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**Court of Common Pleas**

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By: BRIAN J. GREEN 0063921

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JENNIFER SHERMAN, CO-EXECUTOR, ETC.

CV 14 827479

vs.

SANFORD SHERMAN, ET AL

**Judge:**

ROBERT C. MCCLELLAND

**Pages Filed: 27**

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

JENNIFER SHERMAN,	)	CASE NO. CV 14 827479
	)	
Plaintiff,	)	JUDGE ROBERT C. MCCLELLAND
	)	
-vs-	)	<u>DEFENDANT SANFORD SHERMAN'S</u>
	)	<u>MOTION FOR SUMMARY JUDGMENT</u>
SANFORD SHERMAN, <i>et al.</i> ,	)	
	)	
Defendants.	)	

The defendant, Sanford Sherman, M.D. (“Dr. Sherman”), respectfully requests this Court to issue an Order granting him summary judgment, pursuant to Ohio Civil Rule 56(C), for the reasons that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law on the claims set forth in the Complaint of the plaintiff, Jennifer Sherman, Co-Executor of the Estate of Aliza Sherman, Deceased (“Plaintiff”)<sup>1</sup> (Aliza Sherman, Deceased is hereinafter referred to as either “Plaintiff’s Decedent” or “Aliza Sherman”). The reasons in support of Defendant’s motion are more fully set forth in the attached Memorandum in Support, which is incorporated herein as if fully rewritten.

Respectfully submitted,

/s/ **Brian Green**

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<sup>1</sup> The other Co-Executor of Aliza Sherman’s Estate is her son, Joshua Sherman, whose counsel advised Plaintiff’s counsel that Joshua Sherman “wanted nothing to do with this Complaint, and that he did not want his name on it.” See Affidavit of Mark Trubiano, Esq., attached hereto and incorporated herein as Exhibit A.

## MEMORANDUM OF LAW

### **I. INTRODUCTION**

On May 28, 2014, Plaintiff filed a Five Count Complaint against Dr. Sherman<sup>2</sup> and John Doe(s) I through V<sup>3</sup> alleging: (1) Conversion; (2) Breach of Fiduciary Duty, (3) Unjust Enrichment; (4) Civil Remedy for Criminal Act(s); and (5) Civil Conspiracy.<sup>4</sup> The purported gist of Plaintiff's claims appears to boil down to this: sometime in May of 2000, Dr. Sherman allegedly created a Merrill Lynch brokerage account ("Merrill Account"), which he funded with his own money, in the name of Plaintiff's Decedent (a.k.a. his wife<sup>5</sup>) and without her knowledge. Plaintiff further claims that upon creation of the aforementioned Merrill Account, the funds Dr. Sherman deposited into it immediately became the sole and exclusive property of Plaintiff's Decedent, and that thereafter, over the course of approximately ten years, Dr. Sherman, in concert with others, "pilfer[ed]" the money back from the Merrill Account he had created and funded with his own money.<sup>6</sup>

As discussed further below, the pertinent material and undisputed facts adduced during discovery, and the applicable law, demonstrate that Plaintiff's claims are factually and legally unsupportable. Indeed, as will be seen, Plaintiff's claims are based in large measure on nothing more than speculation and innuendo, irrelevant or insufficient facts (or no facts at all), and legal misconceptions or fictions.

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<sup>2</sup> Dr. Sherman is a retired physician, who is the Plaintiff's father and was the husband of Plaintiff's Decedent. See Sanford Sherman Deposition (hereinafter "Dr. Sherman Depo.") at 8-9, 13, 172. Dr. Sherman's Depo. has been filed with the Court and cited excerpts are attached hereto for the Court's convenience.

<sup>3</sup> The John Doe Defendants have never been identified and the Complaint has never been amended to add any new parties or claims.

<sup>4</sup> See generally Complaint.

<sup>5</sup> Dr. Sherman and Plaintiff's Decedent were married on November 28, 1982 and they remained married until March 24, 2013, the date on which Plaintiff's Decedent was murdered by an unknown assailant. See Complaint at ¶ 2. See also Dr. Sherman Depo. at 172.

<sup>6</sup> See Complaint at ¶'s 9-13.

## II. FACTS

The uncontroverted evidence of record is that the money used to fund the Merrill Account was not the separate property of either Dr. Sherman or of Plaintiff's Decedent<sup>7</sup>, but rather constituted "marital assets" earned by Dr. Sherman during the course of his marriage to Aliza Sherman.<sup>8</sup> The Merrill Account was established in 2000, on the advice of a lawyer and family friend, with the intention of protecting the Shermans' marital assets, and was precipitated by the closing and/or liquidation of Dr. Sherman's malpractice carrier around that time, The P.I.E. Mutual Insurance Company, which left him without malpractice insurance coverage.<sup>9</sup>

Given that the money used to fund the Merrill Account came from Dr. Sherman's earnings as an ophthalmologist and investments made from those earnings during his marriage to Aliza Sherman,<sup>10</sup> it is irrefutable that the Merrill Account constituted marital property in which Dr. Sherman had a joint and equal ownership interest, irrespective of who created it or whose name was on it.<sup>11</sup> Moreover, when Aliza Sherman died all of her assets legally became Dr. Sherman's property anyway.<sup>12</sup> As such, Plaintiff is essentially accusing Dr. Sherman of concocting an elaborate conspiratorial and criminal scheme to steal his own money, which

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<sup>7</sup> Dr. Sherman and Plaintiff's Decedent are hereinafter collectively referred to as "the Shermans".

<sup>8</sup> Dr. Sherman Depo. at 246-247, 339, 341-342, 355, 359-360, 416.

<sup>9</sup> Dr. Sherman Depo. at 218-219, 227.

<sup>10</sup> Dr. Sherman Depo. at 341-342.

<sup>11</sup> Moreover, even assuming *arguendo* that Dr. Sherman or someone else created and/or signed a Durable Power of Attorney ("POA") on behalf of Plaintiff's Decedent without her knowledge (as claimed by Plaintiff – see Complaint at ¶'s 9, 12 -- and as denied by Dr. Sherman – see, e.g., Dr. Sherman Depo. at 225, 228-229, 234, 239-240, 243, 273-280, 355-356, 359-360 --), it does not change the incontrovertible fact that the money in the Merrill Account was nevertheless marital property. As such, Plaintiff's claims in this regard are red herrings, as they are irrelevant and immaterial to the issue of whether the Merrill Account was marital property. In this same vein, it is noteworthy that the Shermans' family residence was titled only Aliza Sherman's name, but it nonetheless became Dr. Sherman's property upon her death. Dr. Sherman Depo. at 335-337. Furthermore, Plaintiff's claims in this regard are premised on no personal knowledge, but rather based primarily, if not solely, on alleged unsworn statements made by Plaintiff's Decedent to Plaintiff.

<sup>12</sup> *Id.* Dr. Sherman was also entitled to all of Aliza Sherman's assets pursuant to her Will. See Dr. Sherman Depo. Exhibit 11. Although Dr. Sherman chose to relinquish his right to those assets, and offered to split them with his four children (Dr. Sherman Depo. at 167-168, 298), the fact is that the assets were nevertheless his to relinquish and he could have retained them had he so chosen.

simply does not make sense.<sup>13</sup>

Even putting aside the nonsensical premise of Plaintiff's claims, however, the claims simply lack evidentiary support. Indeed, Plaintiff has admitted that she can only "speculate" as to what Dr. Sherman (a.k.a. Plaintiff's father) and Plaintiff's Decedent (a.k.a. Plaintiff's mother) "considered to be their money or whose money"<sup>14</sup>, and that she knows of no evidence or factual basis for her claim that the Merrill Account immediately and automatically became the sole and exclusive property of her deceased mother from the moment of its inception.<sup>15</sup> Rather, the only basis for Plaintiff's claim that the Merrill Account became the individual and sole property of Plaintiff's Decedent is what Plaintiff's attorneys supposedly told her during allegedly privileged communications, which she and her attorneys have refused to divulge, and which, in any event, is not evidence.<sup>16</sup>

Furthermore, the funds which were withdrawn from the Merrill Account were used to pay for family expenses, which averaged \$25,000.00 to \$40,000.00 a month, and which included household bills, credit card debt amassed by Plaintiff's Decedent, tuition bills for his children, including college tuition for Plaintiff<sup>17</sup>, charitable donations, and/or placed in joint marital investments.<sup>18</sup> Plaintiff also agreed that "[he]r dad [i.e. Dr. Sherman]<sup>19</sup> earned the bulk of the

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<sup>13</sup> Indeed, the Plaintiff acknowledges she has no explanation for this bizarre scenario and can only speculate as to why Dr. Sherman would have allegedly engaged in such a course of conduct. See Deposition of Jennifer Sherman (hereinafter "Plaintiff's Depo.") at 108-109. Plaintiff's Depo. has also been filed with the Court, and cited excerpts from it are attached hereto for the Court's convenience.

<sup>14</sup> See Plaintiff's Depo. at 29.

<sup>15</sup> See Plaintiff's Depo. at 29-36, 53-54.

<sup>16</sup> See Plaintiff's Depo. at 29-36, 53-54.

<sup>17</sup> Plaintiff attended private high school at Hawken and Fuchs and thereafter attended undergraduate and graduate school at Case Western, from where she received Bachelors and Masters degrees. All her educational costs were paid for by her parents (i.e. Dr. Sherman and Plaintiff's Decedent) and she incurred no college debts. See Plaintiff's Depo. at 8, 12. Dr. Sherman and his wife also had three sons who attended private schools and colleges and whose educational costs were likewise paid for by their parents. See Affidavit of Dr. Sherman attached hereto and incorporated herein as Exhibit B.

<sup>18</sup> Dr. Sherman's Depo. at 248-249. See also Plaintiff's Depo. at 7-8, 11-12. The Shermans also paid for a 2010

money that was used to pay family expenses”, and that he was indeed “primarily responsible for paying the family bills”,<sup>20</sup> including Plaintiff’s maintenance and support, and her private high school and college tuitions, until the time she received her Masters Degree in 2014.<sup>21</sup>

The following excerpts from Plaintiff’s deposition testimony further illustrate the utter lack of any factual basis for her claims against Dr. Sherman for conversion, unjust enrichment, or breach of fiduciary duty:

**Q.** The money that you're claiming was taken by your father, do you have any knowledge or understanding as to whether or not he earned any portion of that money?

**A.** I can't say for sure one way or the other.

**Q.** Okay. So as we sit here today, you don't have any knowledge as to whether or not the money you're claiming he converted was actually earned by him, do you?

**A.** No.<sup>22</sup> ...

**Q.** You also allege that your dad breached a fiduciary duty to your mom. Are you familiar with what a fiduciary duty is?

**A.** Yes.

**Q.** As we sit here today, can you identify specifically how your dad breached a fiduciary duty to your mom? ...

**A.** I mean, I'm not an attorney so I can't answer that.<sup>23</sup>

**Q.** Okay. Your next count in your complaint is for unjust enrichment. It's on Page 5. And one of the bases of that claim is that your dad was, somehow benefitted by the alleged removal of these funds from the Merrill Lynch account in your mom's name. As we sit here today, do you have any evidence to support that contention?

**A.** Other than what's been discussed and reviewed, no.

**Q.** Other than what's been discussed with your attorneys, do you know of any person or persons who have knowledge of this

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Toyota Highlander, which they gave to Plaintiff. Plaintiff’s Depo. at 68-69.

<sup>19</sup> Dr. Sherman was an ophthalmologist and owned a private ophthalmology practice from 1986-2004. Dr. Sherman Depo. at 8-9, 13.

<sup>20</sup> Plaintiff’s Depo. at 56, 58. See also Dr. Sherman Depo. at 341-342.

<sup>21</sup> Plaintiff’s Depo. at 7-8, 12.

<sup>22</sup> Plaintiff’s Depo. at 61.

<sup>23</sup> Plaintiff’s Depo. at 62-63.

allegation to support it?

**A.** No.

**Q.** The money that was taken out of the Merrill Lynch 12 · · · account ending in 64 in your mother's name, do 13 · · · you know what was done with those funds?

**A.** No.

**Q.** Do you know if they were spent on any of yours or your brothers' education?

**A.** No.

**Q.** Do you know if they were spent on any family vacations?

**A.** No.

**Q.** Do you know if they were spent to pay for bills or other obligations of your family?

**A.** No.

**Q.** Do you know if they were used to pay for any vehicles or other transportation expenses of the family?

**A.** No.

**Q.** So as we here today, you don't know if all, some or the bulk of the funds were used to benefit the Sherman family, do you?

**A.** I would think you would have to ask the person who obtained the funds.

**Q.** Okay. I'm asking if you have any knowledge.

**A.** My answer is no.<sup>24</sup>

As can be seen, there is absolutely no evidence to support Plaintiff's claims of conversion, unjust enrichment, or breach of fiduciary duty.

There likewise is no evidence to support Plaintiff's claims of conspiracy or of civil liability for criminal acts, as Plaintiff has also admitted that she has no knowledge as to the identities of the John Doe Defendants named in her Complaint,<sup>25</sup> or of any competent factual knowledge concerning who was involved in her mother's death.<sup>26</sup> As testified by Plaintiff:

**Q.** If you take a look at Page 6 of the complaint, It's got a claim for civil conspiracy which alleges that your dad and some John Does, unknown parties, conspired to engage in a pattern of activity causing damages to your mom and to the estate. Do you see that?

**A.** Yes.

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<sup>24</sup> Plaintiff's Depo. at 63-65.

<sup>25</sup> Plaintiff's Depo. at 50-51.

<sup>26</sup> Plaintiff's Depo. at 18-19. Criminal charges have never been filed concerning the murder of Plaintiff's Decedent.

**Q.** As we sit here today, do you have any knowledge as to who these third-parties may be that allegedly conspired with your dad?

**A.** No.<sup>27</sup>

Moreover, neither Dr. Sherman nor anyone else has ever been charged with any crimes, let alone convicted, with regard to any of the matters alleged in Plaintiff's Complaint.<sup>28</sup> Hence, as is the case with the claims for conversion, unjust enrichment, and breach of fiduciary duty, there also is no evidence to support Plaintiff's claims for conspiracy or civil liability for criminal acts.

In sum, and as will be further demonstrated below, no genuine issues of material fact remain to be litigated and Dr. Sherman is entitled to judgment as a matter of law based on the undisputed material facts of record.

### **III. LAW AND ARGUMENT**

#### **A. Legal Standard For Summary Judgment Under Civil Rule 56 (C).**

Ohio Civ. Rule 56(C) provides that summary judgment shall be granted upon a trial court's determination that:

- (1) No genuine issue of material fact remains to be litigated;
- (2) The moving party is entitled to judgment as a matter of law; and
- (3) It appears from the evidence that reasonable minds could come to but one conclusion when viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, and that conclusion is adverse to that party.<sup>29</sup>

Ohio courts have held that a nonmoving party may not avoid summary judgment by merely submitting self-serving testimony or an affidavit contradicting the evidence offered by the moving party. This rule is based upon judicial economy, as allowing a nonmoving party to

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<sup>27</sup> Plaintiff's Depo. at 66.

<sup>28</sup> See Affidavit of Dr. Sherman attached as Exhibit B.

<sup>29</sup> *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 327, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

avoid summary judgment by asserting nothing more than “bald contradictions of the evidence offered by the moving party” would necessarily abrogate the utility of summary judgment and courts would be unable to use Civ. Rule 56 as a means of assessing the merits of a claim at an early stage of the litigation, which would in turn unnecessarily delay the civil process.<sup>30</sup>

**B. Plaintiff’s Conversion Claim Fails As A Matter Of Law Because Dr. Sherman Owned The Allegedly Converted Funds.**

Conversion is defined as “the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.”<sup>31</sup> To succeed on a claim for conversion, a plaintiff must establish his or her own ownership or right to possession of the property at the time that it was converted, the defendant’s conversion of the property by a wrongful act, and damages.<sup>32</sup> Further, if the defendant obtained possession of the property lawfully, the plaintiff must additionally establish that he or she demanded that the defendant return the property after the defendant had exercised dominion or control over it, and that the defendant refused to do so.<sup>33</sup>

In the case *sub judice*, Dr. Sherman is alleged to have “surreptitiously opened” a Merrill Lynch Brokerage Account in the name of Plaintiff’s Decedent (a.k.a. his wife), which he purportedly funded with deposits totaling \$2 million dollars.<sup>34</sup> Plaintiff goes on to further claim that upon opening the Merrill Lynch Brokerage Account all of the money put into the Account somehow automatically became her sole and exclusive property.<sup>35</sup> Plaintiff’s claims in this

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<sup>30</sup> *Lennon v. Cuyahoga Cty. Juvenile Court*, 2006-Ohio-2587, at ¶ 17.

<sup>31</sup> *Bush v. Signals Power & Grounding Specialists, Inc.*, 2009-Ohio-5095, at ¶ 15.

<sup>32</sup> See, e.g., *Alexander v. Motorists Mut. Ins. Co.*, (1st Dist. Hamilton Cty.), 2012-Ohio-3911, ¶ 20, citing *Zacchini v. Scripps Howard Broadcasting Co.*, 47 Ohio St.2d 224, 226, 351 N.E.2d 454 (1976), *rev’d on other grounds*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).

<sup>33</sup> *Bush*, *supra*, at ¶ 16.

<sup>34</sup> See Complaint at ¶’s 9-13.

<sup>35</sup> *Id.*

regard, however, are factually and legally unsupportable since as a matter of indisputable fact, and of law, the Merrill Account was marital property owned by Dr. Sherman, and such was the case regardless of whose putative name appeared as owner on the Merrill Account.

**1. As A Matter Of Law, The Merrill Lynch Account Was Marital Property, And Not Aliza Sherman's Personal Property.**

A trial court's classification of property as marital or separate property is reviewed under a manifest weight of the evidence standard.<sup>36</sup> Under this highly deferential standard of review, a trial court's judgment will not be reversed if there "is even 'some' evidence to support the court's finding."<sup>37</sup> Here, there is a plethora of uncontroverted evidence showing that the Merrill Account was marital property, and there is no evidence to support Plaintiff's claim that the Merrill Account was the separate property of Aliza Sherman.

Marital property includes property currently owned by either or both spouses and which was acquired by either or both of the spouses during the marriage.<sup>38</sup> Furthermore, all property acquired during a marriage is presumed to be marital property unless it can be shown to be separate.<sup>39</sup> Hence, Ohio law assumes that all property acquired during the marriage is marital property unless one spouse can prove otherwise.<sup>40</sup> Furthermore, Ohio Revised Code §3105.171(H) explicitly states that "... the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." Accordingly, the form of title is "not conclusive of, the

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<sup>36</sup> See, e.g., *Reed v. Reed* (3rd Dist.), 2010-Ohio-4550, at ¶ 7, citing *Gibson v. Gibson* (3rd Dist.), 2007-Ohio-6965, at ¶ 26, quoting *Eggeman v. Eggeman* (3rd Dist.), 2004-Ohio-6050, ¶ 14, citing *Henderson v. Henderson* (3rd Dist.), 2002-Ohio-2720, ¶ 28.

<sup>37</sup> *Reed*, supra, at ¶7 citing and quoting *Barkley v. Barkley*, 119 Ohio App.3d 155, 159, 694 N.E.2d 989, and *Huelskamp v. Huelskamp*, 185 Ohio App.3d 611, 620, 2009-Ohio-6864, ¶15, 925 N.E.2d 167 and *DeWitt v. DeWitt*, 3rd Dist., 2003-Ohio-851, ¶10.

<sup>38</sup> *Reed*, supra, 2010-Ohio-4550, at ¶8, citing Ohio Revised Code §3105.171(A)(3)(a).

<sup>39</sup> *Reed*, supra, citing *Huelskamp*, 185 Ohio App.3d at 619, 2009-Ohio-6864, ¶15, 694 N.E.2d 989.

<sup>40</sup> See, e.g., *Reed*, supra.

classification of property as being either marital or separate."<sup>41</sup>

Separate property is statutorily defined by Ohio Revised Code §3105.171(A)(6)(a) in the following manner:

'Separate property' means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

- (i) An inheritance by one spouse by bequest, devise, or descent during the course of the marriage;<sup>42</sup>
- (ii) *Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage;*
- (iii) *Passive income and appreciation acquired from separate property by one spouse during the marriage;*
- (iv) Any real or personal property or interest in real or personal property acquired by one spouse after a decree of legal separation issued under section 3105.17 of the Revised Code;
- (v) Any real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement;
- (vi) Compensation to a spouse for the spouse's personal injury,<sup>43</sup> except for loss of marital earnings and compensation for expenses paid from marital assets;
- (vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.<sup>44</sup>

Ohio Revised Code §3105.171(A)(6)(b) further states that "the commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." Thus, traceability is the key to determining whether separate property has lost its separate character after being

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<sup>41</sup> *Kovacs v. Kovacs* (6<sup>th</sup> Dist.), 2011-Ohio-154, citing *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, at 161. See also *Seifert v. Seifert* (11<sup>th</sup> Dist.), 2012-Ohio-3037, at ¶ 15 ("the holding of title to property by one spouse individually ... does not determine whether the property is marital property or separate property").

<sup>42</sup> Dr. Sherman inherited \$700,000.00 from his mother, however, that inheritance was maintained separate and apart from the Merrill Account. See Dr. Sherman Depo. at 144-145, 339.

<sup>43</sup> Dr. Sherman was hit by a drunk driver 10-20 years ago and received a settlement of \$30,000.00-40,000.00. Dr. Sherman Depo. at 5-6. There is no evidence any of that money was used to fund the Merrill Account.

<sup>44</sup> *Reed*, supra, 2010-Ohio-4550, at ¶9, citing Ohio Revised Code §3105.171(A)(6)(a). (Emphasis added).

commingled with marital property.<sup>45</sup> The party seeking to have a particular asset classified as separate property has the burden of proving and showing, by a preponderance of the evidence, that the asset can be traced back to separate property.<sup>46</sup>

The evidence adduced in the instant matter shows that the money used to create the Merrill Account constituted marital property. As testified by Dr. Sherman:

**Q.** Okay. Where did the deposit, the initiating deposit that went into Merrill Lynch account number 61756864 come from?

**A.** All moneys that came from the initial, when both accounts were set up, were my moneys (sic) that I had earned or invested and earned.

**Q.** Okay.

**A.** That we had invested and earned or I had earned in my practice of ophthalmology. ...

**Q.** There were moneys funded into account number 61756864. From what account did those moneys come?

**A.** I don't know which – if that's the account that had Aliza's name on it or is that the account that had my name on it?

**Q.** The account that had Aliza's name on it.

**A.** Those were from my assets that I had earned as an ophthalmologist and also from our family moneys prior to that date.<sup>47</sup>

Indeed, even Jeffrey D. Firestone, CPA, CFE (“Firestone”), the expert financial consultant initially retained by Aliza Sherman’s divorce lawyers and then by Plaintiff’s counsel herein, considered the Merrill Account to be a “marital account”, notwithstanding that it was only in Aliza Sherman’s name. Firestone also likewise considered Dr. Sherman’s Merrill Account, which was only in his name to also be a “marital account”.<sup>48</sup>

As previously stated, Dr. Sherman and Aliza Sherman were married November 28,

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<sup>45</sup> *Reed*, supra, at ¶10, citing *Ward v. Ward*, 3rd Dist. 2004-Ohio-1390, ¶ 4 citing *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300.

<sup>46</sup> *Peck*, supra, 96 Ohio App.3d at 734.

<sup>47</sup> Dr. Sherman Depo. at 341-342. See also Dr. Sherman Depo. at 246-247, 339, 355, 359-360, 416.

<sup>48</sup> See Firestone Draft Report to Attorney Gregory Moore, dated January 31, 2013, at pp.1-2 and at Exhibit D. The Firestone Report was introduced and marked as Plaintiff’s Exhibit 24 at Dr. Sherman’s Depo., and a copy of it is also attached hereto and incorporated herein by reference.

1982 and they were still married when Aliza Sherman died on March 24, 2103.<sup>49</sup> The money Dr. Sherman earned as an ophthalmologist from his ophthalmology practice occurred between 1986 and 2004, which was during the course of his marriage to Aliza Sherman.<sup>50</sup> Since Dr. Sherman's income and earnings as an ophthalmologist were acquired during his marriage to Aliza Sherman they comprised marital property, as a matter of law.<sup>51</sup>

Inasmuch as Dr. Sherman had an ownership right in the marital property which comprised the Merrill Account, he also had an equal and lawful right to those marital funds. Therefore he cannot be found to have perpetrated conversion because he did not act in a manner inconsistent with his ownership rights.<sup>52</sup> Plaintiff's conversion claim also must fail because there is no evidence that Dr. Sherman exercised wrongful dominion over the Merrill Account to the exclusion of Aliza Sherman.<sup>53</sup> To the contrary, the undisputed evidence is that the funds in the Merrill Account were used to pay for family expenses, which averaged \$25,000.00 to \$40,000.00 a month, and which included household bills, credit card debt amassed by the Plaintiff's decedent, and the Plaintiff's tuition bills while she attended private secondary schools and colleges, and/or invested into other marital assets.<sup>54</sup> Hence, Aliza Sherman directly benefited from Dr. Sherman's use of the Merrill Account.

Moreover, when Aliza Sherman died, the divorce proceedings between the Shermans abated, as did any court's jurisdictional power to determine an equitable division of property

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<sup>49</sup> See Complaint at ¶ 2. See also Dr. Sherman Depo. at 172.

<sup>50</sup> See, e.g., Dr. Sherman Depo. at 8-9, 13.

<sup>51</sup> *Reed*, supra, 2010-Ohio-4550, at ¶8, citing Ohio Revised Code §3105.171(A)(3)(a).

<sup>52</sup> See, e.g., *Bush v. Signals Power & Grounding Specialists, Inc.*, 2009-Ohio-5095, at ¶ 15.

<sup>53</sup> *Id.*

<sup>54</sup> Dr. Sherman's Depo. at 248-249. See also Plaintiff's Depo. at 7-8, 11-12. See also Firestone Report at p.2, marked as Plaintiff's Exhibit 24 at Dr. Sherman's Depo., in which Plaintiff's expert stated: "it is my opinion that approximately \$2.3 million was withdrawn from the Shermans' *marital investment accounts* (emphasis supplied) January 2004 through July 2012, which is an average of \$25,000.00 per month withdrawn."

between the Shermans.<sup>55</sup> It also is telling that during the course of the divorce proceedings, Plaintiff's own expert, Firestone, considered both of the Shermans' Merrill Accounts to be "marital" assets.<sup>56</sup> Once Aliza Sherman died, however, those marital assets all became Dr. Sherman's sole property, as a matter of law, and not Aliza Sherman's separate estate property.<sup>57</sup> As such, Aliza Sherman's Estate has no legal standing or legal right to assert a claim for the "Shermans' marital investment accounts",<sup>58</sup> which included both of their Merrill Accounts, because those became Dr. Sherman's upon his wife's death.<sup>59</sup> In essence, Plaintiff is impermissibly attempting to revive the equitable distribution issues that were at the heart of the Shermans' divorce.<sup>60</sup>

In sum, there is no competent factual or legal basis for Plaintiff's conversion claim, as the uncontroverted facts and pertinent legal authorities demonstrate that the Merrill Account was marital property in which Dr. Sherman held an ownership interest, and there is no evidence whatsoever to show the Merrill Account was Aliza Sherman's separate property.<sup>61</sup> Accordingly, Dr. Sherman is entitled to summary judgment.

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<sup>55</sup> See, e.g., *Diemer v. Diemer* (8th Dist. 1994), 99 Ohio App.3d 54, 59, 649 N.E.2d 1285 ("It is axiomatic that an action for divorce abates and cannot be revived when one of the parties thereto dies."), citing *Hook v. Hook* (1987), 35 Ohio App.3d 51, 519 N.E.2d 687.

<sup>56</sup> See Firestone Report at pp. 1-2, marked as Plaintiff's Exhibit 24 at Dr. Sherman's Depo.

<sup>57</sup> See, e.g., *Diemer*, supra, (8th Dist. 1994), 99 Ohio App.3d 54, 59.

<sup>58</sup> See Firestone Report at p. 2 (i.e. Plaintiff's Exhibit 24).

<sup>59</sup> *Diemer*, supra, at 62 ("while the [Court] has plenary jurisdiction to determine an equitable division of property between spouses, such jurisdiction is present only during proceedings for divorce or legal separation.").

<sup>60</sup> Id.

<sup>61</sup> Further, even assuming *arguendo* the Merrill Account was Dr. Sherman's separate property – a proposition for which there is no evidence – the only possible way it could be deemed Aliza's Sherman's separate property is if it could somehow be established that Dr. Sherman intended to make an *inter vivos* gift to her – a proposition for which there is also no evidence. In order to legally establish an *inter vivos* gift, however, there must be a showing by clear and convincing evidence of "intent of the donor to make an immediate gift", "acceptance of the gift by the donee.", and "relinquishment of ownership, dominion and control over it." *Casper v. Casper*, (12th Dist), 2013-Ohio-4329, ¶ 12, citing *Bolles v. Toledo Trust Co.*, 132 Ohio St.2d 21 (1936), paragraph one of the syllabus. Moreover, the fact that there is absolutely no evidence or legal basis to support or establish an *inter vivos* gift is underscored by the very allegations of Plaintiff's Complaint, which assert that Dr. Sherman used POA's to create the Merrill Account and to then control and manage it, and to move money in and out of it at his pleasure, and all without the knowledge of

2. **Plaintiff's Conversion Claim Also Is Time Barred By The Four Year Statute Of Limitations Found In Ohio Revised Code §2305.09.**

Ohio Revised Code §2305.09 states in pertinent part as follows:

**§ 2305.09. Four years - certain torts**

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

- (A) For trespassing upon real property;
- (B) For the recovery of *personal property* (emphasis added), or for taking or detaining it;
- (C) For relief on the ground of fraud, except when the cause of action is a violation of section 2913.49 of the Revised Code, in which case the action shall be brought within five years after the cause thereof accrued;
- (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code; ...

***If the action is for trespassing under ground or injury to mines, or for the wrongful taking of *personal property*, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered*** (emphasis added).

As discussed above, the Merrill Account allegedly converted by Dr. Sherman was not the “personal property” of Plaintiff’s Decedent, but rather was marital property of which he was an owner, and therefore the conversion claim should fail as a matter of law. Even assuming *arguendo* that the conversion claim was otherwise valid, however, it still fails as a matter of law since it was not brought within four years of when the claim accrued.

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Plaintiff’s Decedent. Hence, Dr. Sherman clearly did not relinquish ownership, dominion or control over the Merrill Account. Further, Plaintiff’s claim that Plaintiff’s Decedent did not even know of the Merrill Account also necessarily means she could not have accepted the Merrill Account as a gift. Lastly, and importantly, even when a spouse does make an *inter vivos* gift of separate property to a spouse during their marriage, the effect of doing so simply operates so as to convert it into marital property. See, e.g., *Osborne v. Malkamaki*, 2014-Ohio-2874, (11th Dist.). Accord *Helton v. Helton*, 114 Ohio App.3d 683 (2nd Dist. 1996)

For instance, and as noted at the outset, Plaintiff's Complaint was not filed until May 28, 2014.<sup>62</sup> The Merrill Account was closed (i.e. zeroed out), however, on April 30, 2010, at which time the remaining securities and cash were transferred to another Merrill Account listed under Dr. Sherman's name.<sup>63</sup> Moreover, according to the Plaintiff, Dr. Sherman allegedly started converting the funds in the Merrill Account starting in 2004.<sup>64</sup> Either way, Plaintiff's conversion claim runs afoul of Ohio Revised Code §2305.09's four year limitations period, and is therefore time barred, as the undisputed facts show that all of the alleged acts of conversion occurred prior to May 28, 2010, and more than four years before Plaintiff's Complaint was filed.<sup>65</sup>

**3. Plaintiff's Conversion Claim Also Is Time Barred Even If The Discovery Rule Is Applied Because, At a Minimum, Aliza Sherman Had Constructive Knowledge Of The Merrill Account And Should Have Made Further Inquiry.**

It is anticipated that Plaintiff will argue that the discovery rule should be applied so as to allow her conversion claim to proceed notwithstanding that it was not filed within four years of the alleged acts of conversion. Any such claim, however, is unmeritorious since under Ohio law the discovery rule is inapplicable to any claims not specifically identified in Ohio Revised Code §2305.09 as being subject to the discovery rule set forth therein.<sup>66</sup> Thus, Ohio Revised Code §2305.09's discovery rule exception, as it pertains to a conversion claim, is only applicable to a claim for conversion of "*personal property*" (emphasis added), and does not extend to a claim,

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<sup>62</sup> See Court's Docket.

<sup>63</sup> See Deposition of Merrill Lynch's Adam Schoesler ("Schoesler Depo.") at 15-17, and Deposition of Merrill Lynch's Scott Spiegle at 12. Schoesler's Depo. and Scott Spiegle's Depo. have also been filed with the Court, and cited excerpts from them are attached hereto for the Court's convenience. See also excerpts from Merrill Lynch business/account records produced in response to subpoenas and/or discovery requests made herein, copies of which are attached hereto and incorporated herein as Exhibit C.

<sup>64</sup> See Complaint at ¶'s 12-13.

<sup>65</sup> See Schoesler Depo. at 15-17; Scott Spiegle Depo. at 12; Merrill records attached hereto as Exhibit C; and Complaint at ¶'s 12-13.

<sup>66</sup> See, e.g., *Clemens v. Nelson Financial Group, Inc.*, 2015-Ohio-1232, at ¶ 47 (10<sup>th</sup> Dist.), citing *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 181 (1989).

such as here, encompassing the alleged conversion of marital property.

Furthermore, even if the discovery rule were utilized, the standard is when Aliza Sherman knew “or should have known” that something may have been amiss.<sup>67</sup>

As stated in pertinent part by the Ohio Supreme Court in *Cundall v. U.S. Bank*:<sup>68</sup>

Statutes of limitations foster important public policies: ensuring fairness to the defendant, encouraging prompt prosecution of causes of action, suppressing stale and fraudulent claims, and avoiding the inconvenience engendered by delay and by the difficulty of proving older cases. (citation omitted) We apply them consistently to ensure the proper administration of justice.<sup>69</sup> ...

A cause of action for ... conversion accrues either when [it] is discovered, or [when] in the exercise of reasonable diligence, [it] should have been discovered. (citation omitted) When determining whether the exercise of reasonable diligence should have discovered a case of [conversion], the relevant inquiry is whether the facts known ‘ ’ would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry \* \* \*.’ (citation omitted)<sup>70</sup>

As the First District has recognized, "this standard does not require the victim of the alleged [conversion] to possess concrete and detailed knowledge, down to the exact penny of damages, of the alleged [conversion]; rather, the standard requires only facts sufficient to alert a reasonable person of the *possibility* of [conversion]."<sup>71</sup> "[C]onstructive knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule." (Emphasis added.)<sup>72</sup>

According to the Merrill account executives who handled the Merrill Account, Merrill sent Aliza Sherman monthly account statements by ordinary U.S. mail beginning in May of 2000,

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<sup>67</sup> See, e.g. *Cundall v. U.S. Bank*, 2009-Ohio-2523, at ¶'s 22-23, 122 Ohio St.3d 188, 909 N.E.2d 1244.

<sup>68</sup> 2009-Ohio-2523, 122 Ohio St.3d 188, 909 N.E.2d 1244.

<sup>69</sup> *Cundall*, supra, 2009-Ohio-2523, at ¶'s 22-23.

<sup>70</sup> *Cundall*, supra, 2009-Ohio-2523, at ¶ 29.

<sup>71</sup> *Cundall*, supra, 2009-Ohio-2523, at ¶30, citing and quoting *Palm Beach Co. v. Dun & Bradstreet, Inc.* (1995), 106 Ohio App.3d 167, 171, 665 N.E.2d 718.

<sup>72</sup> *Cundall*, supra, at ¶ 30, citing *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284.

when the account was opened, until it was closed in April of 2010, a period of nearly 10 years.<sup>73</sup> None of the statements Merrill mailed to Aliza Sherman were ever returned to Merrill.<sup>74</sup> Where, as here, regular mail is not returned, delivery is presumed to have occurred.<sup>75</sup> Further, there is no evidence to rebut the presumption that Aliza Sherman received the account statements Merrill mailed to her. Consequently, and notwithstanding Plaintiff's claim that Plaintiff's Decedent purportedly was unaware of the Merrill Account, the irrefutable fact of the matter is that she at least *should have known* of the Merrill Account, and of the alleged conversions from it, because from May, 2000 through April, 2010 she was sent monthly account statements. This amounts to 120 statements.

A reasonable person, who continues to systematically receive account statements in their name for an account with millions of dollars in it, that they supposedly did not know even existed, would certainly be expected to "make further inquiry" to find out what is going on.<sup>76</sup> Aliza Sherman, however, never did so, and there are only two reasonable explanations: (1) either she actually did know of the Merrill Account (Plaintiff's allegations notwithstanding); or (2) she simply chose to ignore the existence of the Merrill Account. Either way, Aliza Sherman could have and should have made further inquiry concerning the Merrill account, and if she had she would have discovered the alleged conversions complained of herein from their alleged inception starting in May 2004. Accordingly, even if a discovery rule is utilized, Plaintiff's claims for

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<sup>73</sup> See Deposition of Merrill Lynch's Stephen Spiegle at 7-9, 20-21, 26. Stephen Spiegle's Depo. has also been filed with the Court, and cited excerpts from it are attached hereto for the Court's convenience. See also Schoesler Depo. at 7-8, 12, and Scott Spiegle Depo. at 7-8, 14-15.

<sup>74</sup> Id.

<sup>75</sup> See, e.g., *Miller v. Plain Dealer Publishing Co.*, 2015-Ohio-1016, at ¶ 13 (8<sup>th</sup> Dist.) (under the so called "mailbox rule", "a letter sent by ordinary U.S. mail is presumed received in due course."). See also *In re P.O.*, 2015-Ohio-4774, at ¶ 29 (11<sup>th</sup> Dist.) ("when regular mail is not returned, service is presumed perfected").

<sup>76</sup> *Cundall*, supra, at ¶ 30, citing *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284.

conversion are still time barred, as Aliza Sherman, at a minimum, had "constructive knowledge of facts" sufficient "to start the statute of limitations running under the discovery rule."<sup>77</sup>

**C. Plaintiff's Claim For Breach of Fiduciary Duty Is Also Time Barred By Ohio Revised Code §2305.09's Four Year Statute Of Limitations And, In Any Event, Lacks A Factual Basis.**

**1. The Discovery Rule Found in Ohio Revised Code §2305.09 Does Not Apply To Breach Of Fiduciary Duty; Hence Any Claim Not Brought Within Four Years Of When The Breach Of Fiduciary Duty Actually Occurred is Time Barred.**

As discussed above with regard to Plaintiff's conversion claim, although Ohio Revised Code §2305.09 contains a discovery rule for certain torts,<sup>78</sup> the General Assembly elected not to extend the discovery rule to all torts covered by Ohio Revised Code §2305.09. Thus, as held by the Ohio Supreme Court, and multiple Ohio Appellate District Courts, the discovery rule is inapplicable to claims not specifically identified in Ohio Revised Code 2305.09 as being subject to it.<sup>79</sup>

As with conversion claims, Ohio Revised Code §2305.09(D) also determines the statute of limitations for claims for breach of fiduciary duty.<sup>80</sup> Because Ohio Revised Code §2305.09 does not identify claims for breach of fiduciary duty as claims that accrue only upon discovery, the discovery rule does not toll the statute of limitations for those claims.<sup>81</sup> Consequently, "[a] claim for breach of fiduciary duty accrues when the claimant's interest is impaired by such a breach, rather than when the breach is discovered."<sup>82</sup>

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<sup>77</sup> *Cundall*, supra, at ¶ 30, citing *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284.

<sup>78</sup> Those torts to which the discovery rule applies, as set forth in Ohio Revised Code §2305.09, are limited to (1) trespassing under ground or injury to mines, (2) wrongful taking of personal property, and (3) fraud.

<sup>79</sup> See, e.g. *Clemens v. Nelson Financial Group, Inc.*, 2015-Ohio-1232, at ¶ 47 (10<sup>th</sup> Dist.), citing *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 181 (1989).

<sup>80</sup> *Clemens*, supra, at ¶ 46, citing *Wells v. C.J. Mahan Constr. Co.*, (10th Dist.), 2006-Ohio-1831, ¶ 26.

<sup>81</sup> *Clemens*, supra, at ¶ 47, citing *Marks v. Reliable Title Agency*, (7th Dist.), 2012-Ohio-3006, ¶ 14 and *Dodd v. KeyBank*, (8th Dist.), 2006-Ohio-93, ¶ 25 (additional citations omitted).

Like the discovery rule, the termination rule is also an exception to the general rule that a claim accrues when the wrongful act occurs. For example, in determining the accrual date of claims for medical and legal malpractice, courts may apply the discovery rule in combination with the termination rule. Under the termination rule, accrual occurs when a physician-patient relationship for a particular condition, or an attorney-client relationship for a particular transaction or undertaking, terminates.<sup>83</sup> As with the discovery rule, however, the termination rule likewise does not apply to claims subject to the four-year statute of limitations set forth in Ohio Revised Code §2305.09.<sup>84</sup>

In *Clemens*, supra, the Court of Appeals affirmed summary judgment in favor of the defendant on a breach of fiduciary duty claim, based on the above articulated well settled law in this area, and ruled that the trial court had correctly refused to adopt the discovery and/or termination rules.<sup>85</sup> The *Clemens* Court further concluded that since the plaintiffs originally asserted their claim for breach of fiduciary duty in a complaint filed April 6, 2007, the statute of limitations barred liability for any breaches that occurred before April 6, 2003, or four years before the original complaint was filed.<sup>86</sup>

As in *Clemens*, supra, application of the above principles of law, and statutory mandates of Ohio Revised Code §2305.09, to the instant matter likewise mandates entry of summary judgment in favor of Dr. Sherman since Plaintiff's Complaint was not filed until May 28, 2014,

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<sup>82</sup> *Clemens*, supra, at ¶ 47, citing *Wells* at ¶ 29; accord *Union Savings Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, ¶ 28 ("[A] claim for breach of fiduciary duty accrues when the act or omission constituting the breach actually occurs and [ ] the discovery rule does not apply to such claims.").

<sup>83</sup> *Clemens*, supra, at ¶ 48, citing *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385 (1988), paragraph one of the syllabus; *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987), paragraph one of the syllabus.

<sup>84</sup> *Clemens*, supra, at ¶ 48, citing *Beechler v. Touche Ross & Co.*, 81 Ohio App.3d 354, 359 (8th Dist.1992).

<sup>85</sup> *Clemens v. Nelson Financial Group, Inc.* (10<sup>th</sup> Dist.), 2015-Ohio-1232, at ¶'s 49-50.

<sup>86</sup> *Clemens*, supra, at ¶ 49.

which was more than four years after the Merrill Account had been closed and zeroed out in April, 2010. Hence, even assuming that Dr. Sherman committed a breach of fiduciary duty – which is not the case – the claim is, in any event, time barred by Ohio Revised Code §2305.09.<sup>87</sup>

**2. There Is No Factual Or Logically Sustainable Basis To Support Plaintiff’s Claim For Breach Of Fiduciary Duty.**

First, as discussed above, the claim for breach of fiduciary duty is time barred. Secondly, by her own admission, Plaintiff cannot identify any fiduciary duty breached by Dr. Sherman.<sup>88</sup> Lastly, Plaintiff’s argument with respect to the breach of fiduciary duty claim is also logically unsustainable and legally unsupportable.

Plaintiff argues that when one person gives another person a power of attorney that creates a fiduciary relationship. Plaintiff’s entire claim, however, is premised on the notion that the power of attorney which Dr. Sherman allegedly used to withdraw assets from this account was a forgery.<sup>89</sup> Indeed, Plaintiff further alleges that Plaintiff’s Decedent had no knowledge of the account.<sup>90</sup>

A fiduciary relationship is established when one party places a level of trust in the other party. The Ohio Supreme Court has expressly recognized that “[w]hen both parties understand a special trust or confidence has been reposed, a fiduciary relationship may be established (emphasis added).”<sup>91</sup> In a situation, however, such as here, where it is claimed the Plaintiff’s Decedent had no knowledge of the Merrill Account, she could not have placed any fiduciary trust in Dr. Sherman because she purportedly had no understanding that a special trust or

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<sup>87</sup> *Clemens*, supra, at ¶’s 47-50.

<sup>88</sup> Plaintiff’s Depo. at 62-63.

<sup>89</sup> Complaint at ¶ 12.

<sup>90</sup> Complaint at ¶ 9.

<sup>91</sup> *Groob v. Keybank* (2006), 108 Ohio St.348, 351, 843 N.E. 2d 1170, 1173.

confidence (i.e. fiduciary relationship) even existed. Absent such a fiduciary relationship, there cannot be claim for breach of fiduciary duty.

**D. Plaintiff's Unjust Enrichment Is Also Time Barred And Factually Unsupportable**

As is the case with her claims for conversion of marital property and breach of fiduciary duty, Plaintiff's unjust enrichment claim is similarly without a factual basis and time barred. An unjust enrichment claim is subject to a six-year statute of limitations.<sup>92</sup> The Eighth District has held that to establish unjust enrichment the following elements must be proven: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment."<sup>93</sup>

**1. The Evidence Of Record Is Insufficient To Establish An Unjust Enrichment Claim Against Dr. Sherman.**

There is no factual basis for unjust enrichment here since Plaintiff and/or Plaintiff's decedent did not confer any benefit to Dr. Sherman. As already discussed, the Merrill Account was marital property and hence owned by Dr. Sherman. Dr. Sherman cannot be unjustly enriched by virtue of receiving his own money. Further, Aliza Sherman purportedly had no knowledge of the benefit being conferred upon her. Moreover, and contrary to the bald allegations of Plaintiff's Complaint, there is no evidence to show the Merrill Account was ever the separate property of Plaintiff's decedent or of Dr. Sherman prior to its creation. Further, even assuming *arguendo* – as Plaintiff has seemingly alleged, albeit without any factual support – that the money used to create the Merrill Account was entirely Dr. Sherman's own separate property, it then logically follows

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<sup>92</sup> *Pomeroy v. Schwartz* (8<sup>th</sup> Dist.), 2013-Ohio-4920, ¶ 41, citing *Kramer v. Kramer*, 194 Ohio App.3d 70, 2011-Ohio-1812, 954 N.E.2d 1235, ¶ 45, and Ohio Revised Code §2305.07.

<sup>93</sup> *Pomeroy*, supra, at ¶ 41, citing *Miller v. Keybank Natl. Assn.*, (8th Dist.), 2006-Ohio-1725, ¶ 43.

that it was Dr. Sherman who conveyed a benefit upon Plaintiff's Decedent by turning what otherwise would have been his own separate property into marital property. Either way Plaintiff's claim simply does not fly.

**2. The Discovery Rule Does Not Apply To Unjust Enrichment Claims And Therefore Ohio Revised Code §2305.07 Bars Plaintiff's Claim Since It Was Not Brought Within Six Years Of When The Alleged Unjust Enrichment Allegedly Occurred.**

Plaintiff's unjust enrichment claim also fails as a matter of law because it was filed after the six year statute of limitations had already expired since, according to Plaintiff, Dr. Sherman began wrongfully taking money out of the Merrill Account in 2004, which would have been nine to ten years prior to the filing of this suit on May 28, 2014.<sup>94</sup> As observed by the Eighth District in *Pomeroy v. Schwartz*, supra, and the First District in *Palm Beach Co. v. Dun & Bradstreet*,<sup>95</sup> "Ohio does not recognize the discovery rule for unjust enrichment claims discovery"<sup>96</sup> and therefore "a cause of action for unjust enrichment accrues on the date that money is retained under circumstances that make it unjust to do so."<sup>97</sup>

In both *Pomeroy* and *Palm Beach* the respective trial courts granted summary judgment to the defendants, finding that the respective plaintiffs' claims for unjust enrichment were barred by the six year statute of limitations. On appeal, the Eighth District and First District Courts agreed with and affirmed the trial courts' summary judgment rulings, finding that the defendants had indeed failed to create any genuine issue of material fact for trial and that the trial courts had

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<sup>94</sup> See Plaintiff's Complaint at ¶'s 12-13.

<sup>95</sup> 106 Ohio App.3d 167, 655 N.E.2d 158 (1st Dist. 1995).

<sup>96</sup> *Pomeroy v. Schwartz* (8<sup>th</sup> Dist.), 2013-Ohio-4920, at ¶ 44; *Palm Beach*, supra, 106 Ohio App.3d at 175.

<sup>97</sup> Id.

properly concluded the defendants' claims were barred by the applicable statute of limitations, entitling them to summary judgment.<sup>98</sup>

As in *Pomeroy* and *Palm Beach*, Dr. Sherman is also entitled to summary judgment on Plaintiff's unjust enrichment claim since it is undisputed that the alleged acts giving rise to this claim started in 2004, nearly ten years prior to suit being filed, and the discovery rule is inapplicable to extend the six year statute of limitations.

**E. Plaintiff's Claim For Civil Remedy For Criminal Acts Pursuant To Ohio Revised Code §2307.60 Must Fail Because Dr. Sherman Has Never Been Convicted Of Any Crime.**

The Eighth District has ruled that in order to maintain a separate cause of action under Ohio Revised Code §2307.60,<sup>99</sup> that the plaintiff is required to prove that a criminal violation actually occurred before civil liability may arise.<sup>100</sup> In the instant matter, Plaintiff has no evidence, and the Cuyahoga County Courts Docket system show no criminal violations of any kind by Dr. Sherman. The undisputed fact is neither Dr. Sherman nor anyone else has ever been charged let alone convicted of any crimes stemming from the matters alleged herein by Plaintiff.<sup>101</sup> As a result, Ohio Revised Code §2307.60 does not provide Plaintiff with a basis for relief and Dr. Sherman is entitled to summary judgment.<sup>102</sup>

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<sup>98</sup> *Pomeroy v. Schwartz* (8<sup>th</sup> Dist.), 2013-Ohio-4920, at ¶ 46-48; *Palm Beach*, supra, 106 Ohio App.3d at 175.

<sup>99</sup> Ohio Revised Code §2307.60 states in relevant part that "[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law ...".

<sup>100</sup> *Hite v. Brown* (8<sup>th</sup> Dist.), 100 Ohio App. 606, 611, fn. 2, citing *Ivancic v. Cleveland Elec. Illum. Co.* (Sept. 16, 1993), Cuy. Cty. App. No. 63372, unreported, 1993 WL 367092 (trial court correctly granted summary judgment to defendant on plaintiff's claim which sought to impose civil liability for a criminal violation because Ohio Revised Code §2307.60 requires a criminal violation before civil liability arises and there was no such evidence) (copy attached).

<sup>101</sup> See Dr. Sherman Affidavit, attached as Exhibit B.

<sup>102</sup> *Id.* Accord *Tri-State Computer Exchange, Inc. v. Burt*, 2003-Ohio-3197, at ¶ 23 (1<sup>st</sup> Dist. 2003) (upholding dismissal of complaint pursuant to Ohio Civ.R.12(b)(6) because plaintiff's complaint failed to allege that the defendants/appellees had been convicted of any crime). *Tri State Computer* at ¶ 23.

**F. Count V of Plaintiff's Complaint Fails As a Matter of Law Because There Is No Evidence To Establish Or Prove The Necessary Legal Elements Of A Civil Conspiracy Claim.**

In Count V of her Complaint, Plaintiff claims Dr. Sherman conspired with “John Doe(s) Defendant(s) I through V ... to cause injury to Plaintiff’s Decedent and/or Estate by committing ... [a] series of unlawful acts ... and to deprive Plaintiff’s Decedent and/or Estate of their lawful property”.<sup>103</sup> These allegations have no factual basis, however, and hence no legal basis, as there is absolutely no evidence identifying any co-conspirator or showing that anyone committed an unlawful act or actively engaged with Dr. Sherman in a conspiracy to cause harm or damages to Plaintiff’s Decedent and/or Estate. Indeed, and as set forth in the preceding section of this Motion, neither Dr. Sherman nor anyone else has ever been charged with, let alone convicted of, any crime or unlawful act vis a vis Plaintiff or Plaintiff’s Decedent.<sup>104</sup>

In order to maintain a claim of civil conspiracy under Ohio law, a claimant must establish all of the following: (1) a malicious combination of two or more persons; (2) causing injury to another person or property; and (3) the existence of an unlawful act independent from the conspiracy itself.<sup>105</sup> As further explained and stated in 10 Ohio Jurisprudence 2d 59, Conspiracy, § 2 and 3:

\* \* \* conspiracy \* \* \* viewed as a tort, is a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone, resulting in actual damage to him. (Emphasis added.)

Conspiracy, in and of itself, furnishes no cause of civil action. The gist of the civil action for conspiracy is the damage caused by acts

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<sup>103</sup> See Complaint at ¶’s 29-30.

<sup>104</sup> See Dr. Sherman Affidavit, attached as Exhibit B.

<sup>105</sup> See, e.g., *Kenty v. TransAmerican Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 419. See also *Gosden v. Louis* (1996), 116 Ohio App. 3d 195, 219 (there must be proof of the commission of an underlying unlawful act in order to establish an action for civil conspiracy.).

committed pursuant to a formed conspiracy, rather than the conspiracy itself; and unless something is actually done by one or more of the conspirators which proximately results in damage, no civil action lies against anyone.<sup>106</sup>

In the instant case, the parties have conducted a slew of often lengthy depositions, and have propounded and exchanged voluminous written discovery and documentation, yet there has been no evidence adduced whatsoever as to: (1) the identities of any alleged co-conspirators; (2) what these unknown and unnamed co-conspirators purportedly did; or (3) the existence of an unlawful act independent from the conspiracy itself. Nor is there any evidence showing with any specificity what unlawful acts Dr. Sherman and these unknown John Doe Defendants supposedly engaged in to further the alleged conspiracy. Rather, there are nothing but vague and conclusory allegations that Dr. Sherman acted along with John Doe Defendants. Moreover, Plaintiff has no evidence of any criminal action used in furtherance of the alleged conspiracy because no criminal charges have ever been brought against anyone and no one has ever been convicted of any crimes concerning this matter.

As this Court is aware, mere economic harm or mere bad faith alleged by Appellant does not amount to criminal conduct absent demonstrative criminal conduct to meet the elements of conspiracy, Appellant's civil conspiracy/collusion claims must fail, and Summary Judgment was proper.

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<sup>106</sup> Citing *Minarik v. Nagy* (1963), 8 Ohio App 2d 194, 195.

**IV. CONCLUSION**

For all of the foregoing reasons and in accordance with the facts, authorities and principles of law set forth herein, Dr. Sherman respectfully requests that his Motion for Summary Judgment be granted.

Respectfully submitted,

/s/ **Brian Green**

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**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing was served via the Court's electronic mail system this 6th day of May, 2016 upon the following:

Adam M. Fried, Esq.  
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/s/ **Brian Green**

\_\_\_\_\_  
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