

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court Of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No: 2010-CP-CP-0044

Case No.: 2010-CP-40-2812

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

v.

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

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FINAL REPLY BRIEF OF APPELLANTS

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Respondents initial final brief argues for purported alternative sustaining grounds. These arguments are refuted herein below.

## **ARGUMENT**

### **I. APPELLANTS DID NOT APPEAL CONSOLIDATION, AND CONSOLIDATION DID NOT CURE THE TRIAL COURT'S PROCEDURAL ERROR.**

Appellants are not appealing the consolidation of the declaratory judgment and tort actions. Indeed, it was their motion. However, the consolidation does not cure the procedural error committed by the lower court when it ruled on a motion that was not scheduled to be heard, was not heard, and had already been denied by another court.

Moreover, the ruling on the tort claims is not necessarily dispositive as to the declaratory judgment claim. The tort claims originally filed in the Circuit Court sought actual and punitive damages. The declaratory judgment action removed to the Circuit Court sought the retitling of assets and their return to the Estate. As fully discussed in the Initial Brief of Appellants, these are different remedies and there are different policy considerations involved in whether tort claims for Intentional Interference with an Inheritance and Civil Conspiracy to interfere with an expected inheritance should be recognized and whether the same conduct should be a basis for retitling assets.

### **II. DUTY IS NOT AN ELEMENT OF THESE INTENTIONAL TORTS; DUTY IS INHERENT IN THEM.**

Respondents claim they owed the Appellants no duty not to intentionally interfere with Appellants inheritance and no duty not to conspire to injure Appellants. To the extent this argument is an extension of the argument that South Carolina should not

recognize such claims, Appellants refer the Court to their initial brief. However, to the extent this is argued as a separate and alternative sustaining ground, the argument is addressed here.

The elements of Civil Conspiracy and Tortious Interference with an Inheritance, as set forth in *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (S.C. 1996) and *Douglass ex rel. Louthian v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (S.C. 2001), respectively, do not include “duty.” The reason is simple. The duty not to commit intentional torts against one another is universal. Everyone owes a duty to everyone else, even strangers, not to steal their purse or wallet. Likewise, everyone owes all third parties a duty not to conspire with another to injure the third party and cause him or her damages. *Future Group, II, supra*. And, if Tortious Interference with an Inheritance is recognized, everyone owes everyone else a duty not to intentionally and tortiously interfere with an existing expectancy of inheritance. *See Boyce, supra*.

**III. THE PLEADING OF THE ELEMENTS OF CIVIL CONSPIRACY AND TORTIOUS INTERFERENCE WITH AN INHERITANCE WAS NOT CHALLENGED IN THE TRIAL COURT; NEVERTHELESS, THE ELEMENTS WERE PLED.**

The trial court dismissed the Tortious Interference and Civil Conspiracy claims on the limited grounds that South Carolina did not recognize an expectancy in an inheritance as a recoverable damage. Respondents maintain that the elements of these causes of action were pled, as discussed below. However, if the Court affirms the trial court on the alternative grounds that the Complaint did not sufficiently plead the causes of action, the Court should remand the case with leave to amend the pleadings.

**A. The Element Of Tortious Interference With An Inheritance Were Pled.**

The elements of Tortious or Intentional Interference with an Inheritance 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.” *Boyce, supra*.

The Respondents do not appear to challenge the pleading of element (1), the existence of an expectancy. For the Court’s convenience, this element is met by paragraphs 7, 10 and 11 of the complaint. Therein Appellants allege that they were equal beneficiaries with the Respondents to their mother’s will and, at the time the will was executed, their mother held a checking account, savings account and CD as the sole account holder.

Respondents appear to be challenging element (2), the intentional interference by tortious conduct element. Paragraphs 8, 12, 14, 15, 16, and 18-21 establish these elements. They allege tortious conduct of undue influence, breach of fiduciary duty and civil conspiracy. The undue influence is pled in the allegations that decedent placed her trust and confidence in the Respondents, that the Respondents had and exercised dominance over the decedent to manipulate, encourage deceive the decedent into changing the accounts. On the part of Respondent, Voyles, committing the foregoing acts while being the decedent’s attorney in fact, a breach of fiduciary duty. Civil conspiracy is pled in the allegations that Respondents combined their efforts to commit the aforementioned conduct in order to deprive the Appellants of their inheritance, and that they succeeded.

Respondents also appear to challenge element (3), the reasonable expectation element. This element is satisfied by paragraphs 7, 10, 11, and 21 of the Complaint. Therein, Appellants allege their mother willed them an equal share of her estate, that at the time she executed the will the accounts in question were part of her estate, and that it was their mother's desire that the funds in the accounts be divided equally among her children.

Respondents do not appear to challenge element (4), damages. For the Court's convenience, this is pled in paragraphs 18-20, 24 and 29. Therein appellants alleged that the Respondents actions deprived them of their share of the accounts in question and describe the amount at issue.

The pleadings referred to herein described the ultimate facts necessary to establish the claims alleged. While they may not allege evidentiary facts, as Respondents claim they should, only ultimate facts are required. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881, 884 (S.C. App. 2004).

**B. The Elements Of Civil Conspiracy Were Pled.**

Respondents claim the Complaint lacks allegations of an additional act in furtherance of the conspiracy and special damages. These claims were not raised or ruled on by the lower court and lack merit.

The "additional acts" requirement precludes a civil conspiracy claim when the same acts also establish other wrongs that are alleged in a complaint, such as breach of contract accompanied by a fraudulent act. *See Hackworth v. Greenwood At Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). The purpose of the requirement is

to inform the defendant what acts in furtherance of the conspiracy they are accused of, and to assure that liability is sought for an allegedly executed civil conspiracy that itself caused damages, not merely an attempted conspiracy. *See Id.*

In the present case, concerted action is specifically alleged. Acts in furtherance of the conspiracy are alleged in paragraphs 8, 12, 17-19. In paragraph 8 Appellants allege that Respondent Voyles was the attorney in fact for Decedent, but in 2004 *both* Respondents became joint account holders of the checking and savings accounts as alleged in paragraph 12. In paragraphs 17-19 Appellants allege that these additions and the changes to the CDs occurred because Respondents “combined their efforts to intentionally manipulate, encourage, and/or deceive Decedent into adding their names to the Accounts,” and, within days of their mother’s death, received the funds and redistributed the funds between themselves.

Likewise, special damages is specifically pled. In paragraphs 22-25 the Complaint specifically alleges that it was the concerted actions of the Respondents that caused the Appellants to lose part of their inheritance.

The only other claim for damages is the claim for Tortious Interference with an Inheritance. This claim relies in part on the civil conspiracy to establish its elements, not the other way around as in *Hackworth*. The tortious conduct of committing the civil conspiracy, along with undue influence and breach of fiduciary duty, is used to satisfy the element that the interference be committed by tortious conduct.

This is not a case of a breach of contract by multiple parties with a civil conspiracy claim thrown in on the basis that it was breached by two people at the same



time. The civil conspiracy claim is at the heart of the Complaint for damages. The Appellants are contending, and alleged, that the sisters acted in concert to deprive the Appellants of part of their inheritance, that the sisters succeeded, and that in culmination of the conspiracy the sisters redistributed the money evenly between themselves within days of their mother's death. The letter and the purpose of the "additional acts" and special damages requirements were met by the allegations in the Complaint.

### **CONCLUSION**

None of the issues discussed above were fully developed in the trial court. The Respondent has raised them as alternative sustaining grounds, but they are not the issues on appeal. The main issue on appeal is whether South Carolina recognizes a lost expected inheritance as a recoverable damage, either through a claim for Civil Conspiracy or Intentional Interference with an Inheritance. If the Court finds that South Carolina recognizes such claims, as Appellants contend it should, the Court should reverse the trial court and remand the case for further proceedings.

TURNER, PADGET, GRAHAM & LANEY, P.A.

May\_\_\_\_, 2011

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