Alston Duncan, Jr. and Thomas Duncan, denoted as Plaintiffs and Brothers below), by a filing in Richland County Probate Court in Civil Action Number 2007-ES-40-00686, brought a Declaratory Judgment (DJ) action claiming wrongdoing against the Respondents (Rose Ann Voyles and Mary Liverman, denoted as Defendants and Sisters below) by the change of accounts from individual accounts solely in the name of Mary Rose Duncan (Decedent Mother) to joint accounts with right of survivorship to the Respondent Sisters. The claims in the Declaratory Judgment action sound in terms of undue influence, intentional interference with inheritance rights and civil conspiracy. The Declaratory Judgment Action, among other things, requests that the Court order the return of those bank accounts to the Estate for distribution under the terms of the Will of Mary Rose Duncan. The Appellant Brothers also filed in the Probate Court a Motion for Removal of the Declaratory Judgment action to Circuit Court.

The Respondent Sisters by and through counsel filed appropriate returns to the Motion for Removal in addition to a Motion to Dismiss, for a change of venue to Kershaw County, and requested in the alternative that the claims be made more definite and certain.

The Probate Court granted the removal of the DJ action to Circuit Court as requested by the Appellant Brothers, but deferred to the Circuit Court any decision to be made on any and all remaining issues as raised by the Sisters' motions and returns as reflected in an Order granting removal, that Order being filed and served upon the parties on April 15, 2010. This Order was not appealed. Upon removal to Circuit Court, the DJ action originally filed in Probate Court was denoted as Civil Action No. 2010-CP-40-02812.

The Brothers also simultaneously filed a separate original action in Circuit Court, that being Civil Action Number: 2010-CP-40-00044 alleging wrongdoing in those same

transfers as identified in the DJ action originally filed in Probate Court (now denoted Civil Action Number 2010-CP-40-02812) however the Appellant Brothers' separate action in Circuit Court only raises causes of action as to intentional interference with inheritance rights and civil conspiracy. The Respondent Sisters by and through counsel filed a virtually identical Motion to Dismiss and opposition to the matters as raised in the Complaint denoted 2010-CP-40-00044 as made in the Probate Court to the DJ action now denoted 2010-CP-40-02812.

After Respondents' Motion to Dismiss in 2010-CP-40-00044 was set for hearing by the Circuit Court, Appellant Brothers filed a Motion to Consolidate the two pending civil actions. Respondent Sisters waived the ten (10) day notice requirement and consented to Appellants' Motion to Consolidate the cases.

STATEMENT OF FACTS

The Appellants and Respondents are the children of Mary Rose Duncan, Decedent. Her will equally dividing her property between these four children was executed in 1997. (R. p. 56, lines 15-16; R. p. 52, lines 1-2). Mary Rose Duncan had several banking accounts prior to 2004 including checking, savings and certificates of account which as of 2004 she had converted from individual accounts in her name to joint accounts with rights of survivorship in Respondents. (R. p.56, lines 11-14, lines 17-21; R. p. 52, lines 6-14). Mary Rose Duncan died on May 2, 2007, and at her death the joint accounts with rights of survivorship with Respondents were paid to the surviving joint account holders and not under the will. (R. p. 57, lines 8-9).

ARGUMENT

I.

The Trial Court properly consolidated Appellants' pending cases.

The Appellant Brothers moved for, ***and were granted***, a consolidation of the matters and issues raised in both the removed DJ action, now Civil Action 2010-CP-40-02812, and the Complaint originally filed in the Circuit Court as Civil Action 2010-CP-40-00044. By that very motion, Appellants took the position, and Respondents agreed, that there exists an identity of parties, are common matters of law and fact to be determined in both actions and that the Circuit Court should determine in that one action the issues and claims raised by the claims in both actions. SCRCP 42(a). (R. p. 37-38; R. p. 55-59; R. p. 51-54).

It is clear that all of the claims of the Appellant Brothers arise out of Mary Rose Duncan changing accounts that were at one time in her name only to joint with right of survivorship with the Respondent Sisters. The basis of Appellant Brothers' claims is that this conversion of individual accounts to joint accounts with right of survivorship was arguably wrongful against the Appellant Brothers and therefore allegedly entitles them to relief. The parties to both actions are identical and the issues raised in both actions are identical (but for the undue influence claim raised in the DJ action that originated in Probate Court and now denoted Civil Action 2010-CP-40-02812 but not the Complaint denoted 2010-CP-40-00044). There appears to be no legal or logical reason for this Court to have litigation pending in separate courts or by separate hearings as to identical parties, issues, or claims, when all matters complained of by the Brothers arise out of a common factual determination. Therefore, under SCRCP 42(a), the Motion for Consolidation filed by the Brothers, and consented to by the Respondent Sisters was well founded as granting their Motion to Consolidate furthered economies of the Courts and the parties and eliminates

conflicting rulings in different Courts or by separate hearings as to the same issues and parties.

This very logic was repeated by Chief Justice Toal in *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 at 655 (S.C. 2008) where she stated in her concurring opinion in another matter where beneficiaries were disputing the propriety of joint accounts:

Chief Justice TOAL:

> I agree with the majority's holding that this interlocutory order was not immediately appealable. I write separately, however, to express my view that the probate court properly consolidated the two cases. Both matters involve the estate of Mary Fulmer, similar questions of law and fact exist, and consolidation of the actions will promote judicial economy and reduce the risk of inconsistent rulings. Furthermore, it is my view that considering the nature of this consolidated action, Respondent has an absolute right to remove this case to circuit court following the personal representative's amendment to the pleading. Not only does the consolidated action relate to an amount in controversy of at least $5,000, but also it involves a formal proceeding for the probate of Fulmer's will. *See* S.C. Code Ann. § 62-1-302(d) (1) and (5) (2007) (providing that any action or proceeding filed in the probate court and relating to formal proceedings for the probate of wills and actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value must be removed to the circuit court).

Likewise in the case now before the Court, there is an identity of parties, and virtually identical issues of law and fact to be determined in both civil actions, the only real difference in the two actions being that in the matter that originated in Probate Court is the additional claim that undue influence on Mary Rose Duncan caused her to convert assets from her name alone to joint name with right of survivorship in the Respondent Sisters, thereby causing the loss complained of by Appellant Brothers. Appellant Brothers have

advanced not a single argument to this Court that the Motion to Dismiss as directed to the causes of action as contained in either case differs in any significant fashion.

Since the Appellant Brothers asked for, and were granted, their Motion for Consolidation, they cannot now complain that their request was granted. Even if the Court were to determine that they can complain that their request was granted due to how it was granted, an order for consolation is governed by an abuse of discretion standard. As the Court noted in *Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 at 904 (S.C. App. 1993).

> Consolidation under Rule 42(a), SCRCP, may be ordered whenever actions involving a common question of law or fact are pending before the court. *Ellis by Ellis v. Oliver*, 307 S.C. 365, 415 S.E.2d 400 (1992). Under a consolidation order, the parties and the pleadings are not merged, and each action retains its own identity. Id. Consolidation is within the broad discretion of the trial court. Worthy v. Chalk, 44 S.C.L. (10 Rich.) 141 (1856). The moving party has the burden of persuading the court that consolidation is desirable. Prudential Insurance Co. v. Marine National Exchange Bank, 55 F.R.D. 436 (E.D.Wis.1972). An appellate court will not disturb a trial court's ruling on a motion to consolidate absent an abuse of discretion. *Winchester v. United Insurance Co.*, 231 S.C. 288, 98 S.E.2d 530 (1957).

At no point in Appellant's Initial Brief is the claim made that the Trial Court abused its discretion in the terms and conditions of consolidation in the Order under

appeal. Since this issue is not argued in Appellants' Initial Brief, this issue should be considered abandoned for purposes of this appeal. Rule 208(b)(1)(B); *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000). Appellants should not now be allowed to raise the new issue of the consolidation order being an abuse of discretion as their appellate grounds are limited to those matters raised in the Initial Brief and they may not use the reply brief as a vehicle to argue issues not argued in the Appellant's Brief. Rule 211(b), SCACR; *Bochette v. Bochette*, 300 S.C. 109, 386 S.E. 2d 475 (Ct. App. 1989).

Furthermore, it is clear that once Appellant Brothers raised the issue of their entitlement to removal of the Probate Matter to Circuit Court, it would have been improper for the Probate Court to rule on any matter beyond the removal, and that the Probate Court only ruled on the issue of removal. As stated by the Probate Court in its Order, which was appealed by neither party;

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

> Notwithstanding the exclusive jurisdiction of the probate court over the forgoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, ***must*** be removed to the circuit court
> ...
> (3) actions to try title
> …
> (5) actions in which a party has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value ....

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

After an examination of the contents of the Petition and a

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

(R. p. 5, lines 5-22).

Appellant Brothers attempt to argue that because the Motion to Consolidate was being heard does not mean that they consented to hearing Motions to Dismiss in both cases, only the one on the docket that day, that being the Motion to Dismiss in Civil Action 2010-CP-40-0044. Appellant Brothers however have not pointed out how the Motions to Dismiss differed in any significant fashion as both were directed to the same causes of action and were on the same legal grounds. Appellant Brothers cannot request consolidation of cases based on identity of parties, facts and issues, the need for judicial economy and avoidance of inconsistent judicial rulings, and then complain later that they should not be subject to a ruling that adversely affects both actions, unless they can point to some significant difference in the parties, facts or legal issues in the consolidated actions. As is clear by any review of the Petition originally filed in Probate Court that became Civil Action 2010-CP-40-2812, also called the DJ action, (R. p. 51-54) and the Complaint filed in Circuit Court as Civil Action No. 2010-CP-40-0044 (R. p. 55-59) the two pleadings are virtually identical but for the undue influence claim in the DJ action. It is also clear that Respondent Sisters filed virtually identical responses to these pleadings, but for the request by the Respondent Sisters that the Probate Court deny the removal. (R. pp. 45-50; R. pp. 40-44).

In short, the Appellant Brothers cannot now complain of an adverse consolidated ruling when they themselves requested the consolidation, when they can point to no difference in parties, facts or issues that would have made any difference in the issues being determined by the Court, nor do they even attempt to explain how the order in question as to the consolidation is an abuse of discretion.

II.

The Trial Court properly dismissed the causes of action for Tortious or Intentional Interference with Inheritance and Civil Conspiracy.

Appellant Brothers have sounded claims in both civil actions for the tort of tortious or intentional interference with inheritance rights and the tort of civil conspiracy. The Order below dismissed both causes of actions in both pending cases.

As to both of the alleged causes of action, there is no tort action that may lie as there is no duty to the Appellant Brothers by the Respondent Sisters. As was argued before the Trial Court, Mary Rose Duncan was free to distribute her Estate and property as she saw fit, and Respondent Brothers would have had no remedy against their mother. (R. p. 85, line 15—p. 86, lines 1-2).

It is clear that for there to be any cause of action founded in tort, intentional or not, there must be a duty to the Plaintiff, a breach of that duty and damages proximately caused by and related to the breach of that duty. See *Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (S.C. 2010) citing *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000).The Appellant Brothers' causes of action and/or claims founded on interference with inheritance rights and civil conspiracy fail in this basic regard. Essentially the Appellant Brothers' claims under interference with inheritance rights and civil conspiracy are that that because the Respondent Sisters allegedly took advantage of the Decedent by having her convert sole accounts to joint accounts with right of survivorship, the Appellant Brothers have been damaged. One of the problems with this analysis is that the Appellant Brothers cannot show, nor have they alleged any duty of the Respondent Sisters to them that was breached. Another problem with the analysis of Appellant Brothers is that if anyone was harmed, it was the Decedent and arguably the Estate who suffered damage. This is clearly recognized

by the case of *Douglas ex rel Louthian v. Boyce*, 344 S.C. 5, 542 S.E.2d. 715 (2001), wherein our Supreme Court stated that South Carolina does not recognize a cause of action for tortuous interference with inheritance rights and further found no duty by estate attorneys to third parties out of a failure to act to protect their interests in a tort action as any duties owed were to the Estate, not the third parties. Likewise, in the case now before the Court, the Appellants can point to no duty owed Appellants which was violated by the accounts being made joint with right of survivorship.

While the Appellant Brothers argue correctly that generally, novel questions of law should not be decided on a motion to dismiss, they may be so decided when further factual development is not necessary for determination of the claim, and the matter is soley one of law. As was stated in *B & A Development v. Georgetown County*, 361 S.C. 453, 605 S.E.2d 551 at 555,556 (Ct. App. 2004):

> **6 7** As a general rule, our courts are reluctant to decide important questions of novel impression on a motion to dismiss before the parties have had an opportunity to fully develop the factual record. *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001). Instead, "[a] novel issue ... is best *****556*** decided in light of the testimony to be adduced at trial." *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980). "However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim.

In the case before the Court, no further factual development is necessary as the well pleaded facts are admitted, but not any inferences or legal conclusions to be drawn from such facts. As stated even before the enactment of the SCRCP, but still the legal standard, in *Sease v City of Spartanburg*, 242 S.C. 420, 131 S.E.2d 683 at 685 (1963):

> *****685*** **1 2** It is elementary that in passing upon a demurrer, the Court is limited to a consideration of the pleadings under attack, all of the factual allegations whereof that are properly

> pleaded are for the purpose of such consideration deemed admitted. A demurrer admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from such facts. Costas v. Florence Printing Co., 237 S.C. 655, 118 S.E.2d 696. A demurrer to a complaint does not admit conclusions of law pleaded therein. Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486.

In short, the well pleaded facts are simple. The Decedent executed a will in 1997 equally dividing her property between her children. (R. p. 56, lines 5-6; R. p. 52, lines 1-2). At some point prior to 2004, the Decedent's accounts which had been in her name only were made joint with her daughters. (R. p. 56, lines 11-14, lines 17-21; R. p. 52, lines 10-14). There is no claim of improper usage of the joint accounts prior to the death of the Decedent in 2007. (R. p. lines 13-15). The claim of the Appellants, with no well pleaded factual allegation to back the same, is that somehow these transfers from sole accounts to joint accounts were intended to and did so damage the Appellants. The Appellants have not alleged any facts by way of the pleadings in either case to show any reasonable expectation that their mother would not dispose of her property prior to her death, nor any limitation or restriction on the Decedent's ability to so dispose of her property. The Appellants only contention is that since the 1997 will provided for an equal split between the children, and in the transfers from sole accounts to joint accounts that took place in 2002 and 2003, this removed assets from an equal distribution under the will, then this was obviously due to some bad act on the part of the Respondent sisters without spelling out any actual factual basis for that conclusion. This is also contrary to the statutory presumption that a joint account becomes payable to the survivor upon death of the other account holder. Under the Probate Code, this presumption created in favor of the non-contributing survivor to a joint account applies to those funds remaining on deposit at the death of the contributor. *Vaughn v. Bernhardt*, 345 S.C. 196, 547 S.E.2d 869 (S.C. 2001). If the Appellants' analysis is in

fact correct, then every property transfer of a person prior to death is challengeable by the other devisees on the basis that "but for the act of Defendant, I would have gotten X under Mother's Will", with no factual basis being required for the same. Respondent Sisters cannot overemphasize that the Complaint and the Petition allege no facts upon which the Appellant Brothers could have established that "but for" some undisclosed bad act of the Respondent Sisters, the Decedent would not have made the accounts joint, and that the Respondent Brothers had some reasonable expectation as to the accounts in question and therefore maintain that the trial court properly decided this issue on the Motion to Dismiss.

Finally, Appellants argue in their Initial Brief that "Twenty four states either recognize or acknowledge tortious interference with an expected inheritance as a cause of action", but fail to note that included in that number of 24 states are states where the court of last resort have not explicitly recognized it. Initial Brief of Appellants, p. 17, citing 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), see fn 87 pp. 393-394 for explanation of definition. Appellants Initial Brief goes on to claim that "No state has ruled out the cause of action entirely" on page 17 of the Initial Brief, but the direct statement from the article itself is "Thirteen states and the District of Columbia have either declined to adopt the tort or declined to decide whether to tort is recognized", South Carolina being one of those so included. Renfroe, *supra*, at p. 395. It is interesting to note that in California, some courts have accepted the tort, while others have held the opposite. Renfroe, *supra*, at p. 396. Finally, even where the state has recognized the tort, those accepting or recognizing the tort are split as to whether or not to require Plaintiffs to pursue a probate remedy first and further split as to damages. Renfroe, *supra*, pp. 396-397.

Respondents would submit that Appellants in this case have not presented any valid reason for establishing new or alternative causes of action, when the Supreme Court has in the past refused to so act, in a situation where there is no question but that a remedy does exist, if the Appellants can establish the same factually, for undue influence to invalidate the questioned transfers, and return the funds in question to the estate if so warranted.

The civil conspiracy claims also fail not only as there is no duty to the Appellant Brothers owed by the Respondent Sisters, but also due to the failings of the claimed cause of action. The tort of civil conspiracy, by the most recent case of *Hackworth v Greywood*, 385 S.C. 110, 682 S.E.2d 870 at 874-5 (S.C. App. 2009), requires more than a simple restatement of prior alleged acts and damages in the "new" cause of action:

> The tort of **civil conspiracy** has three elements: (1) a combination of two or more persons, (2) for the purpose of

injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites,* 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct.App.1989). The difference between **civil** and criminal **conspiracy** is in criminal **conspiracy**, the gravamen of the offense is the agreement itself, whereas in **civil conspiracy**, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. *Id.; see also Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of **civil conspiracy** is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.").

[7][8] A claim for **civil conspiracy** must allege additional acts in furtherance of a **conspiracy** rather than reallege other claims within the complaint. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) *rev'd on other grounds,* 283 S.C. 155, 321 S.E.2d 602 (1984) *quashed in part on other grounds,* 287 S.C. 190, 336 S.E.2d 472 (1985). Moreover, because the quiddity of a **civil conspiracy** claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. *Vaught*, 300 S.C. at 209, 387 S.E. 2d at 95.

1. Additional Acts in Furtherance of the Conspiracy

[9][10][11] An unexecuted **civil conspiracy** is not actionable. *Charles v. Tex. Co.*, 199 S.C. 156, 163, 18 S.E.2d 719, 727 (1942). The conspiracy becomes actionable, however, once overt acts occur which proximately cause damage to the plaintiff. ****875***Todd*, 276 S.C. at 292, 278 S.E.2d at 611. In a **civil conspiracy** claim, one must plead additional acts in furtherance of the **conspiracy** separate and independent from other wrongful***116** acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim. *See id.* at 293, 278 S.E.2d at 611 (dismissing plaintiff's **civil conspiracy** claim because " the [**civil conspiracy**] action does no more than incorporate the prior allegations and then allege the existence of a **civil conspiracy** and pray for damages resulting from the **conspiracy**. No additional acts in furtherance of the conspiracy [were] plead"); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct.App.2000) ("Because [the third party plaintiff] ... merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action."); *Doe v.*

Erskine Coll., No. 8:04-23001RBH, 2006 WL 1473853, at *17 (D.S.C. May 25, 2006) (granting defendant's motion for summary judgment on plaintiff's **civil conspiracy** action because "the Complaint does not plead specific facts in furtherance of the **conspiracy**; instead the Complaint simply restates alleged wrongful acts pled in relation to the plaintiff's other claims for damages."); *James v. Pratt & Whitney*, 126 Fed.Appx. 607, 613, 2005 WL 670623 (D.S.C.2005) ("If appellant failed to allege facts for his **civil conspiracy** claim separate and distinct from his other two claims, then his **civil conspiracy** claim would fail under *Todd*.").

[12] In this case, Greywood has reiterated verbatim the allegations contained in its cause of action for breach of contract accompanied by fraudulent act in its **civil conspiracy** claim. Specifically, paragraph 46, which lists the fraudulent acts for the breach of contract action, contains the exact same acts alleged in paragraph 49, which is part of the **civil conspiracy** cause of action. As these two paragraphs and their subparts are identical, nothing in the **civil conspiracy** claim informs the Hackworths what acts in furtherance of the alleged **conspiracy** they are being accused of. Accordingly, we do not believe Greywood has adequately alleged acts in furtherance of a **civil conspiracy**.

2. Special Damages

[13][14][15][16] Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. *Loeb v. Mann*, 39 S.C. 465, 469, 18 S.E. 1, 2 (1893). General damages are inferred by ***117** the law itself, as they are the immediate, direct, and proximate result of the act complained of. *Sheek v. Lee*, 289 S.C. 327, 328-29, 345 S.E.2d 496, 497 (1986). Special damages, on the other hand, are not implied at law because they do not necessarily result from the wrong. *Id.* at 329, 345 S.E.2d at 497. Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party. *Id.*

[17] If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their **civil conspiracy** claim, their **conspiracy** claim should be dismissed. *See* *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95 ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is

> barred under *Todd.*"); *Charleston Aluminum, Inc. v. Samuel, Son & Co., Inc.*, No. 3:05-02337-MBS, 2006 WL 2370292, at *3 (D.S.C. Aug.15, 2006) (granting defendant's motion to dismiss plaintiff's **civil conspiracy** claim because "the damages pleaded by [p]laintiff in the **civil conspiracy** cause of action are duplicative of the damages asserted with respect to the contract causes of action"); *Doe*, 2006 WL 1473853, at * 17 (holding plaintiff's **conspiracy** claim failed as a matter of law because plaintiff failed to plead special damages; instead plaintiff's **conspiracy** count "merely realleged[d] the same damages [p]laintiff claim[ed] to have suffered in relation to her other claims").

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In the action now before the Court, Appellant Brothers have done nothing in the civil conspiracy cause of action other than to complain of the same acts complained of in the other "claims", that being the retitling of the sole accounts of Mary Rose Duncan and those accounts being made joint with Mary Rose Duncan and the Respondent Sisters. The pleading further fail to allege any special damages due only to the alleged conspiracy. See (R. pp. 55-59; R. pp. 51-54). Therefore, the cause of action as to civil conspiracy also fails.

Finally, Appellant Brothers argue that even if this Court upholds the dismissal of the causes of action for interference with inheritance rights and civil conspiracy in Civil

Action No. 10-CP-40-2812, that this Court should not extend the same to the DJ action originally filed in Probate Court, then removed to the Circuit Court as Civil Action 10-CP-40-2812 as the Appellant Brothers did not make claims for those torts in the DJ action. See Initial Brief of Appellants, p. 15, lines 6-12. As may be seen by an examination of ¶ 12 of the Petition originally filed in Probate Court now removed to Circuit Court as Civil Action 10-CP-40-2812, the Appellants are requesting a setting aside of the transfer from sole ownership on the grounds of " …the undue influence, intentional interference with 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." (R. p. 53, lines 4-6). Other than conclusory claims of undue influence, interference with inheritance, and/or civil conspiracy, Appellant Brothers have stated no additional grounds for invalidating the account transfers from sole to joint in the matters now before the Court, and have posited no case law nor statute that would allow them to make such a claim for relief, but for the ground of undue influence. Therefore, Respondent Sisters request that Appellant Brothers be limited to the undue influence ground as justification for their attempt to invalidate the transfers at issue, rather than being allowed to repeatedly claim grounds dismissed by the Court, and that this Court uphold the dismissal of the interference with inheritance and civil conspiracy claims in Civil action 40-CP-40-2812, by affirming the Trial Court.

III.

The Court should affirm for any other matter appearing of record.

Based upon Rule 220(c), SCACR, this Court may affirm for any reason appearing in the Record on Appeal. Respondents would maintain that the Appellants may not preserve a matter for appellate review when they were not the party objecting to the trial court. *Tupper v. Dorchester County,* 326 S.C. 318, 487 S.E.2d 187 (1997); *State v Carriker*, 269 S.C. 553, 238 S.E.2d 678 (1977).

Appellants clearly moved for the consolidation of which they now complain, and have failed to specify exactly how the granted consolidation is an abuse of discretion in the issues on appeal.

CONCLUSION

For the foregoing reasons, Respondents request that this Honorable Court affirm the rulings of the Trial Court.

Respectfully submitted,

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Brian Dumas SC Bar 1786, Fed ID 638
Attorney at Law
718 Clemson Road
Columbia, SC 29229
(803)699-4996 / FAX (803)699-4995
briandumasattorney@sc.rr.com

ATTORNEY FOR RESPONDENTS.

Columbia, South Carolina
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