2013 WL 7930004 (Conn.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Connecticut.
Hartford County

Elaine Erwin MATULIS,

v.

Robert MCCABE, Executor.

No. HHBCV095011302.
August 14, 2013.

Defendant's Brief

Defendant, Richard H. Kosinski, His Attorney, 106 Farmington Ave, Ste 2B, New Britain, CT 06053-2982, 860-224-7115.

I. PROPOSED FINDINGS OF FACT

1. The subject premises is a certain piece or parcel of land with all the buildings thereon and improvements and appurtenances thereto, known as 359 Wethersfield Road in the Town of Berlin, County of Hartford and State of Connecticut, and was part of the parties' grandparents' farm which they acquired a little after 1910. Counterclaim (CC) and Plaintiff's Answer (Answ.), 1st Count, Para. 1; 1T27/21-24. [1]

2. Plaintiff ELAINE ERWIN MATULIS has a BS in Nursing and an MBA, and was a branch manager for the former Berlin Savings Bank during the period 1978-1981.1T23/22-24/7.

3. For a considerable period of time, Plaintiff has owned and managed several single-family homes, a four-family apartment building and a commercial piece of property, and has been managing residential properties since 1975. 1T24/13-25.

4. Defendant ROBERT MCCABE is a licensed arborist who in October 1998 lived with his wife and three children and ran an arboriculture business in New Hampshire, 150 miles away. 4T96/20-97/13.

5. John McCabe is a patent attorney with a Ph.D. in physics. 4T9/23-10/26.

6. As of October 1998, John McCabe lived in the Boston area with his wife. 4T17/3, 93/19-23.

7. Though Defendant and his brother, John McCabe, who lives in New Jersey, were very different people, they had a good relationship. 4T9/1-2, 12/9-12.

8. With respect to serious family problems, Defendant and his brother discussed and made decisions in a collaborative manner. 4T12/14-25.

9. They regularly talked about other serious issues, considered each others viewpoints and arrived at mutually agreeable solutions. 4T12/14-25.

10. Valerie McCabe was born on XX/XX/1916. Exh. F.

11. On June 15, 1987, Valerie McCabe executed a will in which she named her sons, Defendant and John McCabe, beneficiaries. Exh. D.

12. On June 18, 1997, Valerie McCabe appointed Defendant as her attorney in fact through a Power of Attorney; as such Defendant assisted in her financial affairs. Exh. E; 3T95/11-14.

13. For many years prior to October 10, 1998, Valerie McCabe, who was a bookkeeper, owned, rented and managed the subject property as a tenant in common with her sister, Jessie K. Erwin, and she was the aunt of Plaintiff; the property had been rented since some time in the early 1970s. CC, Answ., 1st Count, Para. 4; Jt. Exh. , Para. 1; 1T32/26-33/3; 2T23/2-3, 45/9-18; 4T99/2-9.

14. Plaintiff was considerably younger than her aunt. CC, Answ., 6th Count, Para. 35.

15. Prior to about 1998, John McCabe and Plaintiff had friendly relations. 4T14/14-17.

16. When they were younger, Plaintiff was a close cousin to John McCabe. 4T14/17-18.

17. Plaintiff attended John McCabe's wedding in Paris, France in 1992 and allowed her son, John, to come to Yellowstone with John McCabe and his wife and nephews in 1998. 1T34/4; 4T14/21-25.

18. John McCabe would regularly visit Plaintiff at her home when he visited his parents in Berlin. 4T15/4-8.

19. As of April 29, 1998, a joint checking account related to the premises Valerie McCabe had with Erwin had a balance of $6,900.05. Exh. EEEE; 4T100/15-21.

20. On October 10, 1998, the day before she died, Erwin quitclaimed her interest in the premises to her daughter, the Plaintiff. Exh. 31; 1T26/21.

21. At her mother's funeral, Plaintiff observed that her godmother, Valerie McCabe, was in a wheelchair and not able to take care of herself or administer to her affairs properly. 1T27/6-7, 14-19.

22. Plaintiff was a co-fiduciary of her mother's estate. 1T26/22-26.

23. At that time, Defendant was assisting his mother in her affairs since she had cognitive impairments. 1T27/6-7, 14-19.

24. At that time, Plaintiff orally volunteered to manage the rental property for a one time fee of $1,000. 1T32/26-33/3; 4T97/14-19, 98/22-25.

25. That proposal made sense since Plaintiff was Defendant's cousin, had real estate experience and lived less than a mile way from the premises, while Defendant lived in New Hampshire and was preoccupied with dealing with his mother's medical problems and financial issues; Plaintiff then assumed that Defendant had a Power of Attorney for his mother. Jt. Exh 1, Para. 2; Exh. E; 1T33/4-10, 35/17-36/1; 2T46/22-47/1, 53/27-54/4, 55/19-23; 4T97/23-25.

26. Defendant turned over to Plaintiff a checkbook for the joint checking account related to the premises his mother had with Erwin. 4T99/10-19.

27. Defendant does not presently recall the amount in the joint checking account at that time. 4T100/6-8.

28. Plaintiff claims she had no access to knowledge about any accounts related to the premises prior to her management of the property. 2T47/8-11.

29. Defendant and Plaintiff orally agreed that after his mother died, the premises would be sold and the net proceeds evenly divided. 4T101/9-12.

30. Since approximately October 1998, Plaintiff managed the property on behalf of the co-owners. CC, Answ., 1st Count, Para. 5.

31. As a managing co-owner, Plaintiff had a duty to engage in conduct exhibiting good faith and fair dealing. CC, Answ., 7th Count, Para. 32.

32. Since approximately October 1998, a confidential relationship had existed between Plaintiff, on one hand, and deceased and Defendant, on the other.

33. The now deceased and Defendant believed that Plaintiff would never **abuse** her confidential relationship. 3T111/18-26; 4T98/7-8.

34. From time to time since October 1998, Plaintiff would send Defendant information and pictures about houses for sale which she claimed were comparable to the subject premises and prices related to them. 3T20/23-21/11; 4T114/16-22.

35. Defendant never regarded the houses as comparables and the prices related to them were low. 4T114/26-115/1.

36. From time to time since October 1998, Plaintiff would offer to buy out Defendant's mother's half of the premises, but Defendant rejected each offer as below market. 3T21/12-15; 4T115/23-116/1.

37. Since approximately October 1998, Plaintiff collected rents from the property, described by the parties as the common fund. CC, Answ., 1st Count, Para. 6; 2T23/3-5.

38. Since approximately October 1998, Plaintiff, without the knowledge or consent of Valerie McCabe or Defendant, unilaterally paid herself at first annually one-month's rent and later 10% of gross rents collected, which payments neither deceased nor Defendant have contested since they were usual, fair and reasonable compensation for services of such type. CC, Answ., 1st Count, Para. 9; Jt. Exh 1, Para. 3; 1T31/26-32/3, 44/15-17; 2T56/8-59/25.

39. Plaintiff recalls that the property was occupied by the Franks on October 11, 1998 and that they had been there for many years under Valerie McCabe's management. 2T48/9-14.

40. After the Franks vacated, Plaintiff rented the property to four gentlemen. 2T47/17-18.

41. The Willises were tenants of the subject premises continuously from August 15, 1999 -- August 15, 2008; the initial rental amount was $1,050 monthly. Exhs. 4-5; 1T43/1-19.

42. Although the premises generated net rental proceeds, Plaintiff did not distribute any of such proceeds in 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012. CC, Answ., 1st Count, Para. 10; Jt. Exh. 1, Para. 5; 1T32/7-9; 2T77/8-14; 4T101/13-17.

43. Without the knowledge or consent of Valerie McCabe or Defendant, Plaintiff opened four accounts related to the net rental proceeds; for purposes of convenience to Plaintiff, she began to hold and manage said monies, and make investments, in her own name, without specifying the trust nature thereof; although Plaintiff continued to hold, manage and invest the monies in her own name, Plaintiff at all times was acting as trustee of Valerie McCabe's and later Defendant's one-half interest. CC, Answ., 1st Count, Paras. 6-7; Jt. Exh. 1, Para. 4; 1T32/4-6, 64/2-5, 65/3-8; 2T51/8-23, 55/27-56/4; 3T63/17-24, 97/11-14; 4T101/25-102/4.

44. Defendant assumed that the joint checking account was being used to manage the property. 4T102/4-8.

45. The practical effect of Plaintiff's conduct was that Valerie McCabe and Defendant were shut out from any access to rental proceeds, and it appeared to any third person examining accounts into which such proceeds had been deposited that Plaintiff was the sole record owner of them. Jt. Exh 1, Para. 4; 2T53/8-14; 3T64/19-23; 4T102/9-13.

46. Neither Valerie McCabe nor Defendant received 1099 forms from the various financial institutions for the accounts because they were all in Plaintiff's name. 1T69/1-4.

47. On March 1, 1999, Plaintiff made an initial deposit of $2,500 in rents into a Fidelity money market account in West Hartford; that account eventually became cumbersome to Plaintiff. Exh. 7; 1T63/22-24, 66/6.

48. Her next deposit was on November 30, 1999 in the amount of $2,457.99. Exh. 7.

49. No funds from any account from Valerie McCabe or Erwin went into the Fidelity account. 1T65/21-24.

50. The Fidelity transaction register Plaintiff maintained did not reflect all of the deposits into and redemptions from the account. Exh 7; 3T9/1-3.

51. One evening in 1998-1999, John McCabe and his wife were at Plaintiff's house, and Plaintiff asked John McCabe whether he had obtained an appraisal for the subject premises. 4T17/3-11.

52. Plaintiff had previously told John McCabe that she wanted to buy the house and had asked him to get an appraisal. 4T17/12-15.

53. At the time, John McCabe had no legal interest in the house.

54. In response, John McCabe told Plaintiff that he preferred to wait until his mother's death at a time when he would probably have a legal interest in it. 4T17/18-20.

55. Plaintiff excitedly told John McCabe that she wanted to be sole owner of the house because if she managed it she wanted to obtain all the profits from it. 4T17/20-27.

56. Then, Plaintiff told John McCabe that she could force his brother and him to sell the house to her. 4T18/1-5.

57. John McCabe was shocked by Plaintiff's manner of speaking and considered it a threat. 4T18/6, 15-17, 25.

58. As a result, John McCabe walked out of Plaintiff's house and stopped talking to her. 4T18/7-12.

59. Plaintiff testified that she sent a letter dated January 6, 2000 to Defendant and John McCabe in which she claimed that she had managed the property for some 4-5 years, she had mentioned to John an interest in purchasing it and she had had an appraisal done in October 1998 which was for $115,000. Exh. 13.

60. To the knowledge of Defendant and John McCabe, they did not receive the letter. 3T110/2-9; 4T67/27-68/7.

61. Plaintiff claims that around 2000, she had a discussion with Defendant in which she offered that each party get an appraisal and that the agreed price would be the average of the appraisals. 3T21/27-22/5.

62. In 2000, Plaintiff paid Homestyle Siding a total of $6,750. Exh. 7

63. John McCabe left Massachusetts in April 2000 and moved to New Jersey on June 1, 2000 without conveying to Plaintiff any forwarding address. 4T11/3-14.

64. In 2000, Defendant made inquiry about the joint checking account Valerie McCabe had had with Erwin and discovered that it no longer existed. 4T100/22-27, 121/1-3, 13-17, 126/9-13.

65. Plaintiff opened a savings account on March 31, 2003 in her name only. Exh. XX; 1T63/24-25; 2T55/24-26.

66. Many withdrawals from the savings account have no notations of the reasons for the withdrawals or said notations are vague. Exh. XX.

67. Plaintiff forwarded to Defendant copies of 1040 Schedule E forms for 2003-2011 related to rental income for tax returns of Plaintiff and John Matulis, her husband; Valerie McCabe and the estate had to report income which was never actually received; Plaintiff never sent to Defendant Schedule E forms for 1998-2000 and destroyed them; Defendant never received Schedule E forms for 2001 and 2002. Exh. 10; 2T54/17-25; 3T101/4-19.

68. Deceased and Defendant paid income taxes on rental income from 2003-2007 in reliance on representations of Plaintiff that the rental income was collected for both co-owners.

69. During the subject period, CPA Frank Marrocco assisted Plaintiff and her husband in preparing their tax returns. 1T50/16-51/4.

70. Plaintiff testified that she had called Defendant in about March 2004 about a worker falling off the roof. 1T34/23-35/7.

71. Plaintiff testified that in about April 2004, she had placed the 2003 Schedule E in Valerie McCabe's mailbox and Defendant had claimed that he never got it; she later testified about a letter she found in her 2005 file referencing a letter she had dropped in Valerie McCabe's mailbox and she didn't know what happened to it; she stated that Defendant had contacted her to the effect that he had not received the tax information. Exhs. 14-15; 1T35/8-11, 55/12-56/3.

72. Valerie McCabe died owning a one-half interest in the subject property on April 13, 2005, a resident of Berlin within the Probate District of Berlin, leaving a will in which she named Defendant as Executor of her estate, which will was duly proved and allowed by the Probate Court for that District, and Defendant duly qualified as such fiduciary as of July 14, 2005 and was thereafter acting as such. CC, Answ., 1st Count, Para. 3; 3T100/11-13.

73. After John McCabe left Plaintiff's house, he did not have any further communications with her until his mother's funeral. 4T18/10-12.

74. At that time, Plaintiff was quite cold toward John McCabe. 4T19/23-25.

75. Plaintiff opened checking account 3090 on September 16, 2005 in her name only. Exh. FFFF; 1T64/1.

76. Plaintiff never kept a running balance on the register for the account and never made any written reconciliation between any statement and the register. Exh. ZZ; 3T65/16-66/5.

77. As to the checking account, the bank imposed on Plaintiff a $10 return item charge on 10/19/05, an additional $25 overdraft charge on 6/26/07 and additional $5 overdraft transfer fees on 9/24/08, 9/26/08, 10/30/08, 11/3/08, 11/5/08 and 12/30/08; she cannot say that she refunded any bank charges to the common fund. Exhs. YY, FFFF; 3T66/23-67/25.

78. Between 2005 and 2007, Defendant gave John McCabe copies of letters that Plaintiff had written to him. 4T31/27-32/3.

79. In a letter whose date is unclear, Plaintiff enclosed a copy of the 2005 Schedule E; she asked Defendant about his plans about selling the place. Exh. 17.

80. Plaintiff first paid from the common fund $75 for preparation of the Schedule E forms on May 12, 2006 (check #105), and an additional $100 (119), $75 (195) and $50 (768) for the same. Exhs. ZZ, BBB.

81. In a letter dated March 27, 2007, Plaintiff requested that Defendant "send me a copy of the appraisal for review and we can go from there." Exh. 18.

82. In a letter dated April 26, 2007 to Defendant, Plaintiff stated, "Could you please send me a copy of the appraisal for 359 Wethersfield Road. I did get the name of an appraiser and will call. Of course, prices have softened in the past year .... This is a quick list of things that need to be addressed before a sale takes place. As I mentioned before there is some money in the account. Are there things you want to fix before the sale? They will show up on home inspection." Exh. 19.

83. Part of Defendant's duties as Executor was to make an accounting of the property of his mother's estate to the Probate Court. 4T21/8-12.

84. Defendant had several discussions with John McCabe about the house in 2007. 4T21/12-15.

85. John McCabe told Defendant that he should ask Elaine for some of the money that she was holding from rent; otherwise, she might be more difficult later. 4T32/15-19.

86. Defendant's response was always more or less the same; he said that Plaintiff screamed when they talked, and thus, he did not want to talk to her. 4T102/26-27, 124/17-20.

87. John McCabe told Defendant that his relations with Plaintiff were also not good. 4T23/10-11.

88. In 2007, the secretary of the Probate Court sent Defendant a letter stating that he was behind schedule. 4T102/24-25.

89. Several times in 2007, Defendant mentioned to John McCabe that he needed date-of-death and present values of moneys of his mother which were held by Plaintiff. 4T70/5-19.

90. As a result, they decided to have a 3rd party contact Plaintiff to less provoke her. 4T23/11-16.

91. Thus, in November 2007, John McCabe contacted Attorney Richard H. Kosinski and asked him to obtain information on date-of-death and present values of property of the estate being held by Plaintiff. 4T23/14-23, 41/18-23.

92. In early 2008, in further discussions, John McCabe suggested to Defendant that he contact Plaintiff, but Defendant told him that he was afraid to talk with her due to his past discussions with her. 4T24/8-16, 69/22-26.

93. In order to prepare an accurate Inventory for Probate Court, Defendant instructed his counsel, Attorney Kosinski, to contact Plaintiff and request that she provide date of death and present values of any of his mother's assets in her possession. 4T102/20-103/2.

94. That was the sole reason for Attorney Kosinski's initial contact on January 17, 2008. Exh. J.

95. In response, Plaintiff initially disclosed to Attorney Kosinski the existence only of the savings account. 1T78/13.

96. Attorney Kosinski spoke again to Plaintiff on February 18, 2008. Exh. J.

97. In an envelope postmarked February 19, 2008, Plaintiff sent to Attorney Kosinski a letter stating the date of death value of the savings account. Exh. H; 2T112/12-26.

98. Thereafter, Attorney Kosinski attempted to obtain from Plaintiff additional financial information related to her doings as property manager; he left numerous messages on Plaintiff's phone, but she did not return his calls between 9-5. Exh. G; 1T77/24; 2T108/21-26, 111/23-112/1.

99. At the time, Plaintiff was working as a state employee with lunch and break times; her hours were usually 8-4. 2T106/27-107/2, 14-22.

100. For a considerable period of time, Plaintiff failed, neglected and refused to provide all of such information. Exh. 20.

101. In an April 1, 2008 letter, Attorney Kosinski requested Plaintiff to provide additional account information. Exh. 20.

102. In 2008, Defendant regularly updated John McCabe as to papers sent to or received from Plaintiff. 4T33/7-17.

103. As time went on in 2008, Defendant and John McCabe became more and more concerned about Plaintiff's conduct and lack of transparency in disclosing details of her management of the premises. 4T103/14-104/8.

104. John McCabe told Defendant that he was not afraid to contact Plaintiff and proposed that he try to obtain the information needed for the probate accounting. 4T24/13-16, 103/19-20.

105. At that time, John McCabe made two telephone calls to Plaintiff at her home. 4T24/19-20.

106. Thus, the first time after his mother's funeral that John McCabe talked to Plaintiff or communicated with her in any way, was May 18, 2008. 1T34/5-13, 81/15; 4T20/22-27.

107. In the first call, John McCabe told Plaintiff that he was contacting her to get date-of-death and present values of money that she was holding from the rental. 4T25/2-7.

108. Plaintiff was quite agitated and raised her voice. 4T25/27-26/1.

109. Plaintiff complained that no one had told her that Attorney Kosinski was acting for them. 4T25/9-12.

110. At some point, Plaintiff stated in a raised voice, “You're just like your father.” 4T25/27-26/3.

111. John McCabe told Plaintiff that his brother and he wanted to be reasonable with her and sell the house to her at a reasonable price, but that they would not just give her the house. 4T26/6-9.

112. In response, Plaintiff stated, “What makes you think that I want to buy the house?” 4T26/12-13.

113. Then, Plaintiff said, “What we need to do is to get the house ready for sale.” 4T26/14-16.

114. Plaintiff told John McCabe that she would order a home inspection and he told her that she could do that if she wanted to; Plaintiff's purpose was to get “an objective opinion as what needed to be done to get the property ready for sale;” Plaintiff

had discussed with Defendant or John McCabe selling the property for “many, many years” since her mother died; Plaintiff forwarded a copy of the report to Defendant. Exh. 6; 1T83/15-19, 22-26, 84/12-85/2; 2T114/26-115/2; 4T26/17-22.

115. John McCabe told Plaintiff that he would inform his brother about the discussion. 4T29/12-19.

116. John McCabe asked Plaintiff if she wanted to know why he had not talked to her for 9 years. 4T26/26-27/2.

117. John McCabe thinks he asked her twice. 4T27/2-3.

118. John McCabe then told Plaintiff the reason. 4T27/3-4.

119. Plaintiff told John McCabe, “That's childish, this is just business.” 4T27/5-6.

120. In the first call, Plaintiff named an account supposedly holding the rental income of the house, but John McCabe does not remember the name. 4T30/5-7.

121. During the discussion, Plaintiff did not give John McCabe any actual information on present or date-of-death values of funds held. 4T29/20-23.

122. In the second call on or about June 1, 2008, Plaintiff gave John McCabe information inconsistent with information that she had stated in the first call, i.e., different accounts. 4T31/6-9.

123. For the first time, she disclosed the existence of a checking account. 2T114/3-6.

124. In neither call did Plaintiff provide John McCabe with either bank account numbers or amounts of money being held in such accounts. 4T31/10-19.

125. John McCabe subsequently told his brother about the conversations. 4T31/20-23.

126. John McCabe saw several letters from Plaintiff. 4T31/27-32/5.

127. In a letter dated June 2, 2008, Attorney Kosinski made a written demand to Plaintiff for the estate's interest in the rental proceeds and for copies of passbooks and financial statements supporting the amount of money sent. Exh. 21; 1T73/25-74/19.

128. As of June 2, 2008, there was $46,970.60 in the savings account, $207.42 in the checking account and $22,562.18 in the Fidelity account, for a total of $69,740.20. Exhs. 7, XX, YY.

129. In a letter dated June 2, 2008 to Probate Judge Walter A. Clebowicz, copied to Plaintiff, Attorney Kosinski cited his April 1, 2008 letter to her and stated that she was “a major obstacle in closing” the estate and that she continued “to fail and refuse to provide” requested information; Attorney Kosinski described her conduct as “inappropriate and disappointing.” Exh. 22.

130. The June 6, 2008 home inspection report stated that it “was prepared for the seller of this property for use in preparing this home for sale.” Exh. 6.

131. Plaintiff's June 8, 2008 letter repeatedly spoke of preparing the property for sale; she claimed she received “one phone call from John McCabe” on June 1, 2008; she further stated, “Once all the repairs are made and the property sold, the monies remaining would be distributed .... it is best to wait until the date when the property is sold and we all review an accounting before any cash on-hand is distributed.... In response to your request for release of funds I must oppose this action. There is a lengthy list of items for repair that need to be addressed before sale of the property .... The items listed need to be repaired to

get fair market value for the property .... A final accounting at the time of sale of the property would be fairest for all;" Plaintiff omitted any mention of copies of passbooks and financial statements supporting the amount of money spent and did not attach such; John McCabe was given a copy of the letter. Exh. 23; 4T34/2-4.

132. John McCabe also saw the response letter by Attorney Kosinski to Plaintiff, dated June 16, 2008, demanding that she stop placing siding and shingles on the house; the letter stated that she had not obtained a building permit and demand was made that she cease and desist from any actions requiring the expenditure of money except for routine maintenance without Defendant's written approval; Defendant and John McCabe had discussed the siding and shingle issue before the letter was sent. Exh. 24; 1T88/22-89/14; 4T37/12-14.

133. Plaintiff claimed she had signed a siding contract the month before. 1T89/23-27.

134. John McCabe saw the June 23, 2008 response letter of Plaintiff in which she replied, "The real estate market is at best challenging now. A seller needs to be prepared and provide the best product.... The alternative is to sell the property at a bargain basement price .... I have listed the items for maintenance/repair per home inspection from Pillar to Post .... All of these items would be considered maintenance items therefore I will plan to proceed with these maintenance repair items as listed, unless for some reason the McCabe's would like to take responsibility that these items be done in a timely fashion so as not to delay any further in preparing the property for sale.... Given the market conditions properties need to be presented to the best advantage to attract buyers or otherwise sellers get a bargain basement offer. Additionally, when a home inspection is done buyers will have several reasons to opt out of the property sale. This is a very tough real estate market now." Items listed included siding, insulation, attic vents, gutters, foundation grade, carpeting and refinishing floors. Exh. 25; 1T90/19-93/7; 4T12-14.

135. Defendant instructed Attorney Kosinski to issue a Subpoena Duces Tecum. 4T104/20-22.

136. On July 10, 2008, Attorney Kosinski issued the Subpoena to compel Plaintiff to produce records related to her property management and testify thereon. CC, Answ., 1st Count, Para. 13; Exh. 30.

137. Plaintiff was "very upset" about the Subpoena. 2T115/15-26, 136/23-26.

138. Plaintiff filed a Motion dated July 18, 2008 in the Probate Court, District of Berlin, to Quash the Subpoena. CC, Answ., 1st Count, Para. 14; Exh. L; 2T117/1.

139. The high point for the common fund was on July 21, 2008, when there was $47,176.44 in the savings account, $9,637.42 in the checking account and $22,607.28 in the Fidelity account, for a total of $79,421.14. Exhs. 7, XX, YY.

140. Plaintiff wrote a letter dated July 31, 2008 in which she stated that she would not release the funds that she is holding; she stated, "I have sent you a copy of the inspection report which lists items for repair prior to a sale of the property. I will attempt to get these repair items taken care of." She further spoke "of an unknown sale date" and "high attorney's fees and various other expenses associated with the sale of the property." She stated that $20,000 would cover the future expenses that she was considering; she stated she had hired an attorney [her husband's law firm] and that would result in reductions to the overall distributions. She stated, "My feelings are to do a distribution at the time of the sale of the property. I do not believe it would be in anyone's interest to sell the property in the current state it is with the repairs needed." She also provided a summary of the accounts, including the date of death value of the Fidelity account. Exh. 26; 2T94/8-96/7, 114/19-25.

141. Plaintiff provided certain documents through her attorney, but Attorney Kosinski faxed a letter dated August 11, 2008 citing numerous items of information omitted from what was provided. Exh. O.

142. Plaintiff claims she should be compensated for prep and appearance time related to an August 20, 2008 Probate Court hearing. Exh. 27, 1T124/18, 124/22-126/17.

143. At the August 20, 2008 hearing, the Court approved an agreement that the deposition would occur on August 29, 2008. 2T117/2-17; 4T105/7-9.

144. Plaintiff filed Motions in the Probate Court dated August 26, 2008 for Permission to Seek Tenants and to Make Repairs. CC, Answ., 1st Count, Para. 19; Exhs. 32-33, Q-R; 2T121/2-14, 124/16-19.

145. Paragraph 6 of the Motion for Permission to Make Repairs states, "The undersigned expects to utilize licensed and insured contractors and tradesmen. She expects to pay for their services from the rental account which is owned jointly with the estate." Exh. 32.

146. The claim for relief in the Motion for Permission to Seek Tenants states, "The undersigned moves this Court for permission to display the premises for rental and, once an acceptable tenant is located, to enter into an appropriate rental agreement." Exh. 33.

147. Plaintiff claims she should be compensated for prep and appearance time at the deposition. 1T127/14-15.

148. Plaintiff provided testimony and produced certain documents related to her property management at the deposition. CC, Answ., 1st Count, Para. 15.

149. At the deposition, Plaintiff provided information to the effect that there was $37,926.44 in the savings account as of August 8, 2008, $1,182.42 in the checking account as of June 25, 2008 and $22,245.30 in the Fidelity account as of December 31, 2007, for a total of $61,354.16. CC, Answ., 1st Count, Para. 16; 1T107/10-12.

150. Documents produced at the deposition were not all of the documents related to her property management. CC, Answ., 1st Count, Para. 17.

151. As of August 29, 2008, there was then enough money for Plaintiff to liquidate the Fidelity account and still maintain at least a $20,000 reserve, but she not did then liquidate the account. 3T57/1-22.

152. During the time her Motions were pending, Plaintiff arranged repairs to and attempted to rent the property; she put up a for rent sign in October, 2008 related to traffic to the Berlin Fair. 2T124/24-125/16, 125/26-126/3, 130/14-27, 131/5-9.

153. Plaintiff claims she should be compensated for arranging repairs, and the common fund should be charged for such repairs while her Motion to Make Repairs was pending. 1T127/11-131/4, 2T23/13-23; 3T29/1-8.

154. On September 19, 2008, Plaintiff paid her attorneys $2,650 from the common fund. Exh. CCC; 3T69/3-15.

155. Plaintiff claims she should be compensated for time related to an October 14, 2008 Probate Court hearing. 1T128/9-11.

156. In October 2008, Plaintiff obtained an appraisal of $190,000 and offered that amount to Defendant as the full price in order to buy out the one-half interest. 3T22/19-23/10.

157. In reliance on her representations about selling the property, Defendant obtained and provided on or before November 5, 2008 an appraisal of the property to determine the price as requested by Plaintiff. 3T22/7-16.

158. On November 4, 2008, in a letter to the Probate Court, Plaintiff, through her counsel, claimed that the Court had jurisdiction to rule on her Motions. Exh. HHH.

159. There was a meeting between the parties on November 5, 2008 to discuss repairs and improvements that Plaintiff had proposed to put the house in condition for sale on the real estate market. 4T47/25-48/8.

160. The meeting was in reliance on the offers by Plaintiff, i.e., her letters, that the only purpose of the repairs was to prepare the house for sale on the real estate market. 2T115/9-14.

161. At that meeting, Plaintiff raised her voice and threatened that Defendant would have to pay her attorney's fees. 4T58/4-8, 106/14-18.

162. At that meeting, a number of repair/improvement items were discussed. 4T48/4-8.

163. Plaintiff was very aggressive, speaking with an agitated voice, essentially demanding agreement on each of the items. 4T58/11-13.

164. In reliance on her representations about selling the property, Defendant agreed to almost all of the items listed in her Motion for Permission to Make Repairs, but she was still aggressively demanding more. Exh. 35; 2T127/5-12; 4T48/13-16.

165. By the end of the meeting, there was disagreement on two items, insulation and re-doing the upper floors by sanding them or installing carpet there. 1T110/24-27, 127/25-27; 4T48/16-22.

166. Plaintiff claims she should be compensated for time spent obtaining a legal opinion related to the upcoming Probate Court hearing and attendance at the hearing. 1T130/22-131/3.

167. Later on November 5, 2008, in Probate Court, both final repair items were discussed. 4T50/20-51/3.

168. On November 5, 2008, the Probate Court denied Plaintiff's Motion for Permission to Seek Tenants, and granted the Motion for Permission to Make Repairs as to insulation only and denied it as to the upstairs rugs/floor, which Order was memorialized in a document dated April 8, 2009 after Defendant moved on March 20, 2009 for an articulation and memorialization. Exhs. 34, CC.

169. In its memorialization decree, the Court stated, “jurisdiction of this matter appertains to this court.” Exhs. 34, CC.

170. Plaintiff never appealed any such Order or any part thereof. CC, Answ., 1st Count, Para. 22; 3T3/17-19.

171. At the November 5, 2008 hearing on Plaintiff's Motions, Probate Court Judge Walter A. Clebowicz suggested selling the property. 2T128/10-16.

172. Agreement about putting the house for sale on the real estate market was made by statements of the two lawyers. 4T59/12-21.

173. The parties told Judge Clebowicz that they had decided to sell the property on the real estate market, but they had not yet agreed on a listing agent or listing price; to facilitate the sale, he proposed that each party provide a list of real estate agents to him and he would choose an agent to set the listing price if the lists did not have a common agent; the parties agreed to provide a list of agents to him. 1T112/15-19; 2T132/4-16; 4T105/21-106/1.

174. Plaintiff knew that “things were solidified at that point” about selling the property. 1T84/6-9.

175. At that point in November 2008 after the probate hearings, commencing a partition action was on Plaintiff's mind. 3T91/11-18.

176. After the denial of her motions and her considering commencing a partition action, Plaintiff still continued making repairs and improvements through at least the first part of December 2008. 3T91/19-92/2.

177. Plaintiff expended monies from the common fund for improvements and continuing efforts to seek tenants after the Probate Court denied her permission to do so; Plaintiff claims she should be compensated for arranging repairs and the common fund should be charged for such repairs after her Motion to Make Repairs was denied. 1T131/5-137/2; 2T23/13-23.

178. After the hearing, Plaintiff left the for rent sign up. 2T130/26-27, 131/10-17,

179. As to the flooring issue which was the subject of Plaintiff's Motion for Permission to Make Repairs and Defendant's objection thereto, she paid $938 on November 20, 2008 to VN Hardwood Floors for sanding and refinishing. Exhs. 37, CCC; 1T118/15-119/15.

180. By letter dated December 1, 2008, Defendant submitted the name of an agent to Judge Clebowicz, but Plaintiff never did. CC, Answ., 1st Count, Para. 25; Exh. T; 1T112/20-21; 2T135/25-136/1; 4T106/2-9.

181. Defendant made a Motion, dated December 3, 2008, for an Order of Distribution of one-half of the funds held by Plaintiff related to the property. Exh. U.

182. On or prior to the date of the partition sale, John McCabe observed new carpeting on the upper floor; on December 6, 2008 and December 19, 2008, Plaintiff paid $390 and $380, respectively, for the upstairs carpeting from the common fund. Exh. CCC; 3T69/16-70/5; 4T63/22-64/2, 10-13.

183. On December 8, 2008, Plaintiff paid her attorneys an additional $1,000 from the common fund, Plaintiff attributing the payments to the questioning of her management fees and being subpoenaed. Exhs. ZZ, CCC; 3T73/19-24.

184. By letter dated December 9, 2008, Plaintiff stated that once certain items were completed, “we would be in a position to put the property on the market” and offered to purchase the property for $190,000. Exh. V.

185. Plaintiff claims she should be compensated for prep time on December 31, 2008 and January 1, 2009. 1T131/16-18.

186. Plaintiff compiled a list of common fund expenditures from August 26, 2008-January 2, 2009 totaling $15,861.71; it included double entries of $765.85 for CF Oil on October 29, 2008 and December 29, 2008, which Plaintiff concedes was a mistake. Exh. CCC; 3T70/18.

187. On or about January 8, 2009, Plaintiff was actively attempting to rent the property. Exh. W; 2T28/23-29/6-8.

188. Pictures of Plaintiff's For Rent sign, which carry her phone number, were made on January 8, 2009. Exh. W.

189. By letter dated January 16, 2009, Defendant requested of Plaintiff certain documents which were not produced at the August 29, 2008 deposition or January 8, 2009 Probate Court hearing. Exh. X.

190. On or about January 20, 2009, Plaintiff commenced her instant action against Defendant. CC, Answ., 1st Count, Para. 27.

191. In this action, Plaintiff has represented that the vacant status of the property was the result of Defendant forbidding her to rent it, when in actual fact said status was the result of the Probate Court denial of Plaintiff's Motion for Permission to Seek Tenants.

192. In this action, Plaintiff never made a Motion for Permission to Seek Tenants. 3T4/12-5/7.

193. On or about January 27, 2009, the Probate Court declined to rule on the Motion for Order of Distribution in favor of the Superior Court. CC, Answ., 1st Count, Para. 28; Exh. Y.

194. In a March 31, 2009 letter from Plaintiff's counsel, Attorney Martin McQuillan, he denied that the Probate Court had denied Plaintiff's Motion for Permission to Seek Tenants and stated that he and his client "recall vividly that the prohibition against renting ... came directly from your lips." Exh. DD.

195. Without the knowledge or consent of Defendant, on December 22, 2009, Plaintiff opened another checking account (4039) in her name only. Exh. AAA; 1T64/9-11; 2T21/23-27; 3T68/6-11.

196. As to the older 3090 checking account, without the knowledge or consent of Defendant, Plaintiff added her daughter's name to the account at about the same time. 1T64/18-27; 2T22/12-13; 3T67/27-68/5.

197. On a 2008 repair list for the property, there was a request for tree removal; Defendant expended time and money engaging in plumbing upgrades; oil furnace repairs; in the summer of 2010, tree removal and pruning, and asbestos coating remediation; and, in February 2011, winterization; charges were a total of $1,500 overall. 4T129/4-131/1, 135/21-136/14.

198. Plaintiff regarded Defendant's information or discovery requests as voluminous, excessive, onerous and harassment, and most of the interrogatories as inappropriately crafted; she claimed she understood her continuing obligation to disclose during the pendency of the action; she claimed she spent an inordinate amount of time responding to repeated requests from Defendant for information. 2T136/27-137/12; 3T26/6-27/2, 78/27-79/5; 4T148/2-5, 149/7-10, 150/12-15.

199. On January 19, 2011, the Court ruled on Defendant's December 28, 2010 Motion for Sanctions and ordered Plaintiff to comply with Defendant's Discovery Request by February 18, 2011. Exhs. FF, GG.

200. In a February 17, 2011 discovery response, Plaintiff claims she produced to Defendant TD Bank account 3090 statements for September 26, 2007-December 23, 2010; she omitted mention of the 4039 account. Exh. HH.

201. Plaintiff states that she worked with her attorney in preparing the response, that the omission was an oversight and that the 4039 account hadn't been opened that long at that point. 3T37/5-7, 40/13-14.

202. In discovery, Plaintiff initially provided Fidelity statements for 2002-2007.

203. In discovery, Plaintiff initially produced a December 23, 2008 CL&P bill under her account number for service to the subject property and an added property she owned at 17 Beckley Road; she omitted page 2 of the bill in her production; she produced only page 3 of a January 23, 2009 bill Exh. DDD; 2T139/25-140/3.

204. Plaintiff claims she purchased 17 Beckley Road shortly prior to December 23, 2008. 3T28/9-10.

205. At trial, at Defendant's specific request, Plaintiff produced a December 23, 2008 bill which, on page 2, showed that the subject property had been billed for 1,605 hours, an increase from the previous month's billing of 101 kilowatt hours. Exhs. DDD, IIII.

206. At trial, at Defendant's specific request, Plaintiff produced a January 23, 2009 bill which still listed the 17 Beckley Road property and, on page 2, showed that the subject property had been billed for an additional 1,555 hours. Exh. GGGG.

207. A January 30, 2009 bill essentially canceled the December 23, 2008 and January 23, 2009 bills. Exh. DDD.

208. On June 13, 2011, a deposit of $3,500 was made to the savings account to reimburse attorney's fees, the deposit being $150 less than the attorney's fees paid from the common fund. Exh. XX.

209. On June 13, 2011, Defendant filed another Motion for Sanctions; and attached passbook pages and check register pages supplied by Plaintiff which were unreadable, and Plaintiff's answer to Interrogatory 34 which Defendant claimed omitted taxes paid and the amount that would have been paid but for interest income. Exh. II.

210. At the November 5, 2011 Committee Sale, Plaintiff bid $188,000 for the property and John McCabe was the successful bidder at $190,000. 3T92/3-16.

211. After the sale, Defendant instructed his attorney to make another demand for distribution of his mother's assets and that was done. Exh. JJ; 4T110/9-13.

212. In response, Plaintiff moved this Court on January 5, 2012 for an order that she turn over the common fund to the Clerk; that was in spite of the fact that the Clerk was already holding $186,058.32 from the sale after payment of Committee fees for the parties to argue about; Plaintiff then knew that the maximum amount of her damage claim was in the $36,000 range, but she omitted that fact from her motion. Jt. Exh 1, Para. 6; Exhs. 40, KK; 2T80/17-82/9; 3T14/23-15/8, 41/24-42/17, 46/1-4, 47/9-12.

213. In ruling on February 27, 2012 on Defendant's June 13, 2011 Motion, the Court ordered Plaintiff to answer Interrogatory 34 as requested and to produce certain additional documents. Exh. LL.

214. When this Court originally took no action on Plaintiff's turnover Motion, Defendant again instructed his attorney to make another demand for distribution of his mother's assets; in response, Plaintiff filed a reclaim of her January 5, 2012 motion. Exhs. MM, NN; 4T110/24-27.

215. Plaintiff subsequently turned over $28,910.80 from liquidation of the common fund to the Clerk, which was in addition to the $186,058.32 net proceeds from the property sale. Jt. Exh. 1, Para. 6; Exh. 00; 1T32/10-13.

216. In a November 2012 Affidavit, Plaintiff stated that in 2008 Defendant's counsel telephoned her, identified himself and demanded release of one-half of the common fund, but she admitted at trial that the only thing discussed in that initial conversation was account date of death values. Exh. AAAA; 2T104/19-21.

217. On January 28, 2013, Defendant filed a further Motion for Sanctions claiming that Plaintiff had not complied with the Court's February 27, 2012 Discovery Order; the Court ordered Plaintiff to comply by March 1, 2013 on items which Defendant had claimed there was noncompliance. Exhs. PP, QQ.

218. The parties agree that but for the claims against each other, each would be entitled to one-half of $214,969.12. Jt. Exh. 1, Para. 7; 1T32/14-17.

219. The 1099 forms for interest and dividends earned during 1999-2011 related to the subject property listed only the name of Plaintiff, not the name of Valerie McCabe or her estate. Exhs. 8-9.

220. If two names had been listed on the forms related to the subject property, the IRS wouldn't care who paid the tax as long as the total tax was reported between the two. 2T95/15-21.

221. Plaintiff had other accounts in the institutions which provided the 1099 forms and she redacted information about the other accounts in copies produced to Defendant. 3T17/3-12.

222. Between 1999-2011, Plaintiff and her husband paid $615,701 in federal and state taxes. Exh. 12; 2T96/6-16.

223. Plaintiff is claiming reimbursement of one-half of $2,774 (or .225% of taxes paid). Exh. 12; 2T96/17-20.

224. Plaintiff produced to Defendant Fidelity statements for 1999-2001 the Thursday before trial. 2T119/2-5; 3T7/18-21.

225. At trial, Plaintiff claimed the Probate Court had no jurisdiction over her. 2T129/9-10, 21-23.

226. At trial, Plaintiff claimed that statements in her July 31, 2008 letter about withholding $20,000 and liquidating the Fidelity account were offers which Defendant was required to accept before she was required to make a distribution from the common fund. 3T12/1-16/11.

227. Plaintiff states that in her notebook some entries made were not contemporaneous with the act reported on, and she is claiming time regarding repairs and improvements between August 26, 2008 and November 5, 2008, for preparation for and attendance at Probate Court hearings and for consulting with her attorneys. 3T25/6-26/5, 29/2-8.

228. Some of the 3090 account statements were not produced to Defendant until April 10, 2013. Exh. FFFF, 3T62/6-10.

II. ARGUMENT

A. Admission of Evidence

Exhibit C for ID is an assessor's field card of the subject property. It contains information helpful to the Court about property and house dimensions. The fact that it contains value information does not detract from the fact that the document is relevant and material. Exhibits TT-VV for ID are appraisals of the subject property at various times. Plaintiff specifically requested Exhibit UU for ID. They are relevant and material since they support Defendant's refusal of Plaintiff's many offers to buy on the grounds that the offers were below market value. They also support Defendant's damage claim of a difference between the fair market value of the property and the partition sale price.

What witnesses for Defendant saw and heard at the November 5, 1998 Probate Court hearing regarding statements or gestures of the parties or their counsel are exceptions to the hearsay rule since they are admissions or statements of the parties; they are also res gestae. Defendant submits that all of the above evidence should be admitted into evidence.

B. Circumstantial evidence

In *Canty v. Otto,* 304 Conn. 546 (2012), the Court stated:

> The intent to defraud almost always is proven by circumstantial evidence. A person's intent is to be inferred from his conduct under the surrounding circumstances, and is an issue for the trier of fact to decide. *State v. Nosik,* 245 Conn. 196, 208, 715 A.2d 673, cert. denied, 525 U.S. 1020, 119 S. Ct. 547, 142 L. Ed. 2d 455 (1998).

The case involved a civil fraud claim, which is an intentional tort.

State v. Maurice M., 303 Conn. 18 (2011), states:
Contrary to the majority's assertions, there was overwhelming evidence to support the trial court's finding that, consistent with Hannaford's express testimony, the back door was not adequately secured to prevent a two year old from exiting, including, most obviously, evidence that *the child was found wandering in the street outside his home.* See *Goldstar Medical Services, Inc. v.*

Dept. of Social Services, 288 Conn. 790, 834, 955 A.2d 15 (2008) ("[T]here is no distinction between direct and circumstantial evidence [insofar] as probative force is concerned .... In fact, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence." [Internal quotation marks omitted.]); *Stein v. Tong,* 117 Conn. App. 19, 24, 979 A.2d 494 (2009) ("[T]riers of fact must often rely on circumstantial evidence and draw inferences from it .... Proof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact."

In this case, what Plaintiff has said is important. Equally, if not more, important is what Plaintiff did despite her pretexts to the contrary.

C. Declaratory Judgment

The Second Count of the Second Revised Complaint sounds in declaratory judgment. P.B. Sec. 17-55 states,
A declaratory judgment action may be maintained if all of the following conditions have been met:

...

(3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure.

Plaintiff's Second Revised Complaint as to the Second Count is utterly devoid of any allegation, nor has she proved that there is no other form of proceeding that can provide her immediate redress. The Third Count is another form of proceeding, as well as allegations sounding in express or implied contract or quantum meruit which Plaintiff could have made. In addition, Plaintiff does not allege a single fact and has not provided credible evidence to support a conclusion of the Court that she should be allowed to proceed with a claim for declaratory judgment despite the existence of any alternate procedure. If the rule requires that the Court make such a conclusion, then Plaintiff must allege and prove facts in support thereof. Plaintiff admits that she requests reimbursement for managing work on the house between August 26, 2008 and November 5, 2008. In this period, she was managing work while her Motion for Permission to do that very work was pending in the Probate Court. In this period, she did not have any agreement of Defendant to perform more than routine maintenance. Since there was no agreement to even do the work at this time, e.g., Defendant had not yet agreed to the repairs and improvements, she should not be paid for her time to manage the work. Plaintiff had previously unilaterally paid herself 10% of annual rental income. Since the Probate Court denied her Motion for Permission to Seek Tenants, there was no rental income after August 2008. Absent a specific agreement with Defendant that she should receive payment and other alleged damages even though her actions did not result in any rental income, there is no legal basis for such payment or other damages. There was no reason for the Probate Court to have denied her Motion other than that Judge Clebowicz concluded that the property should be sold, as Plaintiff had represented to Defendant for years that it would be sold on the market. Plaintiff admits that she held money of the common fund in her own name at all times. Thus, she is legally liable to pay income taxes on interest, i.e., she held the accounts as sole owner. She could have avoided such tax liability on interest by holding the fund as a joint owner with Valerie McCabe and her estate or by distributing the common fund, but she chose not to do either. Considering the amount of federal and state taxes she paid during the claimed period, and the amount of reimbursement she is claiming from Defendant, her claim is utterly petty. Both the law and the substantial evidence support a finding in favor of Defendant in Plaintiff's Second Count.

D. Tortious Interference

The Third Count sounds in tortious interference with a financial expectancy of income from re-rental of the premises at 359 Wethersfield Rd, Berlin, CT. Plaintiff alleges:
10. Defendant, as co-owner, directly and/or through his counsel of record in this matter, forbade her to re-rent the premises and insisted they remain vacant ....

11. The Defendant continues to forbid Plaintiff to re-rent the premises to this day and, owning only an undivided half-interest in same, she is unable to do so without his consent

....

13. Plaintiff was thus deprived of her share of the leasehold income which would have been thus generated.

Plaintiff's claim for relief is based on her alleged inability to rent the premises due to an alleged refusal of Defendant to consent to the rental the premises. That is, Plaintiff alleges that Defendant's refusal to agree to the rental of the premises is the "proximate cause" of Plaintiff's alleged inability to rent said premises. Thus, Plaintiff pleads that Defendant's alleged refusal to give such consent provides the needed causation element for the intentional tort of "tortious interference with a financial expectancy."

In response, Defendant contends that there is no proximate cause between his alleged refusal to consent to the rental of the premises and the ability of Plaintiff to re-rent said premises. In Connecticut General Statutes Title 47a, dealing with landlord and tenant, the following is stated:
Sec. 47a-1. Definitions As used in this chapter ...:

(d) *"Landlord" means the owner,* lessor or sublessor *of the dwelling unit,* the building of which it is a part or the premises.

(e) *"Owner" means one or more persons,* jointly or severally, *in whom is vested* (1) all or *part of the legal title to property* or (2) all or part of the beneficial ownership *and a right to present use and enjoyment of the premises* and includes a mortgagee in possession.

Sec. 47a-3. *Rental agreement: Permissible terms*

A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by law, *including rent,* term of the agreement and other provisions governing the rights and obligations of the parties (underlining added).

The above clearly states that:

A) An "Owner ... vested in ... *part* of the legal title to property ... and a right to present use and enjoyment of the premises" can be a Landlord. Therefore, there is no requirement that a Landlord own the entire legal title.

B) Such an Owner of *part* of the title may enter into a rental agreement whose terms and conditions include *rent.*

Thus, since Plaintiff pleads that she is a co-owner of the premises, any supposed refusal of Defendant to agree to the rental of said premises would not interfere with her ability to rent said premises. For that reason, any such supposed lack of consent by Defendant does not provide the needed legal causation element of the alleged tort of interfering with her ability to receive financial benefit by renting the premises.

Furthermore, Plaintiff must prove that Defendant "was guilty of fraud, misrepresentation, intimidation or molestation ... or that the defendant acted maliciously." *Blake v. Levy*, 191 Conn. 257, 261 (1983); *Kecko Piping Co. v. Monroe*, 172 Conn. 197, 201-202 (1977). Plaintiff has not alleged or proved such.

Plaintiff continued to try to rent the house in 2008 and 2009, and no action of Defendant stopped her from trying to rent. Plaintiff admits that she had a for rent sign up from October 2008 for the Berlin Fair to at least January 2009, thereby providing strong evidence that Defendant had not interfered with her expectations to rent the property. Indeed, she did not rent the property due to the Probate Court Order. Exhibit W evidences that Plaintiff was trying to rent the house on January 8, 2009 and at the date of the earlier Probate Court hearing, i.e., early November 2008. Plaintiff has herself admitted same at trial.

There is an intimidation element to this tort. There is no evidence at all for such an element. Plaintiff's refusal to give any money to Defendant and other issues with her management as well as her intention to sell are further defenses. Another defense to the tort of interference with prospective economic advantage is "proper justification." Plaintiff's many bad business practices would have given "proper justification" for Defendant to interfere with further *joint* rental of the house. For example, Plaintiff ignored requests of Defendant, e.g., by threatening multiple improvements to the house with money from the common fund, after Defendant requested that she limit expenditures to routine maintenance.

On the other hand, decedent's estate, acting through Defendant, has been deprived of the financial benefits of decedent's interest in the property. Plaintiff knew of the financial expectancy of deceased and Defendant related to the property. Although Defendant has demanded an accounting of the rents and income from Plaintiff, she has neither paid nor accounted to him for the rents and income. The substantial evidence supports a finding by the Court that Plaintiff was guilty of fraud, misrepresentation, intimidation or molestation or that she acted maliciously.

E. Partnership, Good Faith and Fair Dealing, Duty of Care

Plaintiff violated a partner's duty of loyalty and/or the duty of care by acts that *wasted* monies of the common fund, which was partnership property. While Plaintiff's acts wasted or misused the partnership assets, the legal wrong was a violation of a partnership duty, conversion or statutory theft.

Under C.GS. Title 34, there was an at-will partnership between Plaintiff and Valerie McCabe and later her estate for the purpose of renting the property at 359 Wethersfield Rd., Berlin CT for profit. The rental proceeds were the property of the partnership. Even if the Court does not find that there was a partnership, the partnership statute states many of the principals of law which would apply to a joint ownership such as the instant one. The statute merely codified long-standing principals of common law as they relate to partnerships and joint ownerships. The definitions portion of C.G S. Title 34 provide for a partnership when there is an agreement that is written, oral or even implied, i.e., very broad conditions. See below definitions (12) -- (13).
Sec. 34-301. Definitions. As used in sections 34-300 to 34-434, inclusive:

12) "*Partnership" means an association of two or more persons to carry on as co-owners a business for profit formed* under section 34-314, predecessor law or comparable law of another jurisdiction, and includes for all purposes of the laws of this state a registered limited liability partnership.

(13) "Partnership agreement" means the agreement, whether written, *oral or implied*, among the partners concerning the partnership, including amendments to the partnership agreement.

(14) "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

(15) "Partnership interest" or "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights .... (underlining added)

Section 34-314 defines formation of a partnership under very broad conditions. For example, a partnership may be formed by an association of two persons to carry on a business for profit as co-owners *whether the persons intend it or not.* Plaintiff and Valerie McCabe and later her estate formed and maintained an at-will partnership by agreeing to rent the property for profit.
Sec. 34-314. Formation of partnership.

(a) Except as otherwise provided in subsection (b) of this section, *the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.*

(b) An association formed under a statute other than sections 34-300 to 34-399, inclusive, a predecessor statute or a comparable statute of another jurisdiction is not a partnership under sections 34-300 to 34-399, inclusive, unless such association is a foreign registered limited liability partnership.

(c) In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) *A person who receives a share of the profits of a business is presumed to be a partner in the business*, unless the profits were received in payment: ... (underlining added)

Here, subsection (c)(1) does not imply that there was not a partnership. In particular, there was more than a tenancy in common in this case. Since as far back as the early 1970s, the subject property was not occupied by the co-owners and was rented for profit. That made the co-owners partners in addition. The parties herein originally agreed to rent the property together, there was some communication of information from Plaintiff to Defendant, and since 2003, Plaintiff sent Schedule E forms to Defendant presumptively for the purpose of splitting tax liability on the rental income. In addition, Plaintiff admits to having held the rental proceeds in a common fund. Together, these acts are evidence of the existence of a partnership.

The non-waivable duties of partners include a duty of loyalty, duty of care and an obligation of good faith and fair dealing:
Sec. 34-303. Effect of partnership agreement. *Nonwaivable provisions.*

(a) Except as otherwise provided in subsection (b) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, sections 34-300 to 34-399, inclusive, govern relations among the partners and between the partners and the partnership.

(b) The *partnership agreement may not:*

(1) Vary the rights and duties under section 34-305 except to eliminate the duty to provide copies of statements to all of the partners;

(2) *Unreasonably restrict the right of access to books and records* under subsection (b) of section 34-337;

(3) *Eliminate the duty of loyalty* under subsection (b) of section 34-338 or subdivision (3) of subsection (b) of section 34-357, but: (A) The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty,

if not manifestly unreasonable; or (B) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(4) *Unreasonably reduce the duty of care* under subsection (c) of section 34-338 or subdivision (3) of subsection (b) of section 34-357;

(5) *Eliminate the obligation of good faith and fair dealing* under subsection (d) of section 34-338, but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(6) Vary the power to dissociate as a partner under subsection (a) of section 34-356, except to require the notice under subdivision (1) of section 34-355 to be in writing;

(7) Vary the right of a court to expel a partner in the events specified in subdivision (5) of section 34-355;

(8) Vary the requirement to wind up the partnership business in cases specified in subdivision (4), (5) or (6) of section 34-372; or

(9) Restrict rights of third parties under sections 34-300 to 34-399, inclusive (underlining added).

The nonwaivable duties of loyalty and care and good faith and fair dealing are defined in 34-338 as follows:
Sec. 34-338. General standards of conduct of a partner. (a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section.

(b) A *partner's duty of loyalty to the partnership* and the other partners is limited to the following:

(1) *To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct* and winding up *of the partnership business* or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A *partner's duty of care to the partnership* and the other partners in the conduct and winding up of the partnership business is limited to *refraining from engaging in grossly negligent* or reckless conduct, *intentional misconduct or a knowing violation of law.*

(d) A partner shall discharge the duties to the partnership and the other partners under sections 34-300 to 34-399, inclusive, or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing (underlining added).

Plaintiff violated her duty of loyalty by not acknowledging that she was holding the common fund as a trustee, e.g., during 2008 and onward. She also violated the duty of care by engaging in “intentional” misconduct by various transactions from the

common fund in late 2008, e.g., paying her personal lawyers and paying for the rugs, sign, etc. Plaintiff failed to reimburse the common fund for overdraft fees.

Sec. 34-335 states rights and duties of a partner.
Sec. 34-335. Rights and duties of a partner.

(b) *Each partner is entitled to an equal share of the partnership profits* and, except as provided in subsection (c) of section 34-327, is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

(f) *Each partner has equal rights in the management* and conduct of the partnership business.

(g) *A partner may use or possess partnership property only on behalf of the partnership.*

(h) *A partner is not entitled to remuneration for services performed for the partnership,* except for reasonable compensation for services rendered in winding up the business of the partnership.

(j) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. *An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all of the partners.*

(k) This section does not affect the obligations of a partnership to other persons under section 34-322 (underlining added).

Thus, the default situation of the statute is that each partner has rights to an equal share of profits and equal rights to manage. More importantly, a partner may use partnership property only on behalf of the partnership. Plaintiff violated this by using some of the common fund to pay her personal expenses. In addition, (h) states that a partner is not entitled to remuneration, but that may be waivable. Defendant may have waived that while the house was being rented. Subsection (j) requires consent of all partners to do anything outside of “ordinary course of business.” Thus, only the use of the common fund for *routine maintenance and repairs* would have been in accord with this subsection. Otherwise, Plaintiff violated this subsection in acting without Defendant's consent. Plaintiff had other business practices that made it unreasonable for Defendant to continue to jointly rent with her. For example, she did not confer with deceased or him prior to opening accounts for use of money of their business partnership, thereby violating partnership duties of care and good faith. Defendant testified that Plaintiff never told him about opening new accounts. Defendant stated that he did not know the accounts for the common fund were in the name only of Plaintiff. Plaintiff was not forthcoming with information when asked, thereby making it difficult to have business relations with her, e.g., it was more than 6 months before Plaintiff disclosed date of death values for the money in the Fidelity account. Plaintiff had other business practices that made it unreasonable for Defendant to continue a business relationship with her. For example, Plaintiff did not confer with Defendant prior to taking a management fee and did not confer with Defendant prior to increasing her management fee to 10%, thereby violating partnership duties of care and good faith.

Plaintiff had a duty to convey one-half of the rent that she collected on the farmhouse for 10 years, minus maintenance and costs such as insurance and property taxes. The duty to convey is based on the duty to share rental income on jointly owned property. Although Defendant has demanded an accounting of the rents and income from Plaintiff, she has neither paid nor accounted to him for the rents and income.

Plaintiff has never claimed that she did not have records from the financial institutions where the common fund monies were held. It would not have been appropriate to expend estate funds to obtain records directly from financial institutions when she had a duty to produce them. Plaintiff wasted moneys from the common funds. Large expenditures to Plaintiff's attorneys

were not proper expenses for any property co-owned with the Estate of Valerie McCabe. Instead, the checks were written to Plaintiff's personal lawyers. Plaintiff hired lawyers to represent her during proceedings at the Probate Court, but her lawyers were representing her personal interests. Thus, the legal expenses were her personal expenses rather than expenses attributable to property co-owned with the Estate of Valerie McCabe. For that reason, Plaintiff's use of the funds co-owned with the Estate of Valerie McCabe to pay legal expenses was waste of the co-owned funds.

During the November 5, 2008 hearing at the Probate Court, Plaintiff requested authorization to either: redo the floors of two upstairs bedrooms in the house or to carpet said floors. At the hearing, the Court refused the request with respect to the floors of the two upstairs bedrooms. The checks written on December 6, 2008 for $390 to Carl Caputo for carpet installation and on December 19, 2008 for $380 to Chase Card for carpet upstairs are strong evidence that Plaintiff carpeted said bedroom floors in spite of the refusal of the Court to allow expenditures of co-owned funds for said use. The payment for that carpeting from the common fund was conversion by Plaintiff. Since this action violated a Court Order, it is evidence that Plaintiff violated the partnership duties of care and good faith. Such expenditures against the Order of the Court were also waste of the funds that are one-half owned by the Estate of Valerie McCabe. John McCabe testified that new carpeting was put in the upstairs of the house.

At the hearing, Plaintiff moved for authorization to dispense a considerable portion of funds that were one-half owned by the Estate of Valerie McCabe to improve the house. During the prior meeting with Defendant and at the hearing, Plaintiff represented that the improvements were needed to put the house in saleable condition for listing on the real estate market, i.e., representing that an ordinary listing sale of the house would subsequently occur. Defendant agreed with some of the expenditures and the Court authorized expenditures of co-owned funds. for some purposes on Plaintiff's Motion, and said expenditures were made from the co-owned funds. Many or all of the expenditures made to repair or improve the house's condition were lost because the subsequent partition sale led to a sale price that was lower than the market value of the house. That is, if Plaintiff's real goal from the beginning was to seek partition if Defendant did not agree to sell to her at a below market price, and that is precisely what Defendant contends, many of the financial expenditures on the house effectively wasted the funds, which were one-half owned by the Estate of Valerie McCabe, because said expenditures were not recuperated by a comparably higher price for the house at a partition sale. In the case of the funds that Plaintiff held and that were one-half owned by the Estate of Valerie McCabe, there is strong evidence of such waste. Even if the property had been sold on the real estate market, Plaintiff expended monies from the common fund for improvements in amounts greater than any resulting increase in the value of the property.

F. Conversion

Conversion occurs when a bailor withholds the property of his bailee without authorization. Intentionally withholding of property of a bailee by a bailor, without authorization, is conversion. *Mystic Color Lab, Inc. v. Auctions Worldwide LLC,* 284 Conn. 408, 934 A.2d 227 (2007), defines the tort of conversion, states that a bailor-bailee relation can be the basis of conversion and states a fiduciary relationship is characterized by a unique degree of trust and confidence. In *Mystic*, the Court stated,
Conversion is an unauthorized assumption and exercise of the right of ownership over property belonging to another, to the exclusion of the owner's rights. E.g., *Deming v. Nationwide Mutual Ins. Co.,* 279 Conn. 745, 770, 905 A.2d 623 (2006); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.,* 255 Conn. 20, 43, 761 A.2d 1268 (2000); *Devitt v. Manulik,* 176 Conn. 657, 660, 410 A.2d 465 (1979). Similarly, statutory theft is the stealing of another's property or the knowing receipt and concealment of stolen property. See *General Statutes § 52-564* ("[a]ny person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages"). *Statutory theft, however, requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property. Suarez-Negrete v. Trotta,* 47 Conn. App. 517, 521, 705 A.2d 215 (1998). Nonetheless, to prevail on either claim, the *party alleging conversion or statutory theft must prove a sufficient property interest* in the items in question. See *Falker v. Samperi,* 190 Conn. 412, 419-20, 461 A.2d 681 (1983) (plaintiff's property rights are at heart of conversion, and proof of ownership is plaintiff's burden); *Discover Leasing, Inc. v. Murphy,* 33 Conn. App. 303, 309, 635 A.2d 843 (1993) (prima facie case for conversion and statutory theft requires proof that property in question "belonged to" plaintiff). Accordingly, a claim for *conversion may be brought when the relationship is one of bailor and bailee but not when it is one of debtor and creditor.* See *United States v. Johnston,* 268 U.S. 220, 226-27, 45 S. Ct. 496, 69 L. Ed. 925, 1925-1 C.B. 313, TD. 3714 (1925).

284 Conn 408, 418-9; 934 A.2d 227, 234-5 (underlining added).

The Court further stated,
In contrast, "[a] relationship of bailor-bailee arises when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose has been fulfilled, or to otherwise deal with the goods according to the bailor's directions .... In bailment, the owner or bailor has a general property [interest] in the goods bailed .... The bailee, on the other hand, has mere possession of items left in its care pursuant to the bailment." (Citations omitted; internal quotation marks omitted). *B. A. Ballou & Co. v. Citytrust,* 218 Conn. 749, 753, 591 A.2d 126 (1991). A bailment therefore contemplates redelivery of goods entrusted to the bailee ....

284 Conn 408, 419-20; 934 A.2d 227, 235 (underlining added).

Deming v. Nationwide Mut. Ins. Co., 279 Conn. 745, 905 A.2d 623 (2006), defined the tort of conversion with right to ownership and harm and stated that conversion requires property to be identifiable. The Court stated,
"The tort of *[c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights."* (Internal quotation marks omitted.) *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.,* 255 Conn. 20, 43, 761 A.2d 1268 (2000). Thus, *"[c]onversion is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm.* The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm .... *The term owner is one of general application and includes one having an interest other than the full legal and beneficial title* .... The word owner is one of flexible meaning, and it varies from an absolute proprietary interest to a mere possessory right.... It is not a technical term and, thus, is not confined to a person who has the absolute right in a chattel, but also applies to a person who has possession and control thereof." (Citation omitted; internal quotation marks omitted.) *Label Systems Corp. v. Aghamohammadi,* 270 Conn. 291, 329, 852 A.2d 703 (2004).

"Statutory theft under *§ 52-564* is synonymous with larceny under *General Statutes § 53a-119*.... Pursuant to *§ 53a-119,* [a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or [withholds] such property from an owner.... Conversion can be distinguished from statutory theft as established by *§ 53a-119* in two ways. First, statutory theft requires an intent to deprive another of his property; *second, conversion requires the owner to be harmed by a defendant's conduct.* Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Citations omitted; internal quotation marks omitted.) *Howard v. MacDonald,* 270 Conn. 111, 129 n.8, 851 A.2d 1142 (2004). Under our case law, *"[m]oney can clearly be subject to conversion.* See *Devitt v. Manulik,* 176 Conn. 657, 662-63, 410 A.2d 465 (1979) (recovery of money wrongfully taken from joint survivorship bank account); *Dunham v. Cox,* 81 Conn. 268, 270-71, 70 A. 1033 (1908) (recovery of a sum of money entrusted to the defendant for payment to a third person); ... *See Howard v. MacDonald, supra,* 270 Conn. 111 (unlawful transfer of funds from **elderly** woman's bank account to defendant's bank account). *The plaintiff's must establish, however, legal ownership or right to possession of specifically identifiable moneys. Macomber v. Travelers Property & Casualty Corp.,* 261 Conn. 620, 650, 804 A.2d 180 (2002).

279 Conn 745, 770-73; 905 A.2d 623, 639-41 (underlining added).

Conversion occurs when a party knowingly and wrongfully withholds the property of another person to the exclusion of the other person. Partners in a partnership or joint venture have a fiduciary relationship. An unauthorized deprivation of property of a first person by a second person having a fiduciary relation to the first person is an unauthorized deprivation of the property for the tort of conversion. The law will imply a fiduciary duty to a party having a high degree of control over property of another

person if the other person placed his trust and confidence in the party. *Hi-Ho Tower Inc. v. Com-Tronics, Inc.* , 255 Conn. 20, 761 A.2d 1268 (2000), defines the tort of conversion and fiduciary, states that partners have a fiduciary duty and states when a fiduciary duty will be implied by law. The Court states,
It is well settled that "a fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." ... we have recognized that *not all business relationships implicate the duty of a fiduciary* ....

In the seminal cases in which *this court has recognized the existence of a fiduciary relationship,* the *fiduciary was either* in a dominant position, thereby creating a relationship of dependency, *or was under a specific duty to act for the benefit of another*.

In *Dunham v. Dunham,* supra, 204 Conn. 305, a younger brother brought an action against his older brother, an attorney who had represented the plaintiff and in whom the plaintiff continuously placed his trust and confidence for both legal and nonlegal advice, challenging certain probate proceedings and inter vivos transfers of family property. We upheld the trial court's instruction to the jury that, on the basis of the evidence presented, in addition to legal malpractice, the jury could find that the defendant breached his fiduciary duty because the defendant stood in a position of trust and confidence, and the plaintiff relied upon him for both legal and nonlegal advice. *Id., 321.* Similarly, in *Konover Development Corp. v. Zeller, supra,* 228 Conn. 218-19, we recognized that general and limited *partners are "bound in a fiduciary relationship"* and, as such, must act as trustees and represent the interests of each other.

In the cases in which *this court has,* as a matter of law, *refused to recognize a fiduciary relationship,* the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, *or the parties were not engaged in a relationship of special trust and confidence*....

255 Conn 20, 38-9; 761 A.2d 1268, 1278-9 (underlining added).

"The law will imply [fiduciary responsibilities] only where one party to a relationship is unable to fully protect its interests [or *where one party has a high degree of control over the property or subject matter of another] and the unprotected party has placed its trust and confidence in the other."* (Internal quotation marks omitted.) *Ward v. Lange,* 1996 SD 113, 553 N. W.2d 246, 250 (1996).

255 Conn 20, 41; 761 A.2d 1268, 1280 (underlining added).

The tort of "conversion occurs when one, *without authorization,* assumes and *exercises ownership over property belonging to another, to the exclusion of the owner's rights."* ... *Similarly,* "statutory theft under *[General Statutes] § 52-564* is synonymous with larceny [as provided in] *General Statutes § 53a-119* .... Pursuant to *§ 53a-119,* [a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he *wrongfully takes, obtains or [withholds] such property from [the] owner."* ...

In Connecticut, intangible property interests have not traditionally been subject to the tort of conversion, except for those intangible property rights evidenced in a document. See, e.g., *Aetna Life & Casualty Co. v. Union Trust Co.,* 230 Conn. 779, 790 n.6, 646 A.2d 799 (1994) (conversion of trust account); *Devitt v. Manulik,* 176 Conn. 657, 662-63, 410 A.2d 465 (1979) (conversion applicable to account passbook).... 255 Conn 20, 43-44; 761 A.2d 1268, 1281 (underlining added).

... an essential *element of the tort of conversion is the unauthorized use of another's property. Wellington Systems, Inc. v. Redding Group, Inc., supra,* 49 Conn. App. 169. Similarly, *statutory theft requires* that a defendant " *'wrongfully' "* take, obtain *or hold the property of another. Suarez-Negrete v. Trotta, supra,* 47 Conn. App. 520-21. 255 Conn 20, 47; 761 A.2d 1268, 1282-3 (underlining added).

An unauthorized exercise of ownership of the property of another that deprives the other of his/her property for an indefinite time supports a claim of conversion even if the property is returned to the owner after a deprivation of the property for an indefinite period. *Aetna Life and Casualty Company v. Union Trust Company,* 230 Conn. 779, 646 A.2d 799 (1994), states,
"We have defined conversion as an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights .... It is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm." (Internal quotation marks omitted.) *Moore v. Waterbury Tool Co.,* 124 Conn. 201, 209, 199 A. 97 (1938); see also *Falker v. Samperi,* 190 Conn. 412, 419, 461 A.2d 681 (1983); *Devitt v. Manulik,* 176 Conn. 657, 660, 410 A.2d 465 (1979); 1 *Restatement (Second), Torts § 222A* (1965); D. Wright & J. Fitzgerald, Connecticut Law of Torts (2d Ed. 1968) § 25 ("an action of conversion is a suit for damages by the owner of a chattel or by one entitled to the immediate possession of the chattel, against one who has wrongfully appropriated the chattel... in derogation of the rights of the rightful owner or possessor").

230 Conn. 779, 790-1; 646 A.2d 799, 804.

Sullivan v. Delisa, 101 Conn. App. 605, 923 A.2d 760 (2007), states,
The elements that the plaintiff's must prove to *obtain treble damages under the civil theft statute, § 52-564,* are the same as the elements required to prove larceny, pursuant to *General Statutes § 53a-119. Deming v. Nationwide Mutual Ins. Co.,* 279 Conn. 745, 770-71, 905 A.2d 623 (2006). *The elements of civil theft are also largely the same as the elements to prove the tort of conversion, but theft "requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion."* (Internal quotation marks omitted.) *Id., 771.* "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner... It must be shown that (1) there was an intent to do the act complained of, (2) the act was done wrongfully, and (3) the act was committed against an owner." (Internal quotation marks omitted.) *State v. Spillane,* 54 Conn. App. 201, 217-18, 737 A.2d 479 (1999), rev'd on other grounds, *255 Conn. 746, 770 A.2d 898 (2001).* "The essential cause of action is a wrongful exercise of dominion over personal property of another." *Semon v. Adams,* 79 Conn. 81, 82, 63 A. 661 (1906). It is not wrongful "to commit an act which would otherwise be ... a conversion if the act is, or is reasonably believed to be, necessary to protect the actor's land ... and the harm inflicted is not unreasonable as compared with the harm threatened." 1 *Restatement (Second) Torts, § 260 (1),* p. 490 (1965). 101 Conn. App. 605, 619-20; 923 A.2d 760, 771 (underlining added).

Since her **elderly** aunt and cousin placed their trust and confidence in her and they relied on her superior knowledge in the field of real estate, she had a fiduciary duty to protect their interests. Instead, she opened accounts in her name only and thus deprived them of access to monies in which they had an interest. There is substantial evidence that Plaintiff had the intent to control the money of the common fund to the exclusion of deceased and Defendant. Plaintiff admitted she knew that Valerie McCabe or Defendant could have withdrawn money from the common fund if the accounts had been joint. This shows that she was controlling the money of the common fund as if it was her own rather than as a fiduciary, the essence of conversion. Although repeatedly requested to make distributions from the common fund, since 1998 she failed and refused to pay even a penny to her aunt and cousin. No distribution of even a penny for over 14 years qualifies as deprivation for "an indefinite time." Depriving Defendant of money for an indefinite period of time was harm.

Plaintiff's mother and aunt had had a joint checking account for the property which had been rented since the early 1970s, which account had a balance of almost $7,000 earlier in 1998. However, Plaintiff claims that she started management of the property in about October 1998 with a blank slate and knew nothing about any accounts related to the property. That claim is not credible

or even plausible. When Plaintiff took over management, where is the money which was on hand and the accounting for it? One can reasonably conclude that the money was commingled with other funds of Plaintiff and disappeared.

Plaintiff claims that from about October 1998, the Franks, four gentlemen and the Willises were her tenants. The Willises became tenants on August 15, 1999 and paid $1,050 monthly. Yet, Plaintiff did not open the Fidelity account until March 1999 and deposited a total of $4,957.99 into it in 1999. Where is the rest of the money and the accounting for it? One can reasonably conclude that the rest of the money was commingled with other funds of Plaintiff and disappeared.

Plaintiff admitted that she received a demand to disperse monies of the common fund and that she did not make any disbursement, which is prima facie conversion. Plaintiff admitted that she received a letter from Attorney Kosinski making a demand for disbursement of the estate's part of the common fund in June 2008. Plaintiff wrote a letter refusing to make a disbursement in response to Defendant's request, prima facie conversion. Plaintiff admitted that she held the common fund for four years after the initial demand for disbursement by Defendant, thereby effectively depriving him of the money for an indefinite period, prima facie conversion.

In addition, using monies from the common fund, without prior authorization, for improvements rather than routine maintenance and repairs was also conversion. Plaintiff refused to follow Defendant's request to use moneys only for routine maintenance. That was in spite of the fact that in 2000, Plaintiff had paid Homestyle Siding a total of $6,750. In her letter to Attorney Kosinski, Plaintiff stated that she would treat all items of the Pillar to Post report as routine maintenance items and thus as authorized by the letter of Attorney Kosinski requesting that expenditures be limited to routine maintenance. Plaintiff's letter listed items that were clearly upgrades. Thus, the letter showed that Plaintiff intended to control use of the common fund as her own property rather than holding the fund as a fiduciary, thereby converting it. That is, she stated that she would make expenditures with moneys of the common fund which Attorney Kosinski's earlier letter demanded that she not make. That was all part of her plan to buy a one-half interest in the improved property at a below market price.

Plaintiff wrote a July 31, 2008 letter refusing to distribute the estate's portion of the common fund. Her statement about a possible partial distribution was still a refusal to distribute, confirmed by a later statement in the letter. Plaintiff, as a fiduciary, had no right to withhold any of the one-half portion of the common fund, even for future expenses, when demand for disbursement was made. At any rate, she made no disbursement at all. There was no condition precedent that she receive a response or request in order to fulfill her duty to disburse a part of the common fund.

At her August 29, 2008 deposition, she disclosed information to the effect that she had over $60,000 from the common fund in accounts in her name only. In actual fact, as of July 21, 2008, she had almost $80,000 in the common fund. Any claim by her that she could not make any distribution because of anticipated future expenses is pretexual, not credible or even plausible. She was managing an old farmhouse, not some royal palace.

On two occasions, she had the gall to use monies from the common fund to pay her own attorneys. Plaintiff testified about the situation that existed around the time of the November Probate Court hearing. She talked about the relationship between the “parties,” indicating that each party had to hire a lawyer. That is, she implied that she had to hire a lawyer to represent her own interests, i.e., to negotiate about disagreements between the parties. Thus, she had a lawyer to represent her personally rather than hiring a lawyer to represent the partnership with the estate. Plaintiff admitted to payments of $2,650 and $1,000 from the common fund to her lawyers. She stated that part of the attorney fees were related to questioning her management fees. This has more to do with a personal issue than with a partnership issue; the attorney represented her personally relating to fees that she was paid for management. Therefore, her payments to her personal lawyer with moneys of the common fund was an act of conversion. She cannot hide those acts of conversion by stating her own lawyers said that was OK. They had a conflict of interest in giving any such advise. Moreover, if the advice came from her lawyer husband, who has at least an emotional, if not a financial, interest in the outcome of this action, that advice is even more conflicted. Later restitution of part of those monies does not eliminate the earlier acts of conversion. Also, the use of moneys from the common fund for preparation of the Matulis' Schedule E forms was conversion.

Plaintiff admitted to having done flooring work (which violated a Probate Court Order). Equally importantly, she admitted that Defendant had requested that the work not be done prior to the November 5, 2008 Probate Court hearing Thus, her use of the common fund was to pay for work both contrary to authorization of Defendant and contrary to a Court Order. This is conversion. Permission to do this work was discussed at that hearing.

Plaintiff has used the judicial system for her tactical advantage. Even after Defendant had made all those concessions at the November 5, 2008 meeting and things appeared to be on track at the Probate Court hearing later that date, Plaintiff made a shocking U-turn after the Court denied her Motions. That showed Plaintiff's true intent in making the Motions in the first place. When Defendant filed a Motion for Order of Distribution in the Probate Court, in part in response thereto, Plaintiff commenced this action. After the property was sold and the Clerk of Court was holding approximately $186,000 proceeds from the sale for allocation between the parties, Defendant again demanded a distribution from the common fund, but Plaintiff moved that even the common fund be deposited with the Clerk, so as to stubbornly and spitefully avoid having to make a distribution therefrom. In order to induce the Court to grant her Motion, she concealed a material fact from the Court in the Motion, namely, that the maximum amount of her claim against Defendant was about $36,000, which amount was more than covered by Defendant's share of the proceeds from the partition sale. Therefore, Plaintiff could have then disbursed one-half of the common fund without jeopardizing her claim against Defendant. That concealment was an **abuse** of process.

Plaintiff admitted that in December 2009, during the life of the present suit, she made ownership and transfer changes to the accounts of the common fund without advising Defendant, thereby showing that she was using the accounts as her own rather than as a fiduciary. In December 2009, Plaintiff added her daughter to the 3090 account -- even though she transferred the funds. Exercising control over property of another as if it is one's own property is an element of conversion.

If the Court concludes that Defendant is entitled to recover for the conversion of any moneys managed by Plaintiff, the rule for measuring damages is the value of the property at the time it was converted, with interest from that time to this present day at the rate of 10% per annum. *Healy v. Flammia*, 96 Conn. 233 (1921).

G. Trust

In *Town of New Hartford v. Connecticut Resources Recovery Authority*, 291 Conn.

433, 466 (2009), the Court stated:
"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee .... The imposition of a constructive trust by equity is a remedial device designed to prevent unjust enrichment .... Thus, a constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." (Citations omitted; internal quotation marks omitted.) *Cohen v. Cohen*, 182 Conn. 193, 203, 438 A.2d 55 (1980); see also Restatement (Third), Restitution and Unjust Enrichment § 55 (Tentative Draft No. 6, 2008). "A claimant entitled to restitution from property may obtain restitution from any traceable product of that property, without regard to subsequent changes of form." Id., § 58.

A writing is not necessary to create a trust. Trusts of personal property may be created verbally by direct and express statements or by implication from circumstances. *McDonald v. Hartford Trust Co.*, 104 Conn. 169 (1926).

The elements of trust and fiduciary duty have previously been discussed at length in the sections on Partnership, Good Faith and Fair Dealing, Duty of Care and Conversion. By reason of the fact that trust funds and investments have been commingled with the personal funds and investments of Plaintiff, Defendant is entitled to have a constructive trust imposed on the assets

of Plaintiff in the amount of such trust funds and investments. Plaintiff breached and violated her trust by failing and refusing to comply with Defendant's tender demands.

H. Detrimental Reliance

In *Middlesex Mutual Insurance Company v. Donald F. Walsh, Sr., Administrator (Estate of Donald F. Walsh, Jr.),* 218 Conn. 681, 699 (1991), the Court states:
Middlesex' final claim is that Walsh should be estopped from asserting that his son Donald was a resident of his household as a basis for recovery under the policy because he had represented on his application that no children lived in his household. According to Middlesex, it would not have issued the policy to Walsh if he had not made the representation, and thus it relied upon the representation to its detriment. We are unpersuaded.

Under Connecticut law, " ' "any claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury ...." ' " (Citations omitted.) *O'Sullivan v. Bergenty,* 214 Conn. 641, 648, 573 A.2d 729 (1990). It is the burden of the party asserting a claim of estoppel to establish the existence of the elements essential to an estoppel; *see Cleary v. Zoning Board,* 153 Conn. 513, 518, 218 A.2d 523 (1966); and whether that burden has been satisfied in a particular case is an issue of fact....

The above case is cited in *Nicholas Russo v. City of Waterbury,* 304 Conn. 710, 737 (2012), for the teachings on detrimental reliance.

In the present case, Plaintiff induced Defendant to believe that she had agreed to sell the house on the real estate market, by listing the house a with broker, by her letters, her statements at the November 5, 2008 meeting and her lawyer's statements in the Probate Court hearing on that date. In reliance on those representations, Defendant agreed to having various repairs and improvements done to the house and to pay for said repairs and improvements out of the common fund. He agreed only because he believed her inducements in which she stated that she wanted to sell the house on the real estate market by listing with a broker. Indeed, he had not accepted her offer prior to that date. Instead, prior to that date he had requested that Plaintiff not make further expenditures on the house over routine maintenance, and he had requested that she return to him his one-half portion of the common fund.

The resulting harm to Defendant was all expenditures made by Plaintiff until the end of 2008 with respect to improving the house *to make it easier to sell* on the real estate market via a listing broker. Defendant was harmed, because the amount of money that he could receive from the common fund was reduced. For that reason, all the repair/maintenance and cleaning work done by Plaintiff prior to the end of 2008 was harm to Defendant. In numerous Plaintiff's letters, she offered to sell the house on the real estate market and tried to induce Defendant to agree to a large list of repairs and improvements for the reason of preparing the house for such a sale. Defendant agreed to such actions in reliance on her representations at the meeting before and at the November 5, 2008 Probate Court hearing. Even if no contract was formed, it is clear that Defendant was induced change his position on November 5, 2008 based on those representations of Plaintiff, i.e., he relied on those representations.

Plaintiff admitted that she was making repairs and improvements to the house in late November and early December 2008 even though she was already considering filing a partition action. This is evidence of fraud and bad faith act with respect to her actions. Plaintiff admitted that the estate agreed to some of the repairs that she wanted in order to sell the house.

Plaintiff admitted to discussions in June 2008 about preparing the property for sale. Plaintiff admitted that the purpose of the Pillar to Post report was to get the property ready to sell -- circumstantial evidence of her efforts to "induce" Robert McCabe to agree to repairs and updates of the house for the purpose of joint sale of the property on the real estate market. Plaintiff admitted to having received an appraisal from Defendant in the August-September 2008 time frame in response to her earlier request for

one. The appraisal was given to Plaintiff in reliance on her inducements to make a market sale of the house. That is, Plaintiff specifically requested the appraisal in her letters to Defendant, where she was tying to “induce” him to cooperate in making repairs and updates to the house to put it on the real estate market. The letters state that the appraisal was a way of starting the process of selling the house together. Defendant stated that he was convinced by Plaintiff to agree to a list of repairs and improvements of the house at a cost of $13,000.

In the end, Plaintiff failed and refused to participate in listing the property for sale at market value. Plaintiff never intended to have the property placed on the market for sale.

I. Accounting

There are gaping holes in Plaintiff's purported accounting. She claims her own Schedule E forms are financial reports constituting an accounting. The forms were for her and her husband's tax returns and contain minimal information. Plaintiff did not even provide at the time Schedule E forms to Defendant for the tax years 1998-2002 and apparently destroyed the forms for some of those years.

Plaintiff has not accounted for money on hand when she assumed management of the property. She has likewise not accounted for all of the money she received in 1998-1999.

There are transactions into and out of the Fidelity account for which information is missing in the transaction register. There are withdrawals from the savings account for which information is missing.

Plaintiff was both a fiduciary and trustee with a duty to account to Defendant for her acts or omissions. Independent of any subpoena or discovery request, Plaintiff had a duty to use due diligence to provide access to her books and records related to her property management. Instead, from early in 2008 through trial, Plaintiff resisted complying with routine information requests which mere mortals under similar circumstances were required to comply with. She endured several Motions for Sanctions and Orders related thereto. She even disobeyed a specific Court Order to provide certain tax information. Copies of certain records produced were unreadable when all she had to do to produce readable copies was to push the darker copy button on the copier. Plaintiff produced to Defendant Fidelity statements for 1999-2001 only on the Thursday before trial. It is now obvious why Plaintiff concealed such statements since they are the basis for missing money claims.

Those were not the acts of a person acting in good faith. Plaintiff should be ordered to provide to the Court and Defendant a full accounting of her management, including the gross amounts received, the source of the receipts and specific information as to any amounts deducted therefrom

J. Jurisdiction

Plaintiff filed at least three Motions in the Probate Court. Her attorney argued that the Probate Court had jurisdiction to rule on her Motions and the Probate Court agreed. Yet, Plaintiff shockingly claims that the Probate Court had no jurisdiction over her. Her claim has utterly no merit.

The Probate Court and Superior Court have concurrent jurisdiction over certain matters which are the subject of this action. On January 27, 2009, the Probate Court ruled on Defendant's December 3, 2008 Motion for Order of Distribution. The Probate Court first stated that “jurisdiction of this matter appertains to this court.” The Probate Court then stated, “Jurisdiction of this matter is now with the Superior Court and it is in the best interest of all parties that the matter be heard in one forum.” The Court then, in its discretion, declined “to rule on the Matter for Order of Distribution in favor of the Superior Court.” The “matter” which the Probate Court repeatedly referred to was the Motion for Order of Distribution.

The filing of the instant action did not divest jurisdiction of the Probate Court over the Estate of Valerie McCabe. That was made clear when the Probate Court, on April 8, 2009, while the instant action was pending, ruled on Defendant's Motion for Articulation and Memorialization and stated that "jurisdiction of this matter appertains to this court."

K. Setoff

Defendant is entitled to a setoff in the amount of $1,500 for labor and materials provided for the benefit of the subject property.

L. Punitive Damages

The Court may award punitive damages if it finds by a preponderance of the evidence Defendant has proven that Plaintiff intentionally or willfully tortiously interfered with Defendant's financial expectancy or converted to her own use the sums managed by her, and investments related thereto. The measure of punitive damages includes the reasonable litigation expenses, including attorney fees, in prosecuting the action, less the taxable costs, which, if he recovers, will be included in the judgment. *Markey v. Santangelo,* 195 Conn. 76 (1985); *Freeman v. Alamo Management Co,* 221 Conn. 674 (1992).

III. CONCLUSION

This is a typical **elderly** **abuse** case. A younger family member took advantage of an **elderly**, infirm family member, whose son lived 150 miles away and was preoccupied with his own family and business and his mother's medical problems. The elites in this country just don't get it. They have an insatiable sense of entitlement. They consider themselves above the rules of law which are binding on mere mortals. They treat other people like riff-raff. They engage in the fantasy that government exists solely to cater to their interests. Defendant is confident that the Court herein will firmly engage in the disabuse of any such fantasy.

RESPECTFULLY SUBMITTED,

DEFENDANT

BY:/s/032225

RICHARD H. KOSINSKI

His Attorney

106 Farmington Ave, Ste 2B

New Britain, CT 06053-2982

860-224-7115

Footnotes

1 The four volumes of transcripts are cited as 1T-4T, respectively, followed by page and line numbers. For example, lines 21-24 of page 27 of the April 9, 2013 transcript are cited as 1T27/21-24.

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