

IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA  
FOURTH DISTRICT

THELMA MULVEY  
Appellant

CASE NO.: 4D17-1292  
LOWER CT. CASE NO.:  
2015CA686XXXXMB

and

SHEILA STEPHENS  
Appellee

---

**APPELLANT'S INITIAL BRIEF**  
**Lower Tribunal Case No.: 52015CA686XXXXMB**

Joshua D. Ferraro  
Lesser, Lesser, Landy & Smith  
101 Northpoint Parkway  
West Palm Beach, FL 33407  
(561) 655-2028 Fax (561) 655-2033  
E-mail: [jferraro@lesserlawfirm.com](mailto:jferraro@lesserlawfirm.com)

s/Joshua D. Ferraro

---

Joshua D. Ferraro, Esq,  
Florida Bar No. 0797391

RECEIVED, 8/31/2017 12:11 AM, Clerk, Fourth District Court of Appeal

## TABLE OF CONTENTS

Certificate of Interested Persons	3
Table of Authorities	4
Statement of the Case and Facts	5
Summary of the Argument	14
Standard of Review	15
Argument	15
I.    Failure to Introduce any Competent Substantial Evidence	16
II.   Failure to Present Competent Evidence Regarding Personal Property	20
Conclusion	24
Certificate of Service	24
Certificate of Compliance	24

**CERTIFICATE OF INTERESTED PARTIES**

Thelma Mulvey	Appellant, Plaintiff
Sheila Stephens	Appellee, Defendant
Joshua D. Ferraro	Counsel for Appellant
Virginia Sherlock	Counsel for the Appellee
Honorable James Langford	Senior Trial Court Judge

**CITATIONS TO RECORD / REFERENCES TO INTERESTED PARTIES**

Throughout this Initial Brief, citations to the Record on Appeal shall be noted as (R.O.A. \_\_\_\_\_) and citations to the Transcript shall be noted as (T. \_\_\_\_ lines \_\_\_\_\_).

Throughout this Initial Brief, the Appellant, THELMA MULVEY, shall be referred to as the Appellant, the Plaintiff, Mrs. Mulvey or by her full name where appropriate.

Throughout this Initial Brief, the Appellee, SHEILA STEPHENS, shall be referred to as the Appellee, the Defendant, Ms. Stephens or by her full name where appropriate.

Throughout this Initial Brief, the Trial Court and the Honorable James Langford, shall be referred to as the Trial Court, the Court or by his full name where appropriate.

## **TABLE OF AUTHORITIES**

<u>Bank of N.Y. Mellon v. Simpson</u> , 2017 Fla. App. LEXIS 11413	18
<u>Frenz Enters, Inc. v. Port Everglades</u> , 746 S2d 498	17
<u>Geico Insurance Company v. Dixon</u> , 209 So.3d 77, 81	15
<u>Henry v. Hoelke</u> , 82 So.3d 962, 965 (Fla. 4th DCA 2011)	15
<u>Henry v. Jones</u> , 202 So.3d 129, 132-133 (Fla. 2nd DCA 2016)	16
<u>Saewitz v. Saewitz</u> , 79 So.3d 831, 833	22
<u>Whalen v. Prosser</u> , 719 So.3d 2, 10 (Fla. 2nd DCA 1998)	16

## **STATEMENT OF THE CASE AND FACTS**

This case arises from a multi-count complaint in which the Appellee, SHEILA STEPHENS, sued THELMA MULVEY for tortious interference with the expectation that she would inherit assets upon the death of her father, JACK MULVEY. Specifically, Ms. Stephens claimed that THELMA MULVEY (the surviving spouse) and the Decedent's two friends, JAMES and NANCY CAMPBELL, took improper actions that deprived her of an inheritance that she expected upon the death of her father.

Following a two (2) day trial, the jury found in favor of JAMES and NANCY CAMPBELL but awarded the sum of sixty thousand dollars (\$ 60,000) against Mrs. Mulvey. (R.O.A. p. 480). The Defendant moved for a directed verdict at the conclusion of the Plaintiff's case and the Court reserved ruling until the jury returned its verdict. At that time, the Court denied the motion for directed verdict. A timely motion for judgment notwithstanding the verdict was filed post-trial and denied.

### **Procedural History**

The Decedent, JACK MULVEY, died on June 19, 2011 in Martin County, Florida. (R.O.A. 312) Following his death, Mr. Mulvey's daughter, SHEILA STEPHENS, attempted to probate a 2005 Last Will & Testament despite the fact that a later Will existed. (R.O.A. 312). Ms. Stephens claimed that this later Will was

invalid because it was procured through undue influence committed by THELMA MULVEY, JAMES CAMPBELL and NANCY CAMPBELL. (R.O.A. 312)

On May 8, 2015, the Will contest was tried in the Probate Court before the Honorable Lawrence Mirman who ruled in favor of Ms. Mulvey and concluded that *“the suggested evidence of undue influence in this case is speculative, insubstantial and unconvincing. The Petitioner has failed to establish undue influence by the greater weight of the evidence.”* (R.O.A. 317) Approximately one month after Judge Mirman determined that Ms. Mulvey had not unduly influenced the Decedent, Ms. Stephens filed this Complaint for tortious interference. (R.O.A. 1)

### **Factual Basis for Claim**

Several years prior to his death the Decedent, JACK MULVEY, owned a ranch located in Saint Lucie County, Florida. (T. 474 lines 22-23) The ranch was held in the name of a revocable trust in which Mr. Mulvey was the Trustee and had full authority to contribute and withdraw assets in his sole discretion. (T. 347 lines 7-25) SHIELA STEPHENS was a beneficiary of the Revocable Trust.

In 2007, after unsuccessfully attempting to sell the ranch for several years Mr. Mulvey approached his best friend JAMES CAMPBELL with an idea that Mr. Campbell and his Wife should purchase the property. Mr. Campbell discussed the matter with his Wife and they eventually decided to move forward with the purchase. (T. 477 lines 6-22) The terms of the sale included owner financing with the

Campbells making an initial down payment of \$ 200,000 and providing a note and mortgage to Mr. Mulvey for the balance. (T. 478 line 18 – 479 line 18).

At Mr. Mulvey's request, the JAMES CAMPBELL contacted a local attorney that he had worked with in the past to draw up the paperwork. This attorney, JOHN SHERRARD, drafted the closing documents including a note payable and a mortgage. (T. 459 lines 6-13) However, rather than assigning the note and the mortgage to the Revocable Trust the documents reflected that the proceeds from the sale would be payable to JACK and THELMA MULVEY as Husband and Wife. This decision to assign the loan proceeds to JACK and THELMA MULVEY as Husband and Wife rather than to the Revocable Trust is the primary basis for the Plaintiff's lawsuit. (T. 344 lines 9-20). Mrs. Stephens claimed that the Defendants persuaded JACK MULVEY to take the ranch proceeds out of the Revocable Trust such that she could not inherit them upon his death.

Over the next several years, JACK MULVEY and JAMES CAMPBELL remained best friends and in 2008 when the economy drastically reduced real estate prices Mr. Mulvey decided to reduce the balance due on the mortgage to reflect its fair market value. The parties returned to Mr. Sherrard's office who prepared the mortgage modification and they executed the new documents. These new mortgage documents remained in effect until the death of Mr. Mulvey and through the date of the trial.

Ms. Mulvey had no knowledge of the terms of the sale in 2007 beyond a basic understanding that there would be some form of owner financing. (T. 431 lines 16-22). Likewise, she had no knowledge that the property was held in the name of Mr. Mulvey's revocable trust. (T. 433 lines 2-6). In fact, at the time that the ranch was sold Mrs. Mulvey did not even know that a Revocable Trust existed. (T. 433 lines 9-11).

At trial, the Plaintiffs called a total of five (5) witnesses including: (1.) Sheila Stephens; (2.) Sean Patrick Mulvey; (3.) Jeremy Mulvey; (4.) Thelma Mulvey; and (5.) James Campbell. Not a single witness was able to identify a single act, omission or statement in which Thelma Mulvey coerced, threatened or even told Jack Mulvey to structure the sale such that the proceeds were payable to them as Husband and Wife rather than to the Trust.

The first witness called by the Plaintiff was the Decedent's son, Sean Patrick Mulvey. Mr. Mulvey testified as follows:

Q: But here's my question did you ever hear Thelma Mulvey threatened your father with physical harm if he didn't sign the proceeds of the ranch over to her? (T. 169 lines 17-19)

A: No. (T. 169 line 20)

Q: All right, And did you ever hear her coerce him in some way if he didn't sign the proceeds over? (T. 169 lines 21-22)

A: No (T. 169 line 23)

Q: All right. Any you never heard her lie to him in an effort to get him to leave the ranch proceeds to her? (T. 170 lines 16-17)

A: No (T. 170 line 18)

Q: You never saw any documents or emails or letters in which Thelma wrote to Jack and said, “Dear Jack, you need to leave the ranch proceeds to me because of” whatever reason? You never saw any of that? (T. 171 lines 2-5)

A: No. (T. 171 line 6)

Q: You never heard Jack and Thelma discuss the proceeds from the sale of the ranch? (T. 171 lines 20-21)

A: . . . I never heard their personal conversation. (T. 172 line 3)

Mr. Sean Patrick Mulvey did not testify on either direct or cross examination about any improper acts, omissions or statements made by Thelma Mulvey with regard to the structure of the ranch sale of the disposition of any proceeds. (T. 151-180)

The second witness called by the Plaintiff was the Decedent’s grandson, Jeremy Mulvey. Mr. Mulvey testified as follows:

Q: You never heard Thelma Mulvey threaten or coerce or physically intimidate your grandfather in any way, but specifically, not to leave her the proceeds of the ranch; correct? (T. 198 lines 4-7)

A: You mean for that specific circumstance or have I ever witnessed that behavior at all? (T. 198 lines 8-9)

Q: Well, let’s start with that specific circumstance. (T. 198 line 10)

A: No. (T. 198 line 11)

Q: All right. And you never heard Thelma Mulvey tell him, your grandfather, to leave her the proceeds of the ranch? (T. 198 lines 12-14)

A: No. (T. 198 line 15)

Q: Okay. And you never saw any documents, or emails or records where Thelma Mulvey said to your grandfather, you will leave me, or you should leave me, or you must leave me the proceeds from the sale of the ranch? (T. 198 lines 16-19)

A: No. (T. 198 line 20)

Q: All right. In fact, you never witnessed any conversations at all between Thelma and your grandfather about where the proceeds from the ranch were going to go? (T. 198 lines 21-23)

A: No, but I certainly had conversations afterward with Thelma. (T. 198 lines 24-25)

**Q: But you have no evidence whatsoever that Thelma Mulvey, Jack – Jim Campbell or Nancy Campbell improperly or wrongfully or tortuously forced, manipulated or threatened to convince your grandfather to leave the proceeds to Thelma? (T. 206 lines 17-21)**

**A: I never insinuated otherwise. (T. 206 line 22)**

The third witness called by the Plaintiff was the Decedent's daughter, Sheila Stephens (the Plaintiff). Ms. Stephens testified as follows:

Q: Ms. Stephens, as I understand it the primary basis for your claim is that you believe you had a reasonable expectation that upon your father's death you would obtain either the ranch or the loan --of the loan proceeds from the ranch? (T. 344 lines 9-13)

A: Correct. (T. 344 line 14)

Q: All right. And you claim that the action or that inheritance was frustrated by the improper action of Jim Campbell, and Nancy Campbell, and Thelma Campbell (sic); correct? (T. 344 lines 17-19)

A: Correct (T. 344 line 20)

Q: Okay. Now, the real question, is it not, is whether or not Jim Campbell, or Nancy Campbell, and/or Thelma Campbell (sic) improperly influenced your father to change the structure of the sale so that the loan proceeds didn't go to the trust, it went to Thelma and him, as husband and wife; correct? (T. 351 lines 8-13)

A: Yes (T. 351 line 14)

Q: All right. So this isn't a claim – so that's an intentional action that would have had to be done by Jim Campbell, or Nancy Campbell or Thelma Campbell (sic); correct? (T. 351 line 15-18)

A: Correct. (T. 351 line 19)

Q: And they would have obviously had to do that before the 2007 transaction; correct? (T. 31 lines 23-24)

A: Yes (T. 351 line 25)

Q: Okay, prior to 2007, you don't have any evidence that Thelma Mulvey physically forced your father to structure the sale in such a way that the loan proceeds would go to her and Jack as husband and wife, rather than to a trust? (T. 352 lines 8-12)

A: No, I have no physical evidence. (T. 352 line 13)

Q: Okay. And you never witnessed that happening? (T. 352 line 14)

A: No. (T. 352 line 15)

Q: Okay. Any you never heard her, prior to 2007, lie to Jack and say, "you should put the proceeds from the sale of the ranch into joint names instead of into the trust" for some reason? (T 352 lines 16-19)

A: No. We did not know about it. (T. 352 line 20)

Q: But you don't know of any action that she took prior to this sale being consummated that tricked your father or manipulated him? (T. 354 lines 2-4)

A: No. (T. 354 line 5)

Q: Okay. You have no evidence, physical or otherwise, that Thelma Mulvey tortiously interfered with your ability to collect the loan proceeds; correct? (T. 361 lines 23-25)

A: Correct. (T. 362 line 1)

Q: Okay. So we have three Defendants, one, two three; right? (T. 362 lines 2-3)

A: Yes (T. 362 line 4)

**Q: And you have acknowledged that you have no evidence, or testimony, or witness that can say that any of the three of them tortiously interfered with your ability to collect the loan proceeds; correct?** (T. 362 lines 10-13)

A: **Correct.** (T. 362 line 14)

Although Ms. Stephens offered a conclusory opinion that the ranch transaction was improper because her father executed documents effectively removing the sale proceeds from the revocable trust; she failed to identify a single action, omission or statement (on direct or cross examination) that could be considered wrongful or tortious on the part of Thelma Mulvey or the other two defendants.

## The Calculation of Damages

The Plaintiff/Appellee acknowledged that the measure of damages with regard to Ms. Mulvey was limited to any mortgage payments made after the death of Jack Mulvey.

Q: All right. Now, you have indicated that you would like damages of the balance of the loan along with the proceeds that Thelma received after the loan was paid, after he died; correct? (T. 346 lines 15-18)

A: Correct. (T. 346 line 19)

Q: The \$ 15,000? (T. 346 lines 20)

A: Correct (T. 346 line 21)

Q: All right. You're not asking that Thelma give you the balance of the loan, are you? (T. 346 lines 22-23)

A: No (T. 346 line 24)

Q: You're asking that the Campbells give you the balance of the loan; correct? (T. 346 line 25 – 347 line 1)

A: Correct (T. 347 line 2)

Q: And, that Thelma give you the \$ 15,000? (T. 347 line 3)

A: Correct (T. 347 line 4)

Likewise, the stipulated jury instructions state that the measure of damages regarding Thelma Mulvey is the amount of the loan proceeds paid to her after the death of Jack Mulvey.

If you find that Mrs. Mulvey tortiously interfered with Mrs. Stephens' reasonable expectation of inheritance, you

should award Mrs. Stephens an amount equal to the amount of payments received by Mrs. Mulvey from the Campbells toward the purchase price of the property after the death of Mr. Mulvey. (R.O.A. 327).

It was undisputed that the amount received by Mrs. Mulvey from the Campbells toward the purchase price of the property after the death of Mr. Mulvey was fifteen thousand dollars (\$ 15,000). (T. 229 line 11, T. 231 line 21, T. 254 line 14, T. 320 line 22, T 321 line 12)

In addition to the fifteen thousand dollars that was paid to Mrs. Mulvey after the death of her Husband, the Plaintiff claimed at trial that she was entitled to certain personal property which she estimated at \$ 20,000. (T. 518 line 20). No other damages were alleged or testified to with regard to Thelma Mulvey. Therefore, the maximum value of the claims with regard to Mrs. Mulvey was \$ 35,000.

### **SUMMARY OF ARGUMENT**

The Final Judgment should be reversed with instructions to enter a Directed Verdict in favor of the Appellant for two (2) reasons.

**First**, the Plaintiff failed to introduce any competent, substantial evidence with regard to the principle element of tortious interference. Although the witnesses called by the Plaintiff testified that they believed the Decedent was somehow manipulated they could not substantiate that belief with any testimony or evidence showing that Thelma Mulvey took part in any wrongful act. In fact, the Plaintiff specifically testified that she had no evidence or testimony that Thelma Mulvey had

tortuously interfered with her inheritance. In the absence of some competent, substantial evidence with regard to the elements of the claim the Court should enter a Directed Verdict as a matter of law.

**Second**, even assuming that the Plaintiff had provided some evidence that THELMA MULVEY had committed tortious interference, she testified to liquidated damages totaling \$ 35,000. In light of this testimony, there is no reasonable evidentiary basis for a jury verdict against Ms. Mulvey in the amount of \$ 60,000.

### **STANDARD OF REVIEW**

The standard of review with regard to a Court's ruling on a motion for directed verdict is de novo. Geico Insurance Company v. Dixon, 209 So.3d 77, 81 (Fla. 3rd DCA 2017). In reviewing the denial of a motion for directed verdict the Court views all evidence and inferences in the light most favorable to the non-movant and should reverse the Trial Court's decision where no proper review of the evidence could sustain the verdict. Henry v. Hoelke, 82 So.3d 962, 965 (Fla. 4th DCA 2011).

### **ARGUMENT**

The **first** reason that the Judgment should be reversed with instructions to enter a directed verdict in favor of the Appellant is that the Plaintiff failed to introduce any competent, substantial evidence with regard to a material element of her claim.

## **I. Failure to Introduce Any Competent, Substantial Evidence**

The Plaintiff's Amended Complaint contained claims for tortious interference and civil conspiracy against THELMA MULVEY, JAMES CAMPBELL, NANCY CAMPBELL and JOHN SHERRARD. (R.O.A. 57-66). However, the claims against JOHN SHERRARD were eventually voluntarily dismissed (R.O.A. 88) and the civil conspiracy claim was never submitted to the jury. (R.O.A. 322). Therefore, the sole claim that was put to the jury was a claim for tortious interference against THELMA MULVEY, JAMES CAMPBELL and NANCY CAMPBELL.

In order to sustain a claim for tortious interference, the Plaintiff must establish: (a.) the existence of an expectancy; (b.) intentional interference with that expectancy through tortious conduct; (c.) causation; and (d.) damages. Henry v. Jones, 202 So.3d 129, 132-133 (Fla. 2nd DCA 2016). The intentional interference must have been perpetrated through fraud, duress, undue influence or another independent tort that was committed against the testator/settlor rather than the beneficiary. Whalen v. Prosser, 719 So.3d 2, 10 (Fla. 2nd DCA 1998). In other words, the cause of action for intentional interference with the expectancy of an inheritance is essentially a derivative action filed by the beneficiary on behalf of the settlor. Whalen at 10.

Therefore, in this case the Plaintiff/Appellee was required to make a prima facie showing that THELMA MULVEY committed fraud, duress, undue influence

or some independent tort committed against JACK MULVEY with regard to the transfer of the ranch property and or the disposition of the proceeds from that sale.

In this case, the Plaintiff never articulated which tort (fraud, duress, undue influence or some other tortious conduct) she was relying upon to establish her claim of intentional interference. Therefore, each of the witnesses was asked to identify any actions or statements by THELMA MULVEY that would give rise to any potential torts. Not a single witness could identify a single act, omission or statement that THELMA MULVEY made in advance of the sale of the ranch which could provide any reasonable basis for a claim of fraud, duress, undue influence or any other independent tortious conduct.

For example, a claim of fraud would require a material misrepresentation of fact to JACK MULVEY in advance of the sale of his ranch. Frenz Enters, Inc. v. Port Everglades, 746 S2d 498 (Fla. 4th DCA 1999). However, Sean Patrick Mulvey, Jeremy Mulvey and Sheila Stephens all testified that they had no evidence that THELMA MULVEY had any discussions at all with JACK MULVEY about the structure for the sale of the ranch, let alone any evidence that she made a material misrepresentation to him. (T. 170 line 18), (T. 198 lines 21-23), (T. 352 line 20) and (T. 354 line 5)

Likewise, in order to sustain a claim for duress the Plaintiff would need to establish that THELMA MULVEY coerced JACK MULVEY to such a degree that

his decision regarding the disposition of the ranch proceeds was not the product of free will. Bank of N.Y. Mellon v. Simpson, 2017 Fla. App. LEXIS 11413 (Fla. 3rd DCA 2017). However, in this case each of the Plaintiff's witnesses testified that they never witnessed, and had no evidence, of any coercion against JACK MULVEY. (T. 169 lines 21-22), (T. 198 lines 4-11), (T. 352 lines 8-15)

Finally, the Plaintiff's did not introduce any evidence at all against THELMA MULVEY under a theory of undue influence in this litigation with regard to the 2007 sale of the ranch. In fact, the Probate Court previously rejected this theory finding that Ms. Stephens' claim that her father had been unduly influenced with regard to the execution of his testamentary documents (and the allegation of a tortious conspiracy between Ms. Mulvey and the Campbells regarding the disposition of the ranch proceeds) was without merit. *"Overall, the suggested evidence of undue influence in this case is speculative, insubstantial and unconvincing. The Petitioner has failed to establish undue influence by the greater weight of the evidence."* (R.O.A. 317)

The testimony and evidence offered by the Plaintiff certainly supports a finding that they believed they would inherit the proceeds from the sale of the ranch and that they have an amorphous and speculative belief that they were wrongfully deprived of that expectancy. However, the Plaintiff has simply failed to present any actual evidence of wrongdoing on the part of THELMA MULVEY which could

have possibly caused JACK MULVEY to transfer the proceeds outside the revocable trust that named his children as beneficiaries.

In that context, the most important factor for the Court's determination as it reviews the record in search of some factual basis for the claim that THELMA MULVEY committed an intentional tort against her Husband is the express admission by the Plaintiff that neither THELMA MULVEY nor the other two defendants took any action to tortuously interfere with her ability to collect the loan proceeds.

Q: Okay. You have no evidence, physical or otherwise, that Thelma Mulvey tortuously interfered with your ability to collect the loan proceeds; correct? (T. 361 lines 23-25)

A: Correct. (T. 362 line 1)

Q: Okay. So we have three Defendants, one, two, three; right? (T. 362 lines 2-3)

A: Yes (T. 362 line 4)

**Q: And you have acknowledged that you have no evidence, or testimony, or witness that can say that any of the three of them tortuously interfered with your ability to collect the loan proceeds; correct?** (T. 362 lines 10-13)

A: **Correct.** (T. 362 line 14)

In the absence of any competent, substantial evidence of fraud, coercion, undue influence or some other independent tortious conduct on the part of THELMA MULVEY with regard to the disposition of the ranch proceeds; the Judgment against her should be reversed as a matter of law.

## **II. Failure to Present Competent Evidence Regarding Property**

The **second** reason that the Court should reverse the Final Judgment and enter a directed verdict on behalf of the Defendant is that the Plaintiff failed to provide any evidence of damages that can be sustained under the Reasonable Certainty Rule.

The stipulated jury instructions and verdict form in this case advised the jury that if they found in favor of the Plaintiff/Appellee against THELMA MULVEY then the measure of damages would be the amount that she was actually paid for the ranch after the death of JACK MULVEY. (R.O.A. 327). This method for calculating damages was confirmed by the Plaintiff's testimony.

Q: All right. You're not asking that Thelma give you the balance of the loan, are you? (T. 346 lines 22-23)

A: No (T. 346 line 24)

Q: You're asking that the Campbells give you the balance of the loan; correct? (T. 346 line 25 – 347 line 1)

A: Correct (T. 347 line 2)

Q: And, that Thelma give you the \$ 15,000? (T. 347 line 3)

A: Correct (T. 347 line 4)

It was undisputed that this measure of damages would result in an award of \$ 15,000 if the elements of tortious interference were proven.

However, in response to questioning by her attorney, the Plaintiff/Appellee asserted that she was also entitled to the value of certain items of personal property

that she claimed Ms. Mulvey had improperly retained. These items included: (a.) an antique Irish plate collection; (b.) sailor heads; (c.) a painting that she had created herself; (d.) a poster of a bird; (e.) a photograph of her son; and (f.) a chalk drawing that she had made as a child.

Aside from the fact that, there was no evidence (other than the Plaintiff's conclusory statement) that these items were even owned by the trust; the Court should have granted directed verdict with regard to these damages for two (2) reasons.

**First**, the sole pleading before the Court was for claim of tortious interference. In order to prove tortious interference with regard to these items the Plaintiff would need to establish some tort committed against the Decedent prior to his death. On the contrary, the Plaintiff simply testified that after the death of her father she could not obtain these items from Mrs. Mulvey. That testimony might sustain a verdict of replevin, or even conversion, but it does not satisfy any elements for the tortious interference claim that the Plaintiff/Appellee asserted against Ms. Mulvey.

**Second**, the Plaintiff/Appellee failed to provide any evidence with regard to the fair market value of these items. In fact, when asked (under direct examination) the Plaintiff testified that she could not place a value on these items.

Q: --that -- can you -- do you know what the value is?

A: To me it's priceless so I can't really, you know, say it's worth X amount of dollars.

Q: But if you were to go to an antique show or something, you think 20,000 is a reasonable figure?

A: Well, I know the plates and the sailor heads are antiques at –now, and so I wouldn't know really what their true value could be without having them looked at.

(T. 321 lines 6-11)

Under the reasonable certainty rule, evidence with regard to the value of damages must be established within a reasonable degree of certainty and cannot be sustained unless it is supported by more than mere speculation or estimation.

Under the reasonable certainty rule, . . . recovery is denied where the fact of damages and the extent of damages cannot be established with a reasonable degree of certainty. . . The amount of damages claimed need not be proven with exactitude, but it must not be based upon speculation or guesswork. . . The standard for the degree of certainty requires that the mind of a prudent impartial person be satisfied with the damages. Saewitz v. Saewitz, 79 So.3d 831, 833 (Fla. 3rd DCA 2012).

In this case, the Plaintiff did present any receipts, appraisals, photographs or any other evidence with regard to the fair market value of the personal property she was claiming. In fact, the Plaintiff did not even itemize the value of the items that she had delineated, or even state how many of each item (for example the collection of Irish Plates) were in existence.

Instead, the Plaintiff testified to a vague list of personal property that she attempted to procure from Mrs. Mulvey and then relied upon her attorney's suggestion with regard to the aggregate value of those items. This method of

valuation not only fails the reasonable certainty test but failed to present any competent, substantial evidence at all with regard to the fair market value of the items she was seeking to be compensated for.

The sole damages claimed by the Plaintiff from THELMA MULVEY were \$ 15,000 in liquidated damages for the ranch proceeds received following the death of JACK MULVEY and the unliquidated value of the personal property. This limitation on the damages against THELMA MULVEY is clear on the face of the Plaintiff/Appellee's testimony and it is explicitly acknowledged in the Plaintiff's Closing Argument. (T. 518 lines 4-25). However, the jury ultimately awarded the Plaintiff/Appellee the sum of \$ 60,000 against THELMA MULVEY.

Neither the sum of \$ 60,000 (nor the sum of \$ 45,000 representing the difference between the loan proceeds and the verdict) were ever mentioned in the trial. Therefore, it is clear that the damages in excess of \$ 15,000 are attributable solely to the amorphous, undefined value of the personal property claimed by the Plaintiff. Because there was no competent, substantial evidence with regard to the value of this property the Final Judgment should be reversed with instructions to enter a directed verdict in favor of the Appellant.

## CONCLUSION

For the foregoing reasons, the Final Judgment should be reversed with instructions to enter an Directed Verdict in favor of the Appellant, THELMA MULVEY.

## CERTIFICATE OF FONT SIZE

I hereby certify that the foregoing motion complies with the Court's requirements with regard to font/size in that it consists of Times New Roman size 14.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-service on this 30th day of August, 2017 to: Virginia Pitt Sherlock, Esquire, ([lshlawfirm@gmail.com](mailto:lshlawfirm@gmail.com)) Littman, Sherlock & Heims, PA, PO Box 1197, Stuart, FL 34995.

Joshua D. Ferraro  
Lesser, Lesser, Landy & Smith  
101 Northpoint Parkway  
West Palm Beach, FL 33407  
(561) 655-2028 Fax (561) 655-2033  
E-mail: [jferraro@lesserlawfirm.com](mailto:jferraro@lesserlawfirm.com)  
[ijardines@lesserlawfirm.com](mailto:ijardines@lesserlawfirm.com)

s/Joshua D. Ferraro

---

Joshua D. Ferraro, Esq,  
Florida Bar No. 0797391