RECEIVED, 12/22/2017 3:23 PM, Clerk, Fourth District Court of Appeal

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 REPLY BRIEF
Lower Tribunal Case No.: 432015CA000686

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

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

TABLE OF CONTENTS

Table of Authorities	3
Argument	4
The Appellee Fails to Cite Substantial Evidence Demonstrating Liability	5
Plaintiff Failed to Present Substantial, Competent Evidence of Value	13
Conclusion	17
Certificate of Font Size	17
Certificate of Service	17

TABLE OF AUTHORITIES

Blinn v. Carlman, 159 So.3d 390 (Fla. 4th DCA 2015);	6
Gardiner v. Goertner, 149 So. 186 (Fla. 1932)	6
Jacobs v. Vaillancourt, 634 So.2d 667, 672 (Fla. 2nd DCA 1994)	7
Realauction.com LLC v. Grant St. Group, Inc. 82 So.3d 1056, (Fla. 4th DCA 2011)	12
Restatement 2d of Torts, § 911, Comment e	15, 16
Rockledge Mall Associates, Ltd. V. Custom Fences of S. Brevard, Inc. 779 So.2d 554, 557 (Fla. 5th DCA 2001)	8, 12
Sarasota Yacht & Ship Servs. v. Harris, 813 So.2d 231, 232 (Fla. 2nd DCA 2002)	14
Schilling v. Herrera, 952 So.2d 1321 (Fla. 3rd DCA 2007)	5, 6
Stanley v. Marceaux, 991 SO.2d 938, 940 (Fla. 4th DCA 2008)	13
Christopher Adver. Group, Inc. v. R & B Holding Company, 883 So.2d 867, 871 (Fla. 3rd DCA 2004)	15

ARGUMENT

It is undisputed that several years before his death the Decedent sold a ranch property that was held in the name of his revocable trust. It is also undisputed that he did so through an owner-financed mortgage that he provided to the buyers. Finally, it is undisputed that despite the fact that the property had been titled in the name of his revocable trust, the mortgage and note were payable to the Decedent and his spouse, as Husband and Wife. At trial, the Appellee claimed that his Wife tortuously interfered with her inheritance by persuading the Decedent to title the mortgage as Tenants by the Entireties rather than making it payable to the revocable trust. She also claimed that Mrs. Mulvey tortuously interfered with her inheritance by failing to turn over certain, sentimental, items of personal property upon his death. The jury absolved the co-defendant/buyers of any liability but awarded the sum of $ 60,000 against Mrs. Mulvey.

Mrs. Mulvey has appealed the jury's award of $ 60,000 on the grounds that: (a.) there was no substantial, competent evidence that she ever took any improper actions with regard to the sale of the ranch; and (b.) that the Appellee failed to introduce any reasonable basis upon which the jury could value the personal property that she claims to have lost.

In response, the Appellee's Answer Brief acknowledges a lack of direct evidence but claims that this deficiency is excused because proof is difficult to

elicit in tortious interference claims. Therefore, she argues that the jury is entitled to infer liability from the totality of the circumstances. She then goes on to cite a list of inferences (many of which are not borne out by the record) that she impermissibly stacks in an attempt to justify the jury's liability determination.

Likewise, the Appellee acknowledges that she has failed to present any direct evidence that would correlate to the jury's damage award but again claims that this deficiency is excused because the trier-of-fact is permitted to place any value, no matter how speculative, on items of sentimental personal property.

The Appellee Fails to Cite Substantial Evidence Demonstrating Liability

The elements of a claim for tortious interference are:

1. The existence of an expectancy;
2. Intentional interference through tortious conduct;
3. Causation; and
4. Damages

Schilling v. Herrera, 952 So.2d 1321 (Fla. 3rd DCA 2007)

Therefore, the Plaintiff must naturally present evidence that Mrs. Mulvey knew about the expectancy **and** that she actively worked to thwart it. On the contrary, the evidence at trial proved that Mrs. Mulvey **did not even know that the Trust existed** prior to the sale of the ranch. If she did not know that the Trust existed, then logically she could not have intentionally interfered with it through tortious

conduct. Likewise, there is no evidence in the record that Mrs. Mulvey **took any action** (improper or otherwise) to persuade her Husband to title the mortgage in joint names.

In order to explain the fact that there is no direct evidence of wrongdoing in the record, the Appellee now claims that because direct evidence is difficult to obtain in tortious interference claims, the jury is entitled to make its decision based upon the totality of the circumstances. In support of this argument, the Appellee cites three (3) cases: Schilling v. Herrera, 952 So.2d 1321 (Fla. 3rd DCA 2007; Blinn v. Carlman, 159 So.3d 390 (Fla. 4th DCA 2015); and, Gardiner v. Goertner, 149 So. 186 (Fla. 1932).

Essentially, the Appellee has attempted to use these cases to apply the reasoning in *In Re Carpenter* to a claim for tortious interference. In Re Carpenter, 253 So.2d 697 (Fla. 1971) recognized that in Will/Trust contests based upon undue influence, it is often difficult to provide direct evidence because the target of that influence is unavailable to testify. Therefore, *Carpenter* permitted the Court to create a presumption of undue influence based upon a non-exhaustive list of factors where the Defendant occupied a confidential relationship with the Decedent and was a substantial beneficiary under the instrument. Once that presumption arose, it would be up to the beneficiary to effectively disprove the allegations. Without citing it by name, the Appellee urges the Court to effectively extend *Carpenter* to this case in

order to excuse the lack of competent, substantial evidence establishing tortious conduct on the part of Mrs. Mulvey.

None of the cases cited by the Appellee extend *Carpenter* to independent claims of tortious interference. In fact, there does not appear to be a single Florida case which extends the *Carpenter* factors, or otherwise permits a jury to infer improper conduct from the totality of the circumstances, in an independent claim for tortious interference. However, even if *Carpenter* were extended to independent claims for tortious interference it would have little effect in this case because more recent cases have limited its holding such that it would not apply to a surviving spouse.

> We also find that there was no undue influence asserted by Mrs. Jacobs. She wanted her daughter Judy to ultimately inherit all of their estate and persuaded Richard to go along with that plan. A husband and wife naturally have influence on each other, but it cannot be considered undue influence. The law recognizes the special role of husband and wife. The confidential relationship which exists between a husband and wife is not one which may be considered in the law governing will contests. Tarsagian v. Watt, 402 So. 2d 471 (Fla. 3d DCA 1981). Since a confidential relationship is one necessary requirement which must be met before a presumption of undue influence arises, the presumption cannot arise in the case of a husband and wife. If the confidential relationship between spouses is not exempted from the presumption of undue influence rule, the presumption would arise in nearly every case in which the spouse is a substantial beneficiary because the requirement of active procurement would almost always be present. Jacobs v. Vaillancourt, 634 So.2d 667, 672 (Fla. 2nd DCA 1994).

Therefore, even if this Court were to extent the *Carpenter* factors to independent claims for tortious interference with an inheritance, it would have no effect on the standard of proof required in this particular case.

It is true, that the Courts have held that, with regard to the corollary tort of tortious interference with a business relationship, the **existence of malice** can be based upon circumstantial evidence **but only by proving** "*a series of acts which, in their context or in light of the totality of the circumstances, are inconsistent with the premise of a reasonable man pursing a lawful objective, but rather indicate a plan or course of conduce motivated by spite, ill-will, or bad motive*." Rockledge Mall Associates, Ltd. V. Custom Fences of S. Brevard, Inc. 779 So.2d 554, 557 (Fla. 5th DCA 2001).

However, whereas *Carpenter* would permit the trier-of-fact to infer that improper conduct itself had taken place, *Rockledge* only permits the jury to infer malice with regard to conduct that has been otherwise proven. In other words, *Rockledge* does not abrogate the need to provide direct evidence that the Defendant knew of the expectancy and took action that caused the expectancy to fail. Therefore, in the absence of proof that Mrs. Mulvey knew about the Trust and took some overt action that interfered with it, any analysis of her intent (through circumstantial evidence or otherwise) is irrelevant.

To be sure, the Appellee does cite to several portions of the record which she claims provide substantial, competent (albeit admittedly circumstantial) evidence of tortious conduct on the part of Mrs. Mulvey. Specifically, the Appellee's assertions of substantial, competent evidence in the record are as follows:

1. The Appellee claims that there was evidence that the Appellant disliked her husband's children and grandchildren and the family ranch that was at the center of the family's activities and gatherings. Appellee's Brief p. 23.

2. The Appellee claims that there was evidence that the Appellant intended to make sure her husband's children never inherited anything from him by saying to him "Your kids hope you die so that you can get all their money" and later telling one grandchild that he wasn't going to inherit anything.

3. The Appellee claims that there was evidence that the Appellant participated in the execution of documents for the sale of the ranch.

4. The Appellee claims that there was evidence that the Decedent did not instruct the buyer's attorney to make the proceeds from the sale of the ranch payable to himself and the Appellant directly rather than to the trust. On this point, the transcript actually reveals that the Appellant merely testified that she did not hear him make this statement. The drafting attorney was never called to testify by the Plaintiff on this, or any other, issue.

5. The Appellee claims that there was evidence that Appellant dissuaded the Decedent from having his own long-time attorney represent him in with regard to the sale of the ranch.

6. The Appellee claims that there was evidence that knew that the mortgage modification made the mortgage unassignable

7. The Appellee claims that there was evidence that the Appellant walked all over the Decedent.

When reviewing these citations to the record, it is important to put them in the proper context of the transcript. For example, the Appellee's Brief states that Mrs. Mulvey participated in the execution of documents for the sale of the ranch. This is an obvious attempt to bring the *Carpenter* factors into play. However, the transcript actually reveals that Mrs. Mulvey stated that when she was at the attorney's office she simply signed what was put in front of her.

> Q: Well, you know that the property – the ranch was in that trust; right?
>
> A: No, I didn't know that. His business was his and mine was mine. Our finances didn't mingle so I don't know what he was doing with his things.
>
> Q: No, why did you sign a Mortgage Modification Agreement that prevented Mr. Mulvey from assigning the mortgage with the Campbells?
>
> A: I don't know. I signed whatever he put in front of me.
>
> Q: You signed what who put in front of you?
>
> A: Pardon?
>
> Q: you signed what you put in front of you?
>
> A: Jack.
>
> Q: Oh, so Jack - -
>
> A: If he asked me to sign, I signed it.
>
> T. 224 line 19 – T. 225 line 9.

So, while the Appellee's statement that Mrs. Mulvey participated in the execution of the mortgage documents is technically correct, in context it is clear that

there is no evidence that this participation amounted to anything that could be construed as even approaching undue influence.

Likewise, the Appellee's Brief states that there is evidence that the Decedent did not instruct the buyer's attorney to title the mortgage in joint names. On the contrary, a review of the transcript simply reveals that Mrs. Mulvey (who was not otherwise involved in the transaction), she never actually heard her Husband instruct the attorney.

> Q: Did you ever hear him say to John Sherrard or anyone else, "I want this placed in my name and Thelma's as husband and Wife?"
>
> A: No
>
> Q: Was it even discussed when you were in the room?
>
> A: No
>
> T435 lines 2-5 and lines 10 – 11.

In other words, Appellee's recitation of evidence conflates a lack of evidence as to who instructed the attorney to title the mortgage in joint names as affirmative evidence that the Decedent did not instruct him to put it in joint names. However, when read in the context of the transcript it is clear that the portions of the testimony

cited by the Appellee's Brief actually support the Appellant's claim that she had little to nothing to do with this transaction.[1]

The remainder of the items cited by the Appellee with regard her claim that as circumstantial evidence of tortious interference fall into two categories. With regard to her claim that Mrs. Mulvey made comments to her and/or the Decedent there is no follow-up evidence in the record establishing when these comments were made (in relation to the ranch sale) and/or how they caused the Decedent to eliminate the Appellee's inheritance. "*The requisite showing of causation cannot be supported by mere supposition that defendant's interference caused the cessation of the business relationship. . . reversing denial of directed verdict on tortious interference claim where only evidence of causation was plaintiff's circumstantial evidence*" Realauction.com LLC v. Grant St. Group, Inc. 82 So.3d 1056, (Fla. 4th DCA 2011) citing *Rockledge*.

With regard to the remaining items (such that Mrs. Mulvey's experience as a retired banker) the Appellee has simply made a list of separate inferences and then impermissibly stacked them together in an attempt to justify the jury's finding of liability. "*The rule that an inference may not be stacked on another inference is*

[1] The court should also note that the Plaintiff did not call the attorney, John Sherrard to testify with regard to the instructions that he received from the Decedent.

designed to protect litigants from verdicts based upon conjecture and speculation." Stanley v. Marceaux, 991 SO.2d 938, 940 (Fla. 4th DCA 2008).

In the end, not a single one of the items cited by the Appellee, taken individually or together, constitutes substantial, competent evidence that Mrs. Mulvey: (a.) knew of the expectancy; and (b.) took some intentionally wrongful, tortious action that had the effect of eliminating it. On the contrary, the citations to the record provided by the Appellee support the opposite conclusion.

Plaintiff Failed to Present Substantial, Competent Evidence of Value

In this case, the sole evidence with regard to the value of the personal property came from the testimony of the Plaintiff. She testified that the items she wanted to be compensated for included: (a.) an Irish Plate collection; (b.) Sailor heads that hung on the wall; c.) a portrait of the decedent that she had painted; (d.) a poster of a bird and a frog that she found on eBay; (e.) photos of her and her son as children; and (f.) a chalk drawing of the Plaintiff from when she was a child. She acknowledged that most of these items had **sentimental** value only. "*Yes, because you know they probably only meant anything to me, or, you know, possibly some of them would mean something to my brothers also.*" T. 314 Lines 15-18.3. Further, she acknowledged that she considered the Irish Plate collection and the Sailors Heads to be antiques but that she wouldn't know their true their value without having them appraised.

> 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 - - I know the plates and sailor heads are antiques at – now, and so I wouldn't know really what their true could be without having them looked at.
>
> T. 321 Lines 6-11.

The Court starts from the proposition that the value of personal property is measured by the market value on the date of the loss. "*The proper measure of damages for loss of personal property is its market value on the date of the loss*." Sarasota Yacht & Ship Servs. v. Harris, 813 So.2d 231, 232 (Fla. 2nd DCA 2002). The Plaintiff has the opportunity to deviate from this general rule if she can satisfy her burden that using a market value would be manifestly unjust. "

> Because the burden of proving damages rests with the plaintiff, we conclude that in a situation where the lost property has both a market value and sentimental value, as is the case here, the burden again rests with the plaintiff to prove that market valuation would be manifestly unfair. Carye v. Boca Raton Hotel and Club Ltd., 676 So.2d 1020, 1021 (Fla. 4th DCA 1996).

In this case, there was evidence to support this shift from a market valuation to a more flexible rule with regard to all items except the Irish Plates and the Sailors Heads. With regard to these two items, the Appellee testified that they were antiques and that she could not know their true value "***without having them looked at***". (T. 321 Lines 6-11). It is certainly possible to appraise antiques and by the Appellee's own admission she simply neglected to do so. With regard to these items, the

Appellee could not, therefore, satisfy her burden to show that a market valuation would be manifestly unfair because she failed to have one performed in the first place.

With regard to the remaining items (which primarily consisted of homemade artwork), the Appellee is correct that the valuation of these items may be exempted from a "market" or "exchange" value calculation **but that does not excuse the need to provide any competent, substantial evidence of value**.

Instead, Courts have held that the valuation of sentimental, personal property requires a damage rule that can be flexibly applied. Christopher Adver. Group, Inc. v. R & B Holding Company, 883 So.2d 867, 871 (Fla. 3rd DCA 2004). In applying this "flexible" test, Florida courts have principally relied upon the Restatement (Second) of Torts § 911(e). *See Advair at 872.* That provision of the Restatement recognizes that where there is peculiar value to the owner, it would be inappropriate to use a "market" or "exchange" calculation as to value.

However, the Restatement goes on to make clear that there must be some formula (and evidence) by which these damages are measured. For example, the Restatement opines that an author's loss of a manuscript, which has no market value in and of itself, would be valued based upon the amount of time required to reproduce it. Likewise, the Restatement opines that the loss of a family portrait would be valued based upon the original cost along with the quality and condition

of the artwork at the time of the loss. But, above all, this section of the Restatement makes clear that damages cannot be valued based on the sentimental value to the Plaintiff. "*In these cases, however, **damages cannot be based on sentimental value**. **Compensatory damages are not given for emotional distress caused merely by the loss of the things**, except that in unusual circumstances damages may be awarded for humiliation caused by deprivation, as when one is deprived of essential articles of clothing*." Restatement 2d of Torts, § 911, Comment e (emphasis added).

In other words, while a firm rule regarding the need for expert appraisals based upon comparable sales may be inappropriate, the Plaintiff still has a burden to provide some evidence of value beyond mere speculation or supposition. On the contrary, in this case the Plaintiff presented no evidence as to market value, the cost to replace, the time that it would take to replicate or any other evidence that would provide any indicia of value other than a mere conclusory statement that this is what it was worth in her mind.

Absent any competent, substantial evidence on the issue of damages, this jury verdict should be reversed with instructions to the Trial Court to enter a directed verdict in favor of the Appellant.

CONCLUSION

Based upon the foregoing, the Appellant respectfully requests that this Court reverse the Final Judgment and remand this matter to the Trial Court with instructions to enter a directed verdict in favor of the Appellant.

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 22nd day of September, 2017 to: Virginia Pitt Sherlock, Esquire, (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
ijardines@lesserlawfirm.com

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